NINTH BIENNIAL REPORT

OF THE

ATTORNEY-GENERAL

OF THE

STATE OF IOWA

GEORGE COSSON
ATTORNEY-GENERAL

FOR THE PERIOD BEGINNING JANUARY 3, 1911
AND ENDING DECEMBER 31, 1912

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ATTORNEY GENERALS OF IOWA

David C. Cloud	1853-1856
Samuel A. Rice	1856-1861
Charles C. Nourse	1861-1865
Isaac L. Allen	1865-1866
Frederick E. Bissell	1866-1867
Henry O'Connor	1867-1872
Marsena E. Cutts	1872-1877
John F. McJunkin	1877-1881
Smith McPherson	1881-1885
A. J. Baker	1885-1889
John Y. Stone	1889-1895
Milton Remley	1895-1901
Charles W. Mullan	1901-1907
Howard W. Byers	1907-1911
George Cosson	1911-

NINTH BIENNIAL REPORT OF THE ATTORNEY GENERAL

STATE OF IOWA,
DEPARTMENT OF JUSTICE,
Des Moines.

To the Honorable B. F. Carroll,

Governor of Iowa:

Pursuant to the provisions of chapter 9, acts of the Thirty-third General Assembly, I hereby submit to you a report of the business transacted by the Department of Justice during the years 1911 and 1912.

There are now pending in this department 98 cases, 39 of which are criminal cases pending on appeal in the supreme court and 59 civil cases.

At the beginning of the term there were 72 civil cases pending and 37 criminal cases. During this time 82 new civil cases have been instituted and 118 criminal cases; 47 of the civil cases pending at the beginning of the term have been disposed of and 36 of the new cases, making a total of 83 civil cases disposed of during the period. All of the criminal cases pending at the beginning of the term have been disposed of and all of the new cases appealed have been decided except 39, making a total of 199 argued and disposed of during the term.

Of the 116 criminal cases disposed of, 108 were appealed by the defendant. Of this 108, 76 were affirmed, 24 reversed and 8 dismissed. Eight cases were appealed by the state, four of which were reversed, three affirmed and one dismissed.

The number of criminal cases appealed during the past two years is substantially what it was during the previous biennial period.

Over a thousand opinions have been given during the past two years. A considerable number of these opinions were official in nature and given to the state departments, which were not listed as official because the question had been previously passed upon or was not considered of sufficient importance to class as official opinions. Included in this list is a very large number of opinions given to county attorneys.

The department has refused to give opinions to private persons, but inasmuch as the attorney general has supervisory powers over county attorneys, we felt that it was not only the authority of the attorney general but his duty to give opinions to county attorneys whenever in his judgment the proposition submitted was of such a character as to be of state-wide importance or interest.

Over nine thousand letters have been written during this period which were of such importance as to be copied and become a part of the permanent records of the office, and at least two or three thousand letters have been written, circular and otherwise, which are not included in the above list.

The general demands upon the department have very greatly increased during the past two years.

The large increase in the demands made upon the office is of a civil nature, and a universal demand for a general enforcement of all of the laws of the state. An unusual number of complaints have been made to the department concerning the enforcement of the road and drag law and the law relating to the cutting of noxious weeds.

Of the civil cases disposed of, two were argued in the supreme court of the United States, both oral and written arguments being made by the attorney general.

STANDARD STOCK FOOD COMPANY VS. H. R. WRIGHT.

The case of the *Standard Stock Food Company vs. H. R. Wright* involved the constitutionality of chapter 189, acts of the Thirty-second General Assembly, designated as the commercial feeding stuffs act, which is nothing more nor less than a pure food law for animals, including a provision for pure seeds. This case was of much importance, not alone from the amount of the fees collected, but because it determined in a large way the power of the state to protect her citizens under the police power. A number of states had passed a similar law patterned after the Iowa law, and those cases were all pending in the United States circuit courts, and by agreement they were to await the outcome of the Iowa cases. The constitutionality of the law was assailed upon many grounds. It was especially argued that that part of the law which provided for an annual license of one hundred dollars in lieu of an inspection fee was unconstitutional upon the ground that it was a burden upon interstate commerce. The supreme court of the United

States, however, held the law valid in every particular. This was the first time that an American court of last resort had sustained a law passed under the police power of the state as an inspection law, where the fee was prescribed annually and in a lump sum instead of a definite fee being fixed according to the quantity of goods inspected. Heretofore it had always been held that a law of this nature offended against the commerce clause of the federal constitution in that it amounted to a tax or burden upon interstate commerce.

Under this law the state has collected over $62,000.00.

STATE OF IOWA VS. J. N. JONES, MARSHALL DENTAL MANUFACTURING COMPANY.

Another case argued before the supreme court of the United States is entitled the *State of Iowa vs. J. N. Jones, Marshall Dental Manufacturing Company,* commonly known as the Goose Lake case. It was contended by the Marshall Dental Manufacturing Company that non-navigable meandered lakes passed under the Swamp Land Act. If this principle were once established substantially all of the lakes of the state would pass from the jurisdiction of the State of Iowa into the hands of private parties under the Swamp Land Act, and our people would be compelled to pay toll to some private party for the purpose of boating and fishing. The contention of the state that it had jurisdiction over all non-navigable meandered lakes in use and trust for all of the people was upheld by the lower state court and the supreme court of the state of Iowa. The case having been submitted last term to the supreme court of the United States, a decision is anticipated in the very near future, and it is predicted that the contention of the state will be upheld*

STATE OF IOWA VS. FAIRMONT CREAMERY COMPANY.

The constitutionality of the unfair discrimination law was attacked in the case of *State of Iowa vs. Fairmont Creamery Company.* The law was held unconstitutional by the lower court, but our supreme court in an opinion filed December 18, 1911, reversed the lower court and sustained the constitutionality in every respect.

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*This case was decided in favor of the State January 7, 1913.

This is very important as it indicates the extent to which the legislature may go in an effort to control and regulate trusts and monopolies under the police power of the state.

H. F. SCHULTZ VS. C. J. PARKER.

In this case the supreme court of the state also sustained the constitutionality of the anti-pass law.

During this administration no law of the state of Iowa has been held unconstitutional either by our own supreme court or by the supreme court of the United States.

STATE OF IOWA VS. ENOS MOYERS.

The case of *State of Iowa vs. Enos Moyers,* decided by our supreme court June 25, 1912, is important for the reason that it determined the jurisdiction of the state over the waters of the Mississippi river. It was held in that case that the state of Iowa had jurisdiction over the river to the Illinois shore and not merely to the center or thread of the stream which marks the boundary of the state.

K. K. K. MEDICINE COMPANY VS. H. R. WRIGHT.

The concentrated commercial feeding stuffs act was also attacked in the district court of Lee county in the case of *K. K. K. Medicine Company vs. H. R. Wright* upon many grounds and Judge Wm. S. Hamilton sustained the validity of the law.

A great deal of the time of the department has been taken up in the trial of rate cases in the lower federal courts and before the interstate commerce commission of the United States. A substantial reduction in the express rates was made by the railroad commission of Iowa and the same was promulgated on the 31st day of December, 1910. The complaint in this case was filed by former Attorney General Byers and Mr. Wrightman, Secretary of the Manufacturers' Association. The contentions of complainant were found to be true and the railroad commissioners promulgated what is known as express order No. 2. The express companies attacked the validity of the rates promulgated by the board of railroad commissioners in the United States circuit court. It was alleged by the companies that the commission had made a reduction from 10 to 15% in the express rates and a special complaint

was made against the twenty cent minimum inaugurated by the commission. This case was heard before Judge McPherson resulting in a verdict for the state, the restraining order was dissolved and a temporary injunction denied. The attorney general also appeared as intervenor in the proceeding instituted before the interstate commerce commission of the United States concerning the rates and practices of the express companies doing interstate business between Iowa and other states in the Union. A far reaching decision was handed down in that case by Commissioner Lane which not only materially reduced interstate rates but corrected many abuses prevalent in the express business. A very great deal of time was consumed in the preparation of these cases. A vast amount of labor is necessarily required to prepare any rate case.

During this biennial period what are known as the interior Iowa rate cases, the Mississippi river cases, and the Clinton Sugar Refining Company case have been heard both before the commissioner and the full commission at Washington, D. C. A decision favorable to the state has been received in the Clinton Sugar Refining Company case. This case was prepared and argued by Judge Henderson, commerce counsel, and Mr. Robbins of this department. The attorney general and his assistant, Mr. Robbins, Judge Henderson and Dwight Lewis represented the state of Iowa; Mr. Thorne and Judge Henderson represented the railroad commissioners; and Mr. Wylie and Mr. Guernsey, who were specially employed to represent the Greater Des Moines Committee of the city of Des Moines, also represented the state of Iowa in the interior rate cases and performed an unusual amount of valuable service in the preparation and submission of these cases without receiving any compensation at all from the state.

A number of rate cases are now pending in the federal courts, especially the coal rate cases. To secure the proper data to be used in the submission of these cases will require a vast amount of time and the expenditure of a considerable sum of money. The legislature has not appropriated a dollar to the attorney general to be used in the preparation or submission of rate cases, and contrary to popular opinion, the act creating the office of commerce counsel not only placed no responsibility upon the commerce counsel to appear in any of the courts in the contest of rate cases, but it gave him no authority at all in the courts, and not even authority to appear before the interstate commerce

commission, except when directed so to do by the board of railroad commissioners, and then, to such extent only and in such manner as the board determined. The only authority given to the commerce counsel where he might appear on his own initiative is before the board of railroad commissioners affecting rates wholly within the state of Iowa. The attorney general, however, held in an opinion to the board of railroad commissioners that whenever it did not conflict with his duties expressly enjoined upon him by chapter 94, acts of the Thirty-fourth General Assembly, he might on his own motion appear in the federal court in the trial of rate cases with the consent of the board of railroad commissioners, but his appearance can in no wise conflict with the authority and duty imposed upon the attorney general.

A physical valuation of the trunk lines of the state is imperative both as a basis of fixing the rates and also as a proper basis for taxation.

REMOVAL OF DERELICT OFFICIALS.

Proceedings of removal have been instituted against a number of supervisors for a wrongful use of road and bridge funds and maladministration in office in general. A great deal of time has been devoted to the preparation of these removal cases in the securing of data. In each instance the Department of Justice has co-operated with the state highway commission at Ames. We have also had the assistance of Prof. Lambert, head of the engineering department at Iowa City, and had arranged for other experts in the trial of these cases. Before the final hearing, however, each supervisor against whom suit was brought or about to be brought, resigned. In one county alone over $25,000 was returned to the county treasury and the saving to the taxpayers generally over the state by reason of a change in business methods has amounted to many thousands of dollars.

A removal case is now pending against the mayor of Harlan for misconduct and maladministration in office, neglect and refusal to perform the duties of his office and intoxication. The merits of this removal bill are no longer debatable and what has been accomplished under it in the state of Iowa is so well known that no reference will be made thereto.

These are but a few of the important cases argued by the Department of Justice during the past two years but they indicate the

scope of the work of the department and the importance of the work as it affects the public welfare of the state, not only the moral and social welfare which is of primary consideration, but also the property rights.

It has been the aim of the department to enforce all of the laws affecting the moral, the social and the material welfare of our people. I have directed attention to the embarrassment of trying the rate cases now pending in the federal court in the absence of further appropriation for the purpose of securing data including the physical valuation of the roads.

A very earnest effort has been made during the past two years to enforce the trust laws of the state, and the laws relating to unfair discrimination. Several indictments have been found against certain corporations for combining for the purpose of arbitrarily fixing prices on certain necessities, but in view of the fact that this department has no special agents to secure evidence and no funds to pay for the same, and in view of the further fact that under our laws no person can be compelled to testify if it would tend to incriminate him, because no provision of immunity in such cases is provided, it has been extremely difficult to secure evidence against persons or corporations who we knew to a moral certainty were violating the anti-trust laws of the state and arbitrarily fixing prices. In at least two cities of the state there was considerable evidence to show that produce was being destroyed in order to maintain prices.

Without hesitation we confess that we do not expect to see the trust problem ultimately solved by criminal statutes in the nature of the Sherman Anti-trust law, but we do believe that some effective method of prosecution, which also gives to the state and government the power of the injunctive remedy, the power to secure evidence and subpoena witnesses in every part of the state, is indispensable in order to properly deal with the question.

The merits of additional legislation and the nature of the same will not be recommended at this time for the reason that it would improperly extend the length of this report to enter into a discussion of the merits of such additional legislation. Suffice it to say that some bill similar to what was known as the Miller bill, which was introduced in the last session of the general assembly and passed the House and was defeated by a small vote in the Senate, should be enacted by the coming general assembly. This

bill was prepared by this department after a most careful examination of the statutes of congress and the various state legislatures and also the decisions of both state and federal courts.

The unfair discrimination law, the constitutionality of which was sustained by our supreme court in the case of *State vs. Fairmont Creamery Company,* which now applies to petroleum products, dairy products, poultry and grain should be extended to apply to all merchantable commodities. A bill seeking to accomplish this purpose was introduced in the last session of the general assembly by Representative Cunningham, and another by Representative Stipe. It is impossible to secure convictions for violations of trust laws or any other laws without evidence.

The fire marshal, the food and dairy commission, the hotel inspector and the labor commissioner all have inspectors and agents to secure evidence of violations of law with substantial appropriations, but the attorney general is expected to enforce all of the laws of the state without even special agents or special appropriations to secure evidence.

THE NEED OF SPECIAL AGENTS.

A special agent is not only needed for the purpose of securing evidence and investigating anti-trust laws and laws relating to unfair discrimination, but also for the purpose of aiding local officials and securing evidence in heinous and unusual crimes. Your Excellency is well aware of the embarrassment which the state experienced in an effort to secure evidence against the murderous villain who was responsible for the Villisca tragedy, and how because of a lack of funds furnished to this department, it was necessary for you for a number of months to pay one of the assistants in the office in order that we might pay special agents and detectives to secure evidence in this case. In all such cases as this the state should have a man available who is skilled in ferreting out crime to proceed to the place and make immediate investigation. Delay often means a lack of conviction. Whatever evidence there may have been in the beginning is often destroyed by misguided but well-meaning people.

A special agent in order to render the best service should be made an officer of the law with power to make arrests in any part of the state the same as a sheriff. He could co-operate with the sheriffs and police officers over the entire state. His services

would be in demand where escapes were made from any of the state institutions and he could be used as a special agent to return prisoners from other states upon requisitions who were fugitives from justice, and this item alone would almost pay his salary.

The large number of murders committed annually throughout the United States and in the state of Iowa in proportion to the number committed in all other civilized countries of the world is causing the most thoughtful consideration of the students of sociology and good government. When it is considered that as many or more murders are committed in Des Moines every year than are committed in all London, and more in the state of Iowa than all of Great Britain, and considering that the average number of convictions in the United States is only two to four out of every hundred, whereas it ranges from 50 to 95 out of every hundred in civilized foreign countries, and when it is further considered that the cost of crime in nine months in the United States is equal to our entire national debt, and that only a part of the cost of crime in the state of Iowa, as reported to the board of parole, each year amounts to a million dollars, our legislature can well afford to give consideration to this question from the mere economic standpoint, even if they disregard the more important consideration of the welfare of society and the injury inflicted upon the innocent and the unfortunate.

All advancement that has been made in the matter of law enforcement in the state of Iowa, or any other state, has been made by giving the state more authority and this is true whether it concerns violations of law relating to gambling, the social evil and the illegal sale of liquor, or whether it is the enforcement of the road law; the expenditure of county funds, the enforcement of the pure food law, the hotel inspection and sanitary laws, the pharmacy and drug acts or the investigation of the origin of fires.

The creation of a fire marshal, the establishment of a food and dairy department with inspectors to travel over the state, the hotel inspector with his deputies, a pharmacy commission with state-wide powers are all a recognition upon the part of the state that local officials cannot be relied upon to enforce state laws, and this even though there is no popular prejudice against the law as there is certainly none against the pure food law, the road laws, the hotel inspection and sanitary laws, and the laws relating to fires of incendiary origin.

There have been more complaints made to this department for violations of the road law and expenditure of county funds than respecting the violation of any other law, and no relief from this situation will ever come as long as the work is placed in an almost unlimited number of township trustees and road supervisors with no central authority and responsibility either in the township, the county or the state. There is no political significance attached to the duties of any county office and therefore there is no reason why the business of the county should not be looked after by county supervisors or county commissioners elected at large and paid a sufficient salary that they could and would give their entire attention to the business of the county with authority to hire a county engineer and with the responsibility imposed upon them of seeing that the business of the entire county is looked after during every day of the year.

REFORM IN COURT PROCEDURE.

For years the technicalities of the law and the defects in our criminal procedure have been denounced, but mere denunciation in itself amounts to nothing in the absence of some constructive method of relief.

Our supreme court is to be highly commended for its attitude toward the other departments of government; that is to say, for its hesitancy in disturbing laws which have been passed by the legislature under the police power in the interests of the people after due consideration, and which have also received the sanction of the executive department. No act of our general assembly has been held unconstitutional by our supreme court for several years. This attitude of our courts is materially lessening the indiscriminate attacks upon our laws upon the ground of unconstitutionality when there is no substantial foundation for the attack.

There are, however, too many criminal cases being reversed upon the ground of erroneous instructions of the lower courts and other irregularities which do not affect the substantial rights of the defendant. Of the 108 cases appealed by defendants during the last two years about one out of every four was reversed, whereas in the state of Wisconsin only about one out of every ten criminal cases was reversed, and it is important to bear in mind that while Wisconsin has larger cities than Iowa, and therefore ought to have at least as much criminal business, while Iowa had

116 criminal cases appealed, Wisconsin had only about thirty. In other words, Wisconsin with larger cities and with over 100,000 population more than Iowa has nearly one-fourth less criminal cases appealed than Iowa. This is a matter worthy of very serious consideration. It can only be accounted for by the reason that the Wisconsin court is refusing to reverse any criminal case or any civil case unless upon the whole record it affirmatively appears that except for the error complained of a different verdict would have obtained.

The position of the Wisconsin court is very clearly stated in the case of *Hack vs. State,* 124 N. W. 492. The court there overruled a number of their former decisions and refused to follow the supreme court of the United States and held that a defendant by remaining silent waived his right to arraignment and plea and that the irregularity in question did not affect his substantial rights and affirmed the verdict of guilty as pronounced by the jury in the court below. The court said:

"Surely the defendant should have every one of his constitutional rights and privileges, but should he be permitted to juggle with them? Should he be silent when he ought to ask for some minor right which the court would at once give him, and then when he has had his trial, and the issue has gone against him, should he be heard to say there is error because he was not given his right? Should he be allowed to play his game with loaded dice? Should justice travel with leaden heel because the defendant has secretly stored up some technical error, not affecting the merits, and thus secured a new trial because forsooth he can waive nothing? We think not. We think that sound reason, good sense, and the interest of the public demand that the ancient strict rule, framed originally for other conditions, be laid aside, at least so far as all prosecutions for offenses less than capital are concerned It is believed that this court has uniformly attempted to disregard mere formal errors and technical objections, not affecting any substantial right, and to adhere to the spirit of the law which giveth life rather than to the letter which killeth."

The supreme court of Oklahoma in the case of *Caplas vs. State,* 104 Pac., 493, decided in 1909, refused to grant a new trial because of a defect in the indictment, and said that the court proposed to give the people of the state a "just and harmonious system of criminal jurisprudence, founded on justice and supported by reason, freed from the mysticism of arbitrary technicalities," and

the court said: "This standard will control our decisions, it matters not what or how many other appellate courts may have decided to the contrary." The court added: "Now that our criminal jurisprudence is in its formative period, we are determined to do all in our power to place it upon the broad and sure foundation of reason and justice so that the innocent may find it to be a refuge of defense and protection, and that the guilty may be convicted and taught that it is an exceedingly serious and dangerous thing to violate the laws of this state, whether they be rich and influential or poor and friendless. * * * If we place our criminal jurisprudence upon a technical basis it will become the luxury of the rich who can always hire able and skillful lawyers to invoke technicalities in their behalf. We will give full consideration to all authorities which are supported by living principles, and will follow them when in harmony with our laws and the conditions existing in Oklahoma. But we must confess to a want of respect for precedents which were found in the rubbish of Noah's Ark, and which have outlived their usefulness, if they ever had any."

Decisions of other courts which disregard technicalities might be cited, but it is unnecessary.

Repeated efforts have been made to secure a resolution committing the state bar association of our state to a law similar to the Wisconsin law which provides:

"No judgment shall be reversed or set aside or new trial granted in any action or proceeding, civil or criminal, on the ground of misdirection of the jury, or the improper admission of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure the new trial."

Section 3072-m laws of Wisconsin, 1907.

But the conservatism of the lawyers has thus far prevented our bar association from taking favorable action. A law upon similar lines was introduced in the Thirty-third General Assembly by Senator Francis and was again defeated by reason of the conservatism of the lawyers, and yet the law has had a most salutary effect in the state of Wisconsin where it has been on the statute books since 1909.

In my opinion courts have this power without the law and should without hesitation exercise it, but since they are reluctant to do so there can be no excuse for the legislature in failing to pass a law of this nature. In Wisconsin this law and the attitude of their courts have not only very materially lessened the number of criminal appeals but reversals in civil cases are far less frequent than formerly with a corresponding lessening of appeals in civil cases. This, of course, very materially tended to reduce court costs and relieve the congestion of the courts due to needless appeals.

Another very great weakness in our criminal laws is to be found in the very large number of statutory crimes for the same generic offense; that is to say, stealing is made many separate offenses. We have larceny, embezzlement, robbery, cheating by false pretenses, embezzlement by different persons and from different sources; we have larceny in the night time, from the building, from the person, and various other refinements, a large number of which are entirely unnecessary especially in view of the fact that we are approaching the indeterminate sentence law. The character of the offense and the character of the offender can, to a large extent, be left to the board of parole to determine.

A large number of appeals and acquittals due to these refinements could be obviated by reducing the number of statutory offenses covering the various degrees of the same generic offense, or by following the very simple and common-sense method adopted by England of authorizing the higher court to prescribe the punishment to fit the crime which it is admitted by the defendant he had committed in the court below, instead of the exact offense prescribed in the indictment.

The criminal appeal act of 1907 of England provides, in part, as follows:

"If it appears to the court of criminal appeal that an appellant, though not properly convicted on some count or part of the indictment, has been properly convicted on some other count or part of the indictment, the court may either affirm the sentence passed on the appellant at the trial, or pass such sentence in substitution therefor as they think proper, and as may be warranted in law by the verdict on the count or part of the indictment on which the court consider that the appellant has been properly convicted.

"Where an appellant has been convicted of an offense and the jury could on the indictment have found him guilty of some other offense, and on the finding of the jury it appears to the court of

criminal appeal that the jury must have been satisfied of facts which proved him guilty of that other offense, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that offense, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offense, not being a sentence of greater severity.

"Where on the conviction of the appellant the jury have found a special verdict, and the court of criminal appeal consider that a wrong conclusion has been arrived at by the court before which the appellant has been convicted on the effect of that verdict, the court of criminal appeal may, instead of allowing the appeal, order such conclusion to be recorded as appears to the court to be in law required by the verdict, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law."

Paragraphs 1, 2, 3 of section 5 of Butterworth's 20th Century Statutes, Vol. 1, page 381.

The insanity plea furnishes an additional avenue of escape for a large number of criminals annually whose soundness of mind had never been subject to discussion until after the commission of the crime. This matter has been a subject of discussion in many states in the Union; England, however, disposed of this question in a very satisfactory manner in what is known as the lunatic's act in 1883. In that year England passed the following act:

"Where in any indictment or information any act or omission is charged against any person as an offense, and it is given in evidence on the trial of such person for that offense, that he was insane so as not to be responsible according to law for his actions, at the time when the act was done or omission made, then if it appears to the jury before whom such person is tried, that he did the act or made the omission charged, but was insane as aforesaid at the time when he did or made the same, the jury shall return a special verdict to the effect that the accused was guilty of the act or omission charged against him, but was insane as aforesaid at the time when he did the act or made the omission.

"When such special verdict is found the court shall order the accused to be kept in custody as a criminal lunatic, in such place and in such manner as the court shall direct till His Majesty's pleasure shall be known, and it shall be lawful for His Majesty

thereupon and from time to time, to give such order for the safe custody of the said person during pleasure, in such place and in such manner as to His Majesty may seem fit."

So great became the abuse of setting up pleas of insanity that the state of Washington passed a law absolutely prohibiting insanity as a defense in a criminal case. This, of course, was going from one extreme to another.

Massachusetts in 1909 passed the following law:

"If a person who is indicted for murder or manslaughter is acquitted by the jury by reason of insanity, the court shall order him to be committed to a state hospital for the insane during his natural life, and he may be discharged therefrom by the governor, with the advice and consent of the council, when he is satisfied after an investigation by the state board of insanity that such person may be discharged without danger to others."—Acts of Massachusetts, 1909, chapter 504. section 104, page 711.

Undoubtedly there can be no objection to requiring a jury wherever the defense of insanity is set up to make a special finding (1st) as to whether the offense was committed by the defendant; and (2d) as to his insanity. If insane, he should be committed to the asylum not as a means of punishment but as a means of treatment and protection to society during the remainder of his natural life, to be released only by the executive or some other tribunal specially constituted for the purpose, and then only after it was affirmatively shown that no danger to society would result from his release.

Under our present law if he is insane at the time of trial, the trial is postponed and the defendant is sent to the hospital for the criminal insane at Anamosa to remain until his sanity is restored before he is put on trial. If, however, he remains a few years it is almost impossible to secure any evidence for conviction by reason of the death and removal of witnesses; but if it is alleged that he was insane at the time of the offense but now sane, there is nothing to prevent the jurors from using this as an excuse for verdicts of acquittal notwithstanding that the probabilities of his committing other crimes in the future are very great.

I have thus far called attention to acquittals and reversals due to defects in our criminal procedure and it is to these matters that attention is generally directed, but the form of procedure is always related to the kind and character of the punishment inflicted upon

the defendant. Those who decry against the tendency of humanitarian methods of punishment should remember that the more barbaric and severe the punishment, the less will be the number of convictions and consequently the least fear of punishment.

Not only juries but courts consider the kind and character of punishment in dealing with criminals. There is scarcely a criminal trial but what jurors discuss the punishment to be meted out to the defendant, and because of this, some judges decline to mention in the instructions the nature of the punishment especially if the punishment is severe. But jurors can hardly be criticized for this when courts themselves are greatly influenced by the punishment to be inflicted upon the defendant. Indeed, the very inception of technicalities and refinements of court procedure was invented by courts because of the undue harshness and severity of the criminal law two or three centuries ago, and as late as 1909, it was held in England in the case of *R. V. Kirkpatrick,* J. P. 39, that the judge might properly take into consideration the treatment a prisoner would receive while under sentence, and to this effect see also *R. V. Syres,* 73 J. P. 13; but we do not need to go beyond the boundary of our own state.

Our own supreme court in the recent case of *State vs. Baker,* 135 N. W., 1097, who was charged with murder and convicted of murder in the second degree, held there was ample evidence on the part of the state to rebut the theory of the defendant of self-defense, but on a re-hearing rduced the sentence of the defendant from twenty-two years to fifteen, notwithstanding the parole board is created for the special purpose of determining when it is wise to release criminals under parole or pardon; and the recent action of Governor Donohue of Arkansas in releasing 360 prisoners who were working under the contract labor system is familiar to all.

In view of the fact then that executives, courts and jurors are influenced by the punishment prescribed for criminals, if the punishment is not wise, humane and just, it results in the escape of a large number of prisoners from any punishment at all.

It follows that while improvement may be made by reform in court procedure, no permanent or complete relief can come except by a fundamental change in our entire penal system. The defendant must be compelled to right the wrong that he has committed in so far as possible; he must become a producer and be

required to support himself, and, if possible, those dependent upon him, and in so far as possible and practicable to return to society that which he has wrongfully acquired.

Without further elaboration I refer to the Report of the Committee appointed to investigate the conditions at Fort Madison, which was transmitted to your Excellency on the 25th day of May, 1912, and urge a consideration of the recommendations therein made.

Another very great evil and source of crime and litigation is the miscellaneous use of carrying pistols and repeating revolvers. Investigation in this state and generally throughout the United States discloses that a very large part of the homicides are committed with the common revolver, and that nearly every person who commits serious offenses, such as burglary and larceny, always goes with a revolver concealed on his person. No one should be permitted to carry a concealed weapon except with a license duly obtained from proper authority and then only in the giving of a substantial bond. The carrying of revolvers or other dangerous weapons concealed should be made an indictable offense instead of a fine not to exceed one hundred dollars or a jail sentence of not to exceed thirty days as our law now provides.

The enactment of a wise and just workmen's compensation act would very materially lessen damage suits and civil litigation which constitute a considerable part of the business of our courts.

The passage of a blue sky law prohibiting the sale of fraudulent stocks and bonds would also lessen litigation for the reason that every person who has been defrauded seeks redress in our courts, in the state court if the person lives in the state; if not, in the federal court.

There is a growing demand by the bench and bar of the state for an increase in the number of supreme judges, because there is more litigation now than can well be looked after by our court. It will readily be agreed that our judges ought not to be overworked and that they should have ample time to consider each case, but I submit that the reform is starting at the wrong end. Before we increase the number of judges we had better ascertain how much of a demand there is for extra judges after needless litigation is prevented. It will be infinitely better to very materially lessen the business of the courts than to add new judges to look after needless litigation.

If the recommendations herein made with reference to reform in procedure are carried out and a change in our penal system is made, it will result in a reduction in the number of criminal appeals from at least one-half to two-thirds of the number now brought. It will cause many a defendant who is guilty to plead guilty and thus lessen the business of both the appellate and the lower court.

A law similar to the Wisconsin law would also lessen the appeals in civil cases and a workmen's compensation act and a blue sky law, or law prohibiting the sale of fraudulent stocks and bonds, would very materially lessen litigation in both the lower and appellate courts.

Court costs, both civil and criminal, would be materially lessened, thousands of dollars would be saved to the parties in interest. The wife or children of the laborer who was injured in some line of industry would not pay a substantial part of the damage received on account of his injury in litigation and attorney fees, the prisoner would be enabled to become a producer and to aid in the support of his family; the certainty of punishment would greatly increase its deterrent effect, and the indirect result to the state, the county and to society at large would be beyond calculation.

In recommending these fundamental changes nothing revolutionary is suggested. Almost every recommendation is now in successful operation either in some state in this country or has long since been an established policy in England.

NECESSITY FOR ARBITRATION.

The contest between capital and labor during the past two years has been so grave as to make imperative the necessity for legislation touching this question. In 1906 Canada passed a law which, while not providing for absolute compulsory arbitration, yet it has operated most successfully in the settlement of labor disputes. It is to be found in chapter 96 of the Revised Statutes of Canada, Vol. 2, and is known as "An act respecting conciliation and labor."

The state of Ohio has passed a law patterned after the Canada law and is known as "The state board of arbitration and conciliation act," and is found in chapter 14, commencing on page 382 of Page and Adams Annotated Ohio General Code. It provides for the appointment of a commission known as the state board of arbitration and conciliation. It provides for investigation of

the cause of labor disputes, including the subpoeaning of witnesses; provides for the report of the commission to be made public in the event that the board of arbitration fails to bring about an adjustment of differences, which report must set forth a finding of the person who is at fault and a finding as to who has the merits of such controversy and the reason of such finding; it provides that application may be made to the board by either party to the controversy by setting forth the grievances in concise form; provides that both parties may provide by stipulation to abide by the result of the decision, and further provides for the submission of the controversy to a local board of arbitration.

Massachusetts in 1909 passed a similar act. It is to be found in the Acts and Resolves of Massachusetts, 1909, chapter 514 on page 725. Other countries have passed arbitration acts, New Zealand being one of the first, also New South Wales and West Australia.

The absolute compulsory features of some of these acts, however, have been subject to such controversy and the enforcement of the law so difficult that the enactments in the United Stattes have not gone so far as to require an absolute compulsory submission to the findings of the board of arbitration, unless it was agreed to by both parties to the controversy. It has, however, generally resulted that a careful investigation and a finding by a non-partisan commission has had the effect of causing the party at fault to submit to the findings of the commission.

SUMMARY OF RECOMMENDATIONS.

Summarizing our conclusions, we recommend:

First. The passage of a law similar to the law of Wisconsin and England providing that no judgment shall be reversed or set aside or new trial granted in any action or proceeding, civil or criminal, on the ground of misdirection of the jury or the improper admission of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall affirmatively appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment or to secure a new trial.

Second. A better method of selecting jurors.

Third. A law similar to that of England and Massachusetts providing that when insanity is urged as a defense in any criminal case that the jury shall bring in a special verdict showing (a) as to whether the defendant committed the offense; and (b) as to his insanity, and providing for his detention for life in a hospital, unless released by the executive authority or proper tribunal.

Fourth. A reduction of the number of statutory offenses covering various degrees of the same generic offense, or a provision in our law similar to the law of England, giving the supreme court the power of substitution of sentence in the event that the evidence shows the defendant was guilty of a crime of the general nature of that charged in the indictment and distinguishable only by statutory refinement.

Fifth. An amendment to the law whereby the county attorney may comment upon the attitude of the defendant in the event that the defendant does not become a witness in his own behalf.

Sixth. Limiting the time of appeal in criminal cases to three months.

Seventh. The indeterminate sentence law for felons and a limited indeterminate sentence law for misdemeanants.

Eighth. The abolition of justice courts in the city and a provision for municipal courts, and an amendment to the constitution giving municipal courts power to inflict sentences for a period of at least one year in a workhouse or district farm.

Ninth. A fundamental change in the jail and penitentiary system in accordance with the Report of the Committee appointed to investigate conditions at Fort Madison filed with the governor on the 25th day of May, 1912.

Tenth. An amendment to our anti-trust laws by the passage of a bill similar to the Miller bill introduced in the Thirty-fourth General Assembly, known as House File No. 289, and the Stipe bill for the purpose of securing evidence, known as House File No. . . . ; and the Cunningham bill relating to unfair discrimination, known as House File No. 311; or the Stipe bill for the same purpose, known as House File No. 225.

Eleventh. A law prohibiting the carrying of revolvers or other dangerous weapons concealed except by a person who holds a license from the proper tribunal upon the giving of a bond, violation of which is made an indictable offense.

Twelfth. A special agent to secure evidence in cases similar to the Villisca tragedy and evidence of violations of the trust law and other violations of law, with the same power as peace officers to make arrests.

Thirteenth. Sufficient funds to gather data for the trial of the rate cases now pending in the United States circuit court of appeals.

Fourteenth. A provision made for a physical valuation of the trunk line railways of the state.

Fifteenth. The non-partisan election of supervisors at large, requiring them to give their entire attention to the business of the county.

Sixteenth. The non-partisan election of the judiciary.

Seventeenth. The passage of a workmen's compensation act and blue sky law prohibiting the sale of fraudulent stocks and bonds.

Eighteenth. A recognition in the medical practice act of chiropractors with a requirement that they shall have the same knowledge of anatomy and other fundamental knowledge required of osteopaths.

Nineteenth. The passage of a law relating to conciliation and arbitration in labor disputes.

Twentieth. An amendment to the removal bill making it applicable to all city, county or township officers, elective or appointive.

Twenty-first. A sufficient increase in the salary of the assistants to the attorney general to be able to retain experienced and competent lawyers; making the salary of the attorney general equal to that of the judges of the supreme court and requiring him to devote all of his time to the duties of his office.

During this biennial period I have devoted my entire attention to the duties of the office without earning a single dollar in private practice. This is not contemplated in the law and the salary is not fixed accordingly.

I have had very able and experienced assistants, most of whom have been required to work a great deal overtime without any additional compensation.

Mr. Robbins, special counsel, has had over twenty years' experience in the practice of law; has been county attorney of his county. Mr. Fletcher, assistant attorney general, has practiced law for over twelve years and has charge of the criminal appeals in

the supreme court. Mr. Sampson, special counsel, has practiced law for over seven years and assists in the general enforcement of the laws. Mr. Lee had practiced law for over sixteen years; was county attorney of his county two terms, city attorney; was a member of the Thirty-second and Thirty-third General Assemblies. Miss Gilpin, clerk and stenographer, has been connected with the office since the administration of General Mullan and understands and looks after every detail of her work, and Miss Leffert and Miss McNall are experienced and capable stenographers.

We cannot, however, retain help of such ability and experience on the present salaries. Mr. Lee left the office because it was impossible to pay him an adequate salary. He was very shortly thereafter nominated judge of the Fourteenth judicial district of Iowa and elected at the last general election without opposition from either party. The state should pay at least a living wage.

Respectfully submitted,

GEORGE COSSON,

Attorney General of Iowa.

Schedule A is a complete list of all appeals in criminal cases submitted to the supreme court during the years 1911 and 1912, and also all rehearings asked during that period, and shows the final disposition of the cases.

Schedule B is a list of all criminal cases pending on the first day of January, 1913.

Schedule C is a list of civil cases which were pending in the state and federal courts January 1, 1911, and have since been disposed of.

Schedule D is a list of civil cases which have been commenced and disposed of since January 1, 1911.

Schedule E is a list of civil cases which are now pending in the state and federal courts in which the state is a party.

Schedule F contains certain circular letters addressed to county officers and others concerning the road law, the duties of the county attorney, gambling and investigation of prisons.

Schedule G is the official written opinions given by this office during the years 1911 and 1912.

Schedule H contains a few of the many letters which were written in response to inquiries from county officers and others as to the construction and interpretation of statutes, and as to the law in cases which have arisen in the state. These letters are not official in their character, and frequently contain a simple suggestion instead of the expression of an opinion. They relate to matters of public interest as to which uniform action is desired in the state, and it is thought advisable to include the same in this report.

SCHEDULE A.

The following is a list of criminal cases submitted to the supreme court, and also rehearings asked during the years 1911 and 1912 and the final disposition of the cases.

Title of Case	County	Decisions	Offense
State v. Adams, Harry, Appellant....	Cedar.....	Reversed Dec. 18, 1911....	Appeal from an order of district court.
State v. Adams, Harry, Appellant....	Cedar.....	Affirmed June 25, 1912....	Murder.
State v. Allen, Harry, Appellant.....	Adams.....	Affirmed Nov. 17, 1911.....	Compelling to be defiled.
State v. Anderson, Harold, Appellant.	Wright.....	Affirmed April 4, 1912.....	Breaking and entering.
State v. Ahlf, John, Appellant.....	Muscatine.....	Affirmed Oct. 25, 1912.....	Malicious mischief.
State v. Baker, Guy, Appellant.....	Johnson.....	Affirmed May 7, 1912..... (Petition for rehearing overruled Dec. 14, 1912; sentence reduced.)	Murder.
State v. Beede, Jr., John C., Appellant	Allamakee.....	Affirmed April 5, 1911..... (Petition for rehearing overruled Sept. 28, 1911.)	Procuring intoxicating liquor.
State v. Beeson, Genour, Appellant...	Linn.....	Reversed May 15, 1912....	Murder.
State v. Benson, M. G., Appellant.....	Hamilton.....	Reversed March 5, 1912...	Nuisance.
State v. Brandenberger, Jos., Appellant	Dubuque.....	Reversed May 2, 1911.....	Murder.
State v. Brown, Grant, Appellant.....	Mahaska.....	Affirmed Oct. 19, 1911.....	Murder.
State v. Browning, C. P., Appellant..	Polk.....	Affirmed Nov. 15, 1911.....	Malicious threats to extort.
State v. Brumo, Frank, Appellant....	Pottawattamie..	Affirmed Oct. 17, 1911..... (Petition for rehearing overruled Jan. 16, 1912.)	Murder.
State v. Burns, James, Appellant.....	Carroll.....	Affirmed June 5, 1912.....	Breaking and entering.
State v. Butler, John C., Appellant...	Hamilton.....	Reversed April 10, 1912...	Assault with intent to commit murder.
State v. Butler, Fred, Appellant.....	Webster.....	Affirmed, Nov. 12, 1912....	Rape.
State v. Chocklett, Wilham, Appellant	Mahaska.....	Affirmed June 6, 1912.....	Murder.
State v. Christy, James, Appellant...	Story.....	Affirmed Jan. 12, 1912..... (Petition for rehearing overruled May 14, 1912.)	Breaking and entering.

State v. Conklin, Bert, *et al*, Appellants	Washington	Affirmed Nov. 14, 1911. (Petition for rehearing overruled Feb. 14, 1912.)	Receiving stolen goods.
State v. Corwin, George D., Appellant	Poweshiek	Affirmed June 6, 1911	Practicing medicine without a license.
State v. Cotter, Allen, Appellant	Monroe	Reversed Oct. 17, 1911	Seduction.
State v. Crow, Virgil, Appellant	Cerro Gordo	Affirmed Oct. 25, 1912	Assault with intent to commit murder.
State v. Dobbins, John R., Appellant.	Pottawattamie	Affirmed Oct. 18, 1911. (Petition for rehearing overruled Dec. 18, 1911.)	Larceny.
State v. Davis, John, Appellant	Woodbury	Affirmed May 9, 1911	Robbery.
State v. Dingman, Frank, *et al*, Appellants	Woodbury	Affirmed May 11, 1912	Robbery.
State v. Dorsey, W. R., Appellant	Boone	Affirmed March 5, 1912	Larceny.
State v. Dewey, Joe, *et al*, Appellants.	Calhoun	Reversed June 5, 1912	Conspiracy to commit a felony.
State v. Donahue, James, Appellant.	Polk	Dismissed Oct. 24, 1912	Robbery.
State v. Duncan, R. L., Appellant	Fremont	Reversed Dec. 10, 1912	Seduction.
State v. Elston, C., Appellant	Washington	Affirmed Sept. 27, 1912	Forgery.
State v. Fairmont Creamery Co., Appellee	Buena Vista	Reversed Dec. 18, 1911. (Petition for rehearing overruled April 9, 1912.)	Unfair discrimination.
State v. Ferguson, William, Appellant	Sac	Petition for rehearing overruled Feb. 11, 1911	Breaking and entering.
State v. Fisher, Carl, Appellant	Pottawattamie	Affirmed Nov. 20, 1912	Assault with intent to commit murder.
State v. Gill, Barney, *et al*, Appellants	Mahaska	Affirmed Feb. 10, 1911	Keeping a house of ill fame.
State v. Gilmore, J. E., Appellant	Jones	Reversed July 5, 1911	Murder.
State v. Guthrie, W. C., Appellee	Polk	Affirmed Feb. 7, 1911	Compounding a felony.
State v. Haines, Leroy, Appellant	Keokuk	Affirmed Oct. 17, 1911	Larceny.
State v. Holton, Gray & Co., Appellants	Page	Petition for rehearing overruled Jan. 19, 1911	Exposing for sale misbranded and adulterated linseed oil.
State v. Hamilton, Francis, Appellant	Decatur	Affirmed July 5, 1911	Murder.
State v. Harris, J. A., alias Arthur Johnson, Appellant	Linn	Reversed May 5, 1911	Appeal from an order of district court.

SCHEDULE A—CONTINUED

Title of Case	County	Decisions	Offense
State v. Harris, J. A., alias Arthur Johnson, Appellant	Linn	Affirmed April 10, 1912	Burglary.
State v. Harris, J. A., alias Arthur Johnson, Appellant	Linn	Reversed Jan. 10, 1912	Burglary.
State v. Hayward, Charles, Appellant.	Pottawattamie	Affirmed Dec. 12, 1911	Larceny.
State v. Haywood, William, Appellant	Wapello	Affirmed June 5, 1912	Larceny.
State v. Hector, Harry, Appellant	Pottawattamie	Reversed Dec. 10, 1912	Seduction.
State v. Heft, John, Appellant	Buchanan	Affirmed March 5, 1912. (Petition for rehearing overruled June 8, 1912.)	Incest.
State v. Haugh, Frank, Appellant	Jasper	Affirmed Oct. 15, 1912	Rape.
State v. Jackson, John, Appellant	Monroe	Affirmed Oct. 15, 1912	Murder.
State v. Johns, Lem, Appellant	Appanoose	Affirmed Oct. 17, 1911	Murder.
State v. Johnson, Cleo, Appellant	Polk	Reversed Nov. 14, 1911	Rape.
State v. Johnson, J. S., Appellant	Hardin	Affirmed June 25, 1912	Rape.
State v. Johnson, C. W. and Leslie, Appellees	Polk	Reversed Nov. 19, 1912	Keeping intoxicating liquors with intent to sell.
State v. Kernan, John, Appellant	Cass	Reversed April 2, 1912	Lewd, immoral and lascivious acts with a child under the age of 13 years.
State v. Kimes, David, Appellant	Linn	Affirmed July 5, 1911. (Petition for rehearing overruled Oct. 24, 1911.)	Larceny.
State v. Kinney, J. J., Appellant	Pottawattamie	Affirmed May 16, 1912	Larceny.
State v. Kreuger, August, Appellant	O'Brien	Affirmed Sept. 27, 1911	Incest.
State v. Kuechman, Theodore, Appellant	Muscatine	Stricken May 7, 1912	Selling and keeping for sale intoxicating liquor.

State v. Kulough, Fred, Appellee	Greene	Affirmed Dec. 18, 1911	Using obscene language publicly.
State v. King, James, Appellant	Shelby	Affirmed Nov. 20, 1912	Attempting to break and enter a banking building.
State v. Leek, Edna, Appellant	Greene	Affirmed May 5, 1911 (Petition for rehearing overruled Sept. 26, 1911.)	Adultery.
State v. Lindsay, Earl W., Appellant (rehearing)	Jasper	Reversed Oct. 18, 1911	Rape.
State v. Luther, Jack, Appellant	Wapello	Affirmed Feb. 8, 1911	Manslaughter.
State v. Marley, Guy, Appellant	Harrison	Affirmed Nov. 20, 1911	Murder.
State v. Mullen, R. G. Appellant	Wayne	Reversed June 6, 1911	Obtaining money under false pretenses.
State v. Mattix, William, Appellee	Mahaska	Dismissed Sept. 19, 1911	Illegal transportation of intoxicating liquors.
State v. McClelland, Robert R., Appellant	Floyd	Affirmed Nov. 15, 1911	Bigamy.
State v. McGhuey, Ray, Appellant	Ringgold	Affirmed Dec. 14, 1911	Rape.
State v. Manhattan Oil Co., Appellant.	Polk	Reversed May 17, 1912	Exposing and selling misbranded and adulterated linseed oil.
State v. Manhattan Oil Co., Appellant.	Polk	Reversed May 17, 1912	Exposing and selling misbranded and adulterated linseed oil.
State v. Meyer, J. E., Appellant	Allamakee	Affirmed May 16, 1912	Practicing medicine without a certificate.
State v. Morgan, C. A., Appellee	Polk	Reversed June 6, 1912	Desertion.
State v. Moyers, Enos, Appellee	Des Moines	Reversed June 25, 1912	Using nets unlawfully in the waters of Iowa in the Mississippi river.
State v. Moffit, Charley, Appellant	Washington	Affirmed June 26, 1912	Seduction.
State v. Mercuriali, Alesandro, Appellant	Woodbury	Dismissed Nov. 19, 1912	Murder.
State v. McKinnon, Wm., Appellant	Cerro Gordo	Affirmed Nov. 20, 1912	Carnal knowledge of an idiot.
State v. Nathoo, C. A., Appellant	Polk	Reversed Nov. 14, 1911	Carnal knowledge of an insensible female.
State v. Nitzel, Jesse, Appellant	Audubon	Affirmed June 5, 1912	Breaking and entering.
State v. Novak, Frank, Appellant	Marshall	Affirmed July 5, 1911	Assault with intent to commit rape.
State v. O'Callaghan, James, Appellant	Polk	Affirmed Nov. 12, 1912	Breaking and entering.
State v. Orr, George, Appellant	Appanoose	Affirmed Jan. 17, 1912	Nuisance.

SCHEDULE A—CONTINUED

Title of Case	County	Decisions	Offense
State v. O'Brien, John J., *et al*, Appellants	Page	Affirmed Dec. 10, 1912	Breaking and entering.
State v. Patterson, Perry, Appellant	Polk	Affirmed April 7, 1911	Assault with intent to commit murder.
State v. Perry, Sidney, Appellant	Polk	Dismissed by appellant Feb. 7, 1911	Desertion.
State v. Poder, Isadore, Appellant	Mahaska	Affirmed Oct. 24, 1911. (Reversed on rehearing April 3, 1912.)	Conspiracy to commit an unlawful act.
State v. Priesler, Ray, Appellant	Scott	Affirmed Jan. 17, 1912	Burglary.
State v. Price, Elmer, Appellant	Van Buren	Affirmed Nov. 20, 1912	Seduction.
State v. Rankin, John D., Appellant	Dickinson	Affirmed April 5, 1911	Murder.
State v. Rogers, John, *et al*, Appellants	Washington	Modified and Affirmed Oct. 15, 1912	Breaking and entering.
State v. Sampson, Joe, Appellant	Cerro Gordo	Reversed Nov. 19, 1912	Larceny.
State v. Sanderson, W. R., Appellant	Johnson	Dismissed by appellant. May 10, 1911	Larceny.
State v. Scott, Wallace, Appellant	Polk	Affirmed May 16, 1912	Assault with intent to commit murder.
State v. Shearer, John, Appellant	Cerro Gordo	Affirmed May 17, 1912	Murder.
State v. Shoemaker, O. H. P., Appellant	Polk	Reversed Nov. 14, 1912	Attempt to produce miscarriage.
State v. Skaggs, Edgar, Appellant	Page	Affirmed Dec. 18, 1911	Breaking and entering.
State v. Snyder, W. M., Appellant	Muscatine	Affirmed Oct. 19, 1911	Illegal fishing.
State v. Sorenson, Andy, Appellant	Polk	Affirmed Nov. 12, 1912	Breaking and entering.
State v. Standard Oil Co., Appellee	Lyon	Affirmed Jan. 12, 1911	Unfair discrimination.
State v. Stickle, Mart, Appellant	Linn	Affirmed May 12, 1911	Nuisance.
State v. Swearingen, C. M., Appellant	Fremont	Affirmed Nov. 17, 1911	Assault with intent to do great bodily injury.
State v. Sullivan, Mike, *et al*, Appellants	Mahaska	Reversed Oct. 16, 1912	Breaking and entering.

State v. Sullivan, John, Appellant....	Polk.....	Dismissed Oct. 15, 1912...	Attempt to suborn.
State v. Teale, Clarence, Appellant...	Decatur.....	Affirmed April 2, 1912....	Murder.
State v. Thomas, Henry, Appellant...	Polk.....	Affirmed July 5, 1911.....	Murder.
State v. Trachsel, Ed., Appellant.....	Davis.....	Reversed Feb. 6, 1911.....	Adultery.
State v. Thomas, Evan, Appellant...	Page.....	Affirmed Dec. 11, 1912....	Seduction.
State v. Vono, Toney, Appellant.....	Polk.....	Affirmed Feb. 16, 1912....	Assault with intent to commit murder.
State v. Warner, John, Appellant....	Van Buren.....	Affirmed Sept. 12, 1912....	Manslaughter.
State v. Weaver, Walter L., Appellant	Hardin.....	Dismissed April 8, 1911...	Uttering a forged instrument.
State v. Wignall, Thomas, Appel ant..	Mahaska.....	Petition for rehearing overruled May 12, 1911.....	Illegal transportation of intoxicating liquor.
State v. Wilson, Josephine, Appellant.	Mahaska.....	Affirmed Oct. 24, 1911.....	Nuisance.
State v. Wright, Orlando, Appellant..	Harrison.....	Affirmed Nov. 17, 1911....	Keeping and maintaining a gambling house.
State v. Willoughby, Geo., Appellant..	Polk.....	Affirmed Oct. 25, 1912.....	Nuisance.
State v. Young, George, Appellant....	Madison.....	Affirmed Oct. 17, 1911.... (Petition for rehearing overruled Jan. 18, 1912.)	Perjury.
State v. Young, Tom, Appellant.....	Decatur.....	Affirmed Dec. 10, 1912....	Murder.
State v. Zechman, J. H., Appellant....	Polk.....	Affirmed Nov. 12, 1912....	Illegal practice of medicine.
State v. Zechman, J. E., Appellant....	Polk.....	Affirmed Nov. 12, 1912....	Illegal practice of medicine.

SCHEDULE B.

The following is a list of criminal cases pending in the supreme court of Iowa on January 1, 1913.

Title of Case	County	Offense
State v. Becker, Harry, Appellant	Jackson	Robbery.
State v. Buford, John, Appellant	Monroe	Murder..
State v. Burns, James, *et al*, Appellants	Lucas	Breaking and entering.
State v. Clark, W. J., Appellant	Bremer	Larceny.
State v. Davis, Gordon, Appellant	Davis	Assault and battery.
State v. Dowden, Walt, Appellant	Polk	Liquor nuisance.
State v. Dreher, Jr., Gotfried, Appellant	Audubon	Breaking and entering.
State v. Fisk, Roy, Appellant	Jasper	Larceny and embezzlement.
State v. Ford, D. D., Appellant	Wapello	Liquor nuisance.
State v. Gabriella, Raffela, Appellant	Polk	Murder in first degree.
State v. Gibford, Paul, Appellant	Warren	Cheating by false pretenses.
State v. Gulliver, Glenn, Appellant	Mitchell	Assault with intent to rob.
State v. Harrison, J. H., Appellant	Mahaska	Liquor nuisance.
State v. Haugh, Frank, Appellant (rehearing)	Jasper	Rape.
State v. Henrietta, James, Appellant	Muscatine	Larceny.
State v. Hintenleiter, J. L., Appellant	Polk	Larceny by embezzlement.
State v. Kelley, H. D., Appellant	Polk	Murder in first degree.
State v. Kilduff, Anna, Appellant	Scott	Murder.
State v. Klute, Conrad, Appellant	Boone	Murder in first degree.
State v. Krampe, Leo, Appellant	Jasper	Murder.
State v. Lehlan, J. F., Appellant	Linn	Larceny in a building.
State v. Lindsay, Earl W., Appellant	Jasper	Rape.
State v. McCaskill, J. T., Appellant	Black Hawk	Murder.
State v. McClure, Charley, Appellant	Davis	Seduction.
State v. McEwen, Will D., Appellant	Pocahontas	Fraudulent banking.
State v. McKinnon, Wm., Appellant (rehearing)	Cerro Gordo	Carnal knowledge of an idiot.
State v. Mertens, Ray, Appellant	Sac	Murder.
State v. Norman, Grover, Appellant	Fremont	Seduction.

State v. O'Callaghan, Jas., Appellant (rehearing)	Polk	Breaking and entering.
State v. Russolo, Matt, Appellant	Appanoose	Nuisance.
State v. Sego, Charles, Appellant	Jasper	Robbery.
State v. Smithart, Orley, Appellant	Keokuk	Maliciously injuring a chattel.
State v. Sodi, Ferdinand, Appellant	Polk	Liquor nuisance.
State v. Sorenson, Andy, Appellant (rehearing)	Polk	Breaking and entering.
State v. Teale, Hugh, Appellant	Decatur	Murder in first degree.
State v. Waltz, Major, Appellant	Story	Maliciously injuring a building and fixtures.
State v. Warner, John, Appellant (rehearing)	Van Buren	Manslaughter.
State v. Warmuth, H. M., Appellant	Cedar	Practicing as a physician without a license.
State v. Wilson, Clifford, Appellant	Calhoun	Murder.

SCHEDULE C.

Cases pending January 1, 1911, which have since been disposed of:

IN DISTRICT COURT.

Mrs. F. M. Randolph vs. Cottage Hospital, State of Iowa, et al.
Western Union Telegraph Company vs. B. F. Carroll, Auditor of State.
In the Matter of the Estate of Richard Wilde, deceased.
Western Union Company vs. B. F. Carroll, Auditor of State.
State of Iowa, ex rel B. F. Carroll, Auditor of State, vs. New Liberty Savings Bank.
Frank L. McCoy, et al., vs. James L. Paxton, et al.
Isaac Hall vs. Butler County, et al.
State of Iowa, ex rel Chas. W. Mullan, vs. The Fraternal Accident Society of Cedar Rapids.
L. W. Nichols, et al., vs. The National Masonic Accident Association, et al.
City of Council Bluffs, et al., vs. Martin Harkins, et al.
Freemont Benjamin, et al., vs. B. F. Huff, et al.
George C. Clark, et al., vs. J. W. McIntosh, et al.
A. White vs. State Board of Medical Examiners, et al.
City of Ottumwa vs. Calvin Manning, et al.
State of Iowa, ex rel H. W. Byers, Attorney General, vs. The Protective Legion of Waverly, New York.
State of Iowa, ex rel H. W. Byers, Attorney General, vs. Iowa Business Men's Building and Loan Association.
State of Iowa, ex rel H. W. Byers, Attorney General, vs. Iowa Farmers' Protective Mutual Hail Insurance Association of Des Moines, Iowa.
Nina Hamilton, by her next friend, F. M. Davenport, vs. Ella Hamilton, et al.
L. P. Boule vs. Nicholas Cronin.
Theron W. Prindle vs. Unknown Claimants and Orphans' Home, et al.
State of Iowa, ex rel W. W. Morrow, Treasurer of State, vs. James McKim, et al.
Chicago, Milwaukee & St. Paul Ry. Co. vs. D. J. Palmer, et al.
Milwaukee Cement Company vs. A. B. Funk, et al.
Minnie A. Dewey, et al., vs. George F. Anders, et al.
State of Iowa vs. Carrie Livingston, et al.

IN SUPREME COURT.

William H. Semonies, et al., vs. Charles W. Needles, et al.
State of Iowa, ex rel Mullan, vs. Syndicate Land Company.
W. W. Morrow, Treasurer of State, vs. Carrie Durant.

H. F. Schultz vs. C. J. Parker, Sheriff.
E. R. Lacy, Administrator of the Estate of John Smith, vs. The Treasurer of the State of Iowa.
In re Estate of Emma H. Haddock, George B. Haddock vs. W. W. Morrow, Treasurer of State.
Ella Wieting, Executrix Phillip Wieting Estate, vs. W. W. Morrow, Treasurer of State.
D. T. Denmead vs. J. M. Parker, Judge, C. Schmitz, et al.
D. T. Denmead vs. J. M. Parker, Judge, W. H. Muclhaupt, et al.
D. T. Denmead vs. J. M. Parker, Judge, P. E. Gifford, et al.
D. T. Denmead vs. J. M. Parker, Judge, Owen Hartley, et al.
In re Estate of Louise C. Crawford.
In re Estate of James T. Bell, deceased, State of Iowa vs. Joseph H. Bell, et al.
State of Iowa vs. Chicago, Milwaukee & St. Paul Ry. Co.
W. W. Morrow, Treasurer of State, vs. Henry Depper, et al.
American Linseed Oil Company vs. W. B. Barney, State Food and Dairy Commissioner.
K. K. K. Medicine Co. vs. W. B. Barney.

IN UNITED STATES SUPREME COURT.

Frank A. McComber vs. Alva A. Nicholson, et al.
Standard Stock Food Company vs. H. R. Wright.

IN FEDERAL COURT.

Robert C. Rice, et al., vs. Northwestern Life & Savings Company, B. F. Carroll, Auditor, et al.
Henry W. Poor vs. The Iowa Central Railroad Company, et al.
Wm. Shillaber vs. M. & St. L. Ry. Co., et al.

SCHEDULE D.

Cases which have been commenced and disposed of since January 1, 1911:

State of Iowa, ex rel Joseph H. Egermayer, County Attorney, vs. H. S. McGoogan, et al., and six other cases.
E. E. Fields, et al., vs. Iowa State Board of Agriculture, et al.
Henry Craver vs. C. C. Horton, Commandant of the Iowa Soldiers' Home, Marshalltown, Iowa.
State of Iowa, ex rel Jos. H. Egermayer, vs. John Kelley, et al., and Chas. M. Forney.
State of Iowa, ex rel Joseph H. Egermayer, vs. W. H. Muelhaupt, et al., Kirby & Howe, et al.
State of Iowa vs. Owen Bartley, et al., and two other cases.
State of Iowa vs. C., M. & St. Paul Ry. Company.
State of Iowa vs. Jesse Cole, Guardian of W. M. Rood, Philo Brockway and J. M. Ford, Insane, and Cole, Administrator, Nathan Hackley.
D. T. Blodgett vs. State of Iowa, B. F. Carroll and J. C. Sanders.
J. C. Duncan vs. George Cosson, Attorney General.
William Adams vs. Marquis Barr.
W. W. Wallace vs. Iowa State Board of Agriculture.
State of Iowa, ex rel George Cosson, Attorney General, Board of Railroad Commissioners, vs. The Western Transit Company, et al.
W. J. Conly vs. Ed G. Dilley.
State of Iowa vs. Wm. Barsby.
American Fidelity Company vs. John L. Bleakly.
State of Iowa vs. Wapello County and J. F. Stevens, County Auditor and Henry Glenn, County Treasurer.
State of Iowa vs. Atlantic Coast Line Railway Company, et al.
Wm. P. Bolei, by Geo. P. Bolei, vs. M. N. Voldeng, Superintendent Cherokee State Hospital and Board of Control.
Isaac N. Yarrington vs. George Donohoe.
Thomas P. Cleary vs. Ole O. Roe, State Fire Marshal and J. A. Tracy.
American Patriots vs. John L. Bleakly.
Ernst Emil Nilson, et al., vs. A. M. Duus, Administrator.
G. M. Babbitt vs Hugh Corrigan, et al.
State ex rel Crawford vs. J. E. Anderson.
State of Iowa vs. J. H. Mathis.
Grant McPherrin vs. A. D. Nye, County Treasurer of Taylor County.
In the Matter of the Legal Settlement of Carrie Snyder of unsound mind.
State of Iowa vs. Mrs. Eva Brown, et al.
In the Matter of the Condemnation of Certain Real Estate for the Purpose of an Addition to the Iowa State Fair Grounds vs. Mrs. Eva Brown.

Myrtle White vs. Frank T. Stevens, et al.
State of Iowa vs. I. N. Long, et al.
W. M. Corbett vs. State Agricultural Society and J. H. Deemer.
First National Bank of Tama vs. County of Tama.
State vs. Frank Kearney.
In the Matter of the Estate of A. A. Cherry, deceased.

SCHEDULE E.

Cases pending in the several courts of the State and the United States, and before the Interstate Commerce Commission, January 1, 1913:

CASES PENDING IN DISTRICT COURT.

State of Iowa, ex rel George Cosson, Attorney General, vs. Wyoming Cattle Company, et al.
In re Estate of Eben R. Voorhees.
State of Iowa, ex rel George Cosson, Attorney General, and Board of Railroad Commissioners, vs. Atchison, Topeka & Santa Fe Ry. Co., et al.
H. J. Toenningsen, County Treasurer, vs. Merchants National Bank of Clinton.
N. F. Miller vs. George Donohoe, Superintendent of State Hospital.
J. M. Taylor, et al., vs. National Masonic Accident Association and North American Accident Association, et al.
Mary Ann McKeown vs. W. W. Morrow, John L. Bleakly, S. Y. Eggert, Administrator, James Murray, deceased.
State of Iowa vs. B. F. Swanson and L. W. Smith.
Commercial National Bank, et al., vs. Pottawattamie County.
First National Bank vs. City of Council Bluffs, Thomas Maloney, Mayor.
Story County vs. State of Iowa.
Keokuk National Bank vs. Lee County.
Theodore H. MacDonald, Ins. Com., vs. Aetna Indemnity Co., et al.
State of Iowa, ex rel George Cosson, Attorney General, vs. W. L. Baughn.
State of Iowa, ex rel George Cosson, Attorney General, vs. C. W. Scott, et al.

CASES PENDING IN SUPREME COURT.

State of Iowa vs. Carrie Livingston, et al.
State of Iowa, ex rel George Cosson, Attorney General, and W. C. Edson, County Attorney, vs. Terrence Thomas.
In the Matter of the Estate of Hannah H. Adams, deceased, W. W. Morrow, Treasurer of State, vs. Said Estate.
Frank G. Pierce vs. Executive Council, et al.
Henry S. Keely vs. Board of Supervisors of Dubuque County, et al.
In the Matter of the Estate of Almiron Culver, deceased, Melissa Gould, Administratrix, vs. W. W. Morrow, Treasurer.
Martha Ellen McPherson, nee Cosson, vs. A. H. Day, Chief of Police, and Board of Control.
Nellie Ryan vs. Wm. Hutchinson, Judge.
Lucille Addis vs. Dr. C. F. Applegate.

IN UNITED STATES SUPREME COURT.

State of Iowa upon the relation of Chas. W. Mullan vs. The Marshall Dental Mfg. Co.

CASES PENDING IN FEDERAL COURT.

Henry Loring and Parley Sheldon, as Receivers of the Fort Dodge, Des Moines & Southern R. R. Co., vs. David J. Palmer, et al.
C., M. & St. P. R. R. Co., vs. Board of Railroad Commissioners.
C. & N. W. Ry. Co. vs. Board of Railroad Commissioners.
C., B. & Q. R. R. Co. vs. Board of Railroad Commissioners.
C., R. I. & P. Ry. Co. vs. Board of Railroad Commissioners.
C. G. W. R. R. Co. vs. Board of Railroad Commissioners.
C., St. P., M. & O. Ry. Co. vs. Board of Railroad Commissioners.
Ill. Central R. R. Co. vs. Board of Railroad Commissioners.
Wm. M. Barrett, as President of the Adams Express Company, vs. David J. Palmer, et al.
Chauncey H. Crosby, as Vice-President of the U. S. Express Co., vs. David J. Palmer, et al.
James Fargo, as President of the American Express Company, vs. David J. Palmer, et al.
Wells Fargo & Company vs. Board of Railroad Commissioners.
In re Habeas Corpus Andrew H. Wilcox by Chas. F. Wilcox vs. Max E. Witte, et al.
M. & St. L. R. R. Co. vs. D. J. Palmer, et al.
Samuel Carr, et al., vs. Charles R. Hannan, et al.
John A. Creighton, et al., vs. Charles R. Hannan, et al.
John I. Redick vs. Charles R. Hannan, et al.
The Whitney Realty Company vs. Charles R. Hannan, et al.
James Barr Ames, et al., vs. Charles R. Hannan, et al.
George Baxter, et al., vs. Charles R. Hannan, et al.
Elizabeth D. McClintock vs. Cedar Rapids & Iowa City Railway and Light Company, et al.
Old Colony Trust Company vs. Fort Dodge, Des Moines & Southern Ry. Co., et al.

CASES PENDING BEFORE INTERSTATE COMMERCE COMMISSION.

Board of Railroad Commissioners of Iowa vs. Illinois Central Railway Company, et al.
State of Iowa, ex rel H. W. Byers, Attorney General, et al., vs. Chicago, Northwestern Railway Company.
State of Iowa. ex rel H. W. Byers, Attorney General, vs. Chicago, Milwaukee & St. Paul Railway Company.
State of Iowa, ex rel H. W. Byers, Attorney General, Board of R. R. Commissioners, vs. Chicago Great Western Railroad Company.

State of Iowa, ex rel H. W. Byers, Attorney General, Board of Railroad Commissioners, vs. Iowa Central Railway Company.

State of Iowa, ex rel H. W. Byers, Attorney General, Board of Railroad Commissioners, vs. Illinois Central Railway Company.

State of Iowa, ex rel H. W. Byers, Attorney General, Board of Railroad Commissioners, vs. Chicago, Rock Island & Pacific Railroad Company.

State of Iowa, ex rel H. W. Byers, Board of Railroad Commissioners, vs. Chicago, Milwaukee & St. Paul Railway Company.

State of Iowa, ex rel H. W. Byers, Attorney General, Board of Railroad Commissioners, vs. Atchison, Topeka & Santa Fe Railway Company.

State of Iowa, ex rel H. W. Byers, Attorney General, Board of Railroad Commisisoners, vs. Chicago, Burlington & Quincy Railroad Co.

State of Iowa, ex rel H. W. Byers, Attorney General, Board of Railroad Commissioners, vs. New York Central & Hudson River Railroad Company.

State of Iowa, ex rel George Cosson, Attorney General, Board of Railroad Commissioners, vs. Atchison, Topeka & Santa Fe Ry. Co., et al.

INDEX

(Figures refer to pages)

NINTH BIENNIAL REPORT

OF THE

ATTORNEY-GENERAL

OF THE

STATE OF IOWA

GEORGE COSSON
ATTORNEY-GENERAL

FOR THE PERIOD BEGINNING JANUARY 3, 1911
AND ENDING DECEMBER 31, 1912

Printed by Authority of General Assembly

DES MOINES
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1913

ATTORNEY GENERAL'S DEPARTMENT

GEORGE COSSON.....*Attorney General*
JOHN FLETCHER.....*Assistant Attorney General*
C. A. ROBBINS.....*Assistant to the Attorney General*
HENRY E. SAMPSON.....*Assistant to the Attorney General*
ZEPHYR B. GILPIN.....*Law Clerk and Stenographer*
CATHERINE MCNALL.....*Stenographer*
CHARLOTTE HARRIS.....*Stenographer*

ATTORNEY GENERALS OF IOWA

David C. Cloud	1853-1856
Samuel A. Rice	1856-1861
Charles C. Nourse	1861-1865
Isaac L. Allen	1865-1866
Frederick E. Bissell	1866-1867
Henry O'Connor	1867-1872
Marsena E. Cutts	1872-1877
John F. McJunkin	1877-1881
Smith McPherson	1881-1885
A. J. Baker	1885-1889
John Y. Stone	1889-1895
Milton Remley	1895-1901
Charles W. Mullan	1901-1907
Howard W. Byers	1907-1911
George Cosson	1911-

NINTH BIENNIAL REPORT OF THE ATTORNEY GENERAL

STATE OF IOWA,
DEPARTMENT OF JUSTICE,
Des Moines.

To the Honorable B. F. Carroll,

Governor of Iowa:

Pursuant to the provisions of chapter 9, acts of the Thirty-third General Assembly, I hereby submit to you a report of the business transacted by the Department of Justice during the years 1911 and 1912.

There are now pending in this department 98 cases, 39 of which are criminal cases pending on appeal in the supreme court and 59 civil cases.

At the beginning of the term there were 72 civil cases pending and 37 criminal cases. During this time 82 new civil cases have been instituted and 118 criminal cases; 47 of the civil cases pending at the beginning of the term have been disposed of and 36 of the new cases, making a total of 83 civil cases disposed of during the period. All of the criminal cases pending at the beginning of the term have been disposed of and all of the new cases appealed have been decided except 39, making a total of 199 argued and disposed of during the term.

Of the 116 criminal cases disposed of, 108 were appealed by the defendant. Of this 108, 76 were affirmed, 24 reversed and 8 dismissed. Eight cases were appealed by the state, four of which were reversed, three affirmed and one dismissed.

The number of criminal cases appealed during the past two years is substantially what it was during the previous biennial period.

Over a thousand opinions have been given during the past two years. A considerable number of these opinions were official in nature and given to the state departments, which were not listed as official because the question had been previously passed upon or was not considered of sufficient importance to class as official opinions. Included in this list is a very large number of opinions given to county attorneys.

The department has refused to give opinions to private persons, but inasmuch as the attorney general has supervisory powers over county attorneys, we felt that it was not only the authority of the attorney general but his duty to give opinions to county attorneys whenever in his judgment the proposition submitted was of such a character as to be of state-wide importance or interest.

Over nine thousand letters have been written during this period which were of such importance as to be copied and become a part of the permanent records of the office, and at least two or three thousand letters have been written, circular and otherwise, which are not included in the above list.

The general demands upon the department have very greatly increased during the past two years.

The large increase in the demands made upon the office is of a civil nature, and a universal demand for a general enforcement of all of the laws of the state. An unusual number of complaints have been made to the department concerning the enforcement of the road and drag law and the law relating to the cutting of noxious weeds.

Of the civil cases disposed of, two were argued in the supreme court of the United States, both oral and written arguments being made by the attorney general.

STANDARD STOCK FOOD COMPANY VS. H. R. WRIGHT.

The case of the *Standard Stock Food Company vs. H. R. Wright* involved the constitutionality of chapter 189, acts of the Thirty-second General Assembly, designated as the commercial feeding stuffs act, which is nothing more nor less than a pure food law for animals, including a provision for pure seeds. This case was of much importance, not alone from the amount of the fees collected, but because it determined in a large way the power of the state to protect her citizens under the police power. A number of states had passed a similar law patterned after the Iowa law, and those cases were all pending in the United States circuit courts, and by agreement they were to await the outcome of the Iowa cases. The constitutionality of the law was assailed upon many grounds. It was especially argued that that part of the law which provided for an annual license of one hundred dollars in lieu of an inspection fee was unconstitutional upon the ground that it was a burden upon interstate commerce. The supreme court of the United

States, however, held the law valid in every particular. This was the first time that an American court of last resort had sustained a law passed under the police power of the state as an inspection law, where the fee was prescribed annually and in a lump sum instead of a definite fee being fixed according to the quantity of goods inspected. Heretofore it had always been held that a law of this nature offended against the commerce clause of the federal constitution in that it amounted to a tax or burden upon interstate commerce.

Under this law the state has collected over $62,000.00.

STATE OF IOWA VS. J. N. JONES, MARSHALL DENTAL MANUFACTURING COMPANY.

Another case argued before the supreme court of the United States is entitled the *State of Iowa vs. J. N. Jones, Marshall Dental Manufacturing Company,* commonly known as the Goose Lake case. It was contended by the Marshall Dental Manufacturing Company that non-navigable meandered lakes passed under the Swamp Land Act. If this principle were once established substantially all of the lakes of the state would pass from the jurisdiction of the State of Iowa into the hands of private parties under the Swamp Land Act, and our people would be compelled to pay toll to some private party for the purpose of boating and fishing. The contention of the state that it had jurisdiction over all non-navigable meandered lakes in use and trust for all of the people was upheld by the lower state court and the supreme court of the state of Iowa. The case having been submitted last term to the supreme court of the United States, a decision is anticipated in the very near future, and it is predicted that the contention of the state will be upheld*

STATE OF IOWA VS. FAIRMONT CREAMERY COMPANY.

The constitutionality of the unfair discrimination law was attacked in the case of *State of Iowa vs. Fairmont Creamery Company.* The law was held unconstitutional by the lower court, but our supreme court in an opinion filed December 18, 1911, reversed the lower court and sustained the constitutionality in every respect.

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*This case was decided in favor of the State January 7, 1913.

This is very important as it indicates the extent to which the legislature may go in an effort to control and regulate trusts and monopolies under the police power of the state.

H. F. SCHULTZ VS. C. J. PARKER.

In this case the supreme court of the state also sustained the constitutionality of the anti-pass law.

During this administration no law of the state of Iowa has been held unconstitutional either by our own supreme court or by the supreme court of the United States.

STATE OF IOWA VS. ENOS MOYERS.

The case of *State of Iowa vs. Enos Moyers,* decided by our supreme court June 25, 1912, is important for the reason that it determined the jurisdiction of the state over the waters of the Mississippi river. It was held in that case that the state of Iowa had jurisdiction over the river to the Illinois shore and not merely to the center or thread of the stream which marks the boundary of the state.

K. K. K. MEDICINE COMPANY VS. H. R. WRIGHT.

The concentrated commercial feeding stuffs act was also attacked in the district court of Lee county in the case of *K. K. K. Medicine Company vs. H. R. Wright* upon many grounds and Judge Wm. S. Hamilton sustained the validity of the law.

A great deal of the time of the department has been taken up in the trial of rate cases in the lower federal courts and before the interstate commerce commission of the United States. A substantial reduction in the express rates was made by the railroad commission of Iowa and the same was promulgated on the 31st day of December, 1910. The complaint in this case was filed by former Attorney General Byers and Mr. Wrightman, Secretary of the Manufacturers' Association. The contentions of complainant were found to be true and the railroad commissioners promulgated what is known as express order No. 2. The express companies attacked the validity of the rates promulgated by the board of railroad commissioners in the United States circuit court. It was alleged by the companies that the commission had made a reduction from 10 to 15% in the express rates and a special complaint

was made against the twenty cent minimum inaugurated by the commission. This case was heard before Judge McPherson resulting in a verdict for the state, the restraining order was dissolved and a temporary injunction denied. The attorney general also appeared as intervenor in the proceeding instituted before the interstate commerce commission of the United States concerning the rates and practices of the express companies doing interstate business between Iowa and other states in the Union. A far reaching decision was handed down in that case by Commissioner Lane which not only materially reduced interstate rates but corrected many abuses prevalent in the express business. A very great deal of time was consumed in the preparation of these cases. A vast amount of labor is necessarily required to prepare any rate case.

During this biennial period what are known as the interior Iowa rate cases, the Mississippi river cases, and the Clinton Sugar Refining Company case have been heard both before the commissioner and the full commission at Washington, D. C. A decision favorable to the state has been received in the Clinton Sugar Refining Company case. This case was prepared and argued by Judge Henderson, commerce counsel, and Mr. Robbins of this department. The attorney general and his assistant, Mr. Robbins, Judge Henderson and Dwight Lewis represented the state of Iowa; Mr. Thorne and Judge Henderson represented the railroad commissioners; and Mr. Wylie and Mr. Guernsey, who were specially employed to represent the Greater Des Moines Committee of the city of Des Moines, also represented the state of Iowa in the interior rate cases and performed an unusual amount of valuable service in the preparation and submission of these cases without receiving any compensation at all from the state.

A number of rate cases are now pending in the federal courts, especially the coal rate cases. To secure the proper data to be used in the submission of these cases will require a vast amount of time and the expenditure of a considerable sum of money. The legislature has not appropriated a dollar to the attorney general to be used in the preparation or submission of rate cases, and contrary to popular opinion, the act creating the office of commerce counsel not only placed no responsibility upon the commerce counsel to appear in any of the courts in the contest of rate cases, but it gave him no authority at all in the courts, and not even authority to appear before the interstate commerce

commission, except when directed so to do by the board of railroad commissioners, and then, to such extent only and in such manner as the board determined. The only authority given to the commerce counsel where he might appear on his own initiative is before the board of railroad commissioners affecting rates wholly within the state of Iowa. The attorney general, however, held in an opinion to the board of railroad commissioners that whenever it did not conflict with his duties expressly enjoined upon him by chapter 94, acts of the Thirty-fourth General Assembly, he might on his own motion appear in the federal court in the trial of rate cases with the consent of the board of railroad commissioners, but his appearance can in no wise conflict with the authority and duty imposed upon the attorney general.

A physical valuation of the trunk lines of the state is imperative both as a basis of fixing the rates and also as a proper basis for taxation.

REMOVAL OF DERELICT OFFICIALS.

Proceedings of removal have been instituted against a number of supervisors for a wrongful use of road and bridge funds and maladministration in office in general. A great deal of time has been devoted to the preparation of these removal cases in the securing of data. In each instance the Department of Justice has co-operated with the state highway commission at Ames. We have also had the assistance of Prof. Lambert, head of the engineering department at Iowa City, and had arranged for other experts in the trial of these cases. Before the final hearing, however, each supervisor against whom suit was brought or about to be brought, resigned. In one county alone over $25,000 was returned to the county treasury and the saving to the taxpayers generally over the state by reason of a change in business methods has amounted to many thousands of dollars.

A removal case is now pending against the mayor of Harlan for misconduct and maladministration in office, neglect and refusal to perform the duties of his office and intoxication. The merits of this removal bill are no longer debatable and what has been accomplished under it in the state of Iowa is so well known that no reference will be made thereto.

These are but a few of the important cases argued by the Department of Justice during the past two years but they indicate the

scope of the work of the department and the importance of the work as it affects the public welfare of the state, not only the moral and social welfare which is of primary consideration, but also the property rights.

It has been the aim of the department to enforce all of the laws affecting the moral, the social and the material welfare of our people. I have directed attention to the embarrassment of trying the rate cases now pending in the federal court in the absence of further appropriation for the purpose of securing data including the physical valuation of the roads.

A very earnest effort has been made during the past two years to enforce the trust laws of the state, and the laws relating to unfair discrimination. Several indictments have been found against certain corporations for combining for the purpose of arbitrarily fixing prices on certain necessities, but in view of the fact that this department has no special agents to secure evidence and no funds to pay for the same, and in view of the further fact that under our laws no person can be compelled to testify if it would tend to incriminate him, because no provision of immunity in such cases is provided, it has been extremely difficult to secure evidence against persons or corporations who we knew to a moral certainty were violating the anti-trust laws of the state and arbitrarily fixing prices. In at least two cities of the state there was considerable evidence to show that produce was being destroyed in order to maintain prices.

Without hesitation we confess that we do not expect to see the trust problem ultimately solved by criminal statutes in the nature of the Sherman Anti-trust law, but we do believe that some effective method of prosecution, which also gives to the state and government the power of the injunctive remedy, the power to secure evidence and subpoena witnesses in every part of the state, is indispensable in order to properly deal with the question.

The merits of additional legislation and the nature of the same will not be recommended at this time for the reason that it would improperly extend the length of this report to enter into a discussion of the merits of such additional legislation. Suffice it to say that some bill similar to what was known as the Miller bill, which was introduced in the last session of the general assembly and passed the House and was defeated by a small vote in the Senate, should be enacted by the coming general assembly. This

bill was prepared by this department after a most careful examination of the statutes of congress and the various state legislatures and also the decisions of both state and federal courts.

The unfair discrimination law, the constitutionality of which was sustained by our supreme court in the case of *State vs. Fairmont Creamery Company,* which now applies to petroleum products, dairy products, poultry and grain should be extended to apply to all merchantable commodities. A bill seeking to accomplish this purpose was introduced in the last session of the general assembly by Representative Cunningham, and another by Representative Stipe. It is impossible to secure convictions for violations of trust laws or any other laws without evidence.

The fire marshal, the food and dairy commission, the hotel inspector and the labor commissioner all have inspectors and agents to secure evidence of violations of law with substantial appropriations, but the attorney general is expected to enforce all of the laws of the state without even special agents or special appropriations to secure evidence.

THE NEED OF SPECIAL AGENTS.

A special agent is not only needed for the purpose of securing evidence and investigating anti-trust laws and laws relating to unfair discrimination, but also for the purpose of aiding local officials and securing evidence in heinous and unusual crimes. Your Excellency is well aware of the embarrassment which the state experienced in an effort to secure evidence against the murderous villain who was responsible for the Villisca tragedy, and how because of a lack of funds furnished to this department, it was necessary for you for a number of months to pay one of the assistants in the office in order that we might pay special agents and detectives to secure evidence in this case. In all such cases as this the state should have a man available who is skilled in ferreting out crime to proceed to the place and make immediate investigation. Delay often means a lack of conviction. Whatever evidence there may have been in the beginning is often destroyed by misguided but well-meaning people.

A special agent in order to render the best service should be made an officer of the law with power to make arrests in any part of the state the same as a sheriff. He could co-operate with the sheriffs and police officers over the entire state. His services

would be in demand where escapes were made from any of the state institutions and he could be used as a special agent to return prisoners from other states upon requisitions who were fugitives from justice, and this item alone would almost pay his salary.

The large number of murders committed annually throughout the United States and in the state of Iowa in proportion to the number committed in all other civilized countries of the world is causing the most thoughtful consideration of the students of sociology and good government. When it is considered that as many or more murders are committed in Des Moines every year than are committed in all London, and more in the state of Iowa than all of Great Britain, and considering that the average number of convictions in the United States is only two to four out of every hundred, whereas it ranges from 50 to 95 out of every hundred in civilized foreign countries, and when it is further considered that the cost of crime in nine months in the United States is equal to our entire national debt, and that only a part of the cost of crime in the state of Iowa, as reported to the board of parole, each year amounts to a million dollars, our legislature can well afford to give consideration to this question from the mere economic standpoint, even if they disregard the more important consideration of the welfare of society and the injury inflicted upon the innocent and the unfortunate.

All advancement that has been made in the matter of law enforcement in the state of Iowa, or any other state, has been made by giving the state more authority and this is true whether it concerns violations of law relating to gambling, the social evil and the illegal sale of liquor, or whether it is the enforcement of the road law; the expenditure of county funds, the enforcement of the pure food law, the hotel inspection and sanitary laws, the pharmacy and drug acts or the investigation of the origin of fires.

The creation of a fire marshal, the establishment of a food and dairy department with inspectors to travel over the state, the hotel inspector with his deputies, a pharmacy commission with state-wide powers are all a recognition upon the part of the state that local officials cannot be relied upon to enforce state laws, and this even though there is no popular prejudice against the law as there is certainly none against the pure food law, the road laws, the hotel inspection and sanitary laws, and the laws relating to fires of incendiary origin.

There have been more complaints made to this department for violations of the road law and expenditure of county funds than respecting the violation of any other law, and no relief from this situation will ever come as long as the work is placed in an almost unlimited number of township trustees and road supervisors with no central authority and responsibility either in the township, the county or the state. There is no political significance attached to the duties of any county office and therefore there is no reason why the business of the county should not be looked after by county supervisors or county commissioners elected at large and paid a sufficient salary that they could and would give their entire attention to the business of the county with authority to hire a county engineer and with the responsibility imposed upon them of seeing that the business of the entire county is looked after during every day of the year.

REFORM IN COURT PROCEDURE.

For years the technicalities of the law and the defects in our criminal procedure have been denounced, but mere denunciation in itself amounts to nothing in the absence of some constructive method of relief.

Our supreme court is to be highly commended for its attitude toward the other departments of government; that is to say, for its hesitancy in disturbing laws which have been passed by the legislature under the police power in the interests of the people after due consideration, and which have also received the sanction of the executive department. No act of our general assembly has been held unconstitutional by our supreme court for several years. This attitude of our courts is materially lessening the indiscriminate attacks upon our laws upon the ground of unconstitutionality when there is no substantial foundation for the attack.

There are, however, too many criminal cases being reversed upon the ground of erroneous instructions of the lower courts and other irregularities which do not affect the substantial rights of the defendant. Of the 108 cases appealed by defendants during the last two years about one out of every four was reversed, whereas in the state of Wisconsin only about one out of every ten criminal cases was reversed, and it is important to bear in mind that while Wisconsin has larger cities than Iowa, and therefore ought to have at least as much criminal business, while Iowa had

116 criminal cases appealed, Wisconsin had only about thirty. In other words, Wisconsin with larger cities and with over 100,000 population more than Iowa has nearly one-fourth less criminal cases appealed than Iowa. This is a matter worthy of very serious consideration. It can only be accounted for by the reason that the Wisconsin court is refusing to reverse any criminal case or any civil case unless upon the whole record it affirmatively appears that except for the error complained of a different verdict would have obtained.

The position of the Wisconsin court is very clearly stated in the case of *Hack vs. State,* 124 N. W. 492. The court there overruled a number of their former decisions and refused to follow the supreme court of the United States and held that a defendant by remaining silent waived his right to arraignment and plea and that the irregularity in question did not affect his substantial rights and affirmed the verdict of guilty as pronounced by the jury in the court below. The court said:

"Surely the defendant should have every one of his constitutional rights and privileges, but should he be permitted to juggle with them? Should he be silent when he ought to ask for some minor right which the court would at once give him, and then when he has had his trial, and the issue has gone against him, should he be heard to say there is error because he was not given his right? Should he be allowed to play his game with loaded dice? Should justice travel with leaden heel because the defendant has secretly stored up some technical error, not affecting the merits, and thus secured a new trial because forsooth he can waive nothing? We think not. We think that sound reason, good sense, and the interest of the public demand that the ancient strict rule, framed originally for other conditions, be laid aside, at least so far as all prosecutions for offenses less than capital are concerned It is believed that this court has uniformly attempted to disregard mere formal errors and technical objections, not affecting any substantial right, and to adhere to the spirit of the law which giveth life rather than to the letter which killeth."

The supreme court of Oklahoma in the case of *Caplas vs. State,* 104 Pac., 493, decided in 1909, refused to grant a new trial because of a defect in the indictment, and said that the court proposed to give the people of the state a "just and harmonious system of criminal jurisprudence, founded on justice and supported by reason, freed from the mysticism of arbitrary technicalities," and

the court said: "This standard will control our decisions, it matters not what or how many other appellate courts may have decided to the contrary." The court added: "Now that our criminal jurisprudence is in its formative period, we are determined to do all in our power to place it upon the broad and sure foundation of reason and justice so that the innocent may find it to be a refuge of defense and protection, and that the guilty may be convicted and taught that it is an exceedingly serious and dangerous thing to violate the laws of this state, whether they be rich and influential or poor and friendless. * * * If we place our criminal jurisprudence upon a technical basis it will become the luxury of the rich who can always hire able and skillful lawyers to invoke technicalities in their behalf. We will give full consideration to all authorities which are supported by living principles, and will follow them when in harmony with our laws and the conditions existing in Oklahoma. But we must confess to a want of respect for precedents which were found in the rubbish of Noah's Ark, and which have outlived their usefulness, if they ever had any."

Decisions of other courts which disregard technicalities might be cited, but it is unnecessary.

Repeated efforts have been made to secure a resolution committing the state bar association of our state to a law similar to the Wisconsin law which provides:

"No judgment shall be reversed or set aside or new trial granted in any action or proceeding, civil or criminal, on the ground of misdirection of the jury, or the improper admission of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure the new trial."

Section 3072-m laws of Wisconsin, 1907.

But the conservatism of the lawyers has thus far prevented our bar association from taking favorable action. A law upon similar lines was introduced in the Thirty-third General Assembly by Senator Francis and was again defeated by reason of the conservatism of the lawyers, and yet the law has had a most salutary effect in the state of Wisconsin where it has been on the statute books since 1909.

In my opinion courts have this power without the law and should without hesitation exercise it, but since they are reluctant to do so there can be no excuse for the legislature in failing to pass a law of this nature. In Wisconsin this law and the attitude of their courts have not only very materially lessened the number of criminal appeals but reversals in civil cases are far less frequent than formerly with a corresponding lessening of appeals in civil cases. This, of course, very materially tended to reduce court costs and relieve the congestion of the courts due to needless appeals.

Another very great weakness in our criminal laws is to be found in the very large number of statutory crimes for the same generic offense; that is to say, stealing is made many separate offenses. We have larceny, embezzlement, robbery, cheating by false pretenses, embezzlement by different persons and from different sources; we have larceny in the night time, from the building, from the person, and various other refinements, a large number of which are entirely unnecessary especially in view of the fact that we are approaching the indeterminate sentence law. The character of the offense and the character of the offender can, to a large extent, be left to the board of parole to determine.

A large number of appeals and acquittals due to these refinements could be obviated by reducing the number of statutory offenses covering the various degrees of the same generic offense, or by following the very simple and common-sense method adopted by England of authorizing the higher court to prescribe the punishment to fit the crime which it is admitted by the defendant he had committed in the court below, instead of the exact offense prescribed in the indictment.

The criminal appeal act of 1907 of England provides, in part, as follows:

"If it appears to the court of criminal appeal that an appellant, though not properly convicted on some count or part of the indictment, has been properly convicted on some other count or part of the indictment, the court may either affirm the sentence passed on the appellant at the trial, or pass such sentence in substitution therefor as they think proper, and as may be warranted in law by the verdict on the count or part of the indictment on which the court consider that the appellant has been properly convicted.

"Where an appellant has been convicted of an offense and the jury could on the indictment have found him guilty of some other offense, and on the finding of the jury it appears to the court of

criminal appeal that the jury must have been satisfied of facts which proved him guilty of that other offense, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that offense, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offense, not being a sentence of greater severity.

"Where on the conviction of the appellant the jury have found a special verdict, and the court of criminal appeal consider that a wrong conclusion has been arrived at by the court before which the appellant has been convicted on the effect of that verdict, the court of criminal appeal may, instead of allowing the appeal, order such conclusion to be recorded as appears to the court to be in law required by the verdict, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law."

Paragraphs 1, 2, 3 of section 5 of Butterworth's 20th Century Statutes, Vol. 1, page 381.

The insanity plea furnishes an additional avenue of escape for a large number of criminals annually whose soundness of mind had never been subject to discussion until after the commission of the crime. This matter has been a subject of discussion in many states in the Union; England, however, disposed of this question in a very satisfactory manner in what is known as the lunatic's act in 1883. In that year England passed the following act:

"Where in any indictment or information any act or omission is charged against any person as an offense, and it is given in evidence on the trial of such person for that offense, that he was insane so as not to be responsible according to law for his actions, at the time when the act was done or omission made, then if it appears to the jury before whom such person is tried, that he did the act or made the omission charged, but was insane as aforesaid at the time when he did or made the same, the jury shall return a special verdict to the effect that the accused was guilty of the act or omission charged against him, but was insane as aforesaid at the time when he did the act or made the omission.

"When such special verdict is found the court shall order the accused to be kept in custody as a criminal lunatic, in such place and in such manner as the court shall direct till His Majesty's pleasure shall be known, and it shall be lawful for His Majesty

thereupon and from time to time, to give such order for the safe custody of the said person during pleasure, in such place and in such manner as to His Majesty may seem fit."

So great became the abuse of setting up pleas of insanity that the state of Washington passed a law absolutely prohibiting insanity as a defense in a criminal case. This, of course, was going from one extreme to another.

Massachusetts in 1909 passed the following law:

"If a person who is indicted for murder or manslaughter is acquitted by the jury by reason of insanity, the court shall order him to be committed to a state hospital for the insane during his natural life, and he may be discharged therefrom by the governor, with the advice and consent of the council, when he is satisfied after an investigation by the state board of insanity that such person may be discharged without danger to others."—Acts of Massachusetts, 1909, chapter 504. section 104, page 711.

Undoubtedly there can be no objection to requiring a jury wherever the defense of insanity is set up to make a special finding (1st) as to whether the offense was committed by the defendant; and (2d) as to his insanity. If insane, he should be committed to the asylum not as a means of punishment but as a means of treatment and protection to society during the remainder of his natural life, to be released only by the executive or some other tribunal specially constituted for the purpose, and then only after it was affirmatively shown that no danger to society would result from his release.

Under our present law if he is insane at the time of trial, the trial is postponed and the defendant is sent to the hospital for the criminal insane at Anamosa to remain until his sanity is restored before he is put on trial. If, however, he remains a few years it is almost impossible to secure any evidence for conviction by reason of the death and removal of witnesses; but if it is alleged that he was insane at the time of the offense but now sane, there is nothing to prevent the jurors from using this as an excuse for verdicts of acquittal notwithstanding that the probabilities of his committing other crimes in the future are very great.

I have thus far called attention to acquittals and reversals due to defects in our criminal procedure and it is to these matters that attention is generally directed, but the form of procedure is always related to the kind and character of the punishment inflicted upon

the defendant. Those who decry against the tendency of humanitarian methods of punishment should remember that the more barbaric and severe the punishment, the less will be the number of convictions and consequently the least fear of punishment.

Not only juries but courts consider the kind and character of punishment in dealing with criminals. There is scarcely a criminal trial but what jurors discuss the punishment to be meted out to the defendant, and because of this, some judges decline to mention in the instructions the nature of the punishment especially if the punishment is severe. But jurors can hardly be criticized for this when courts themselves are greatly influenced by the punishment to be inflicted upon the defendant. Indeed, the very inception of technicalities and refinements of court procedure was invented by courts because of the undue harshness and severity of the criminal law two or three centuries ago, and as late as 1909, it was held in England in the case of *R. V. Kirkpatrick,* J. P. 39, that the judge might properly take into consideration the treatment a prisoner would receive while under sentence, and to this effect see also *R. V. Syres,* 73 J. P. 13; but we do not need to go beyond the boundary of our own state.

Our own supreme court in the recent case of *State vs. Baker,* 135 N. W., 1097, who was charged with murder and convicted of murder in the second degree, held there was ample evidence on the part of the state to rebut the theory of the defendant of self-defense, but on a re-hearing rduced the sentence of the defendant from twenty-two years to fifteen, notwithstanding the parole board is created for the special purpose of determining when it is wise to release criminals under parole or pardon; and the recent action of Governor Donohue of Arkansas in releasing 360 prisoners who were working under the contract labor system is familiar to all.

In view of the fact then that executives, courts and jurors are influenced by the punishment prescribed for criminals, if the punishment is not wise, humane and just, it results in the escape of a large number of prisoners from any punishment at all.

It follows that while improvement may be made by reform in court procedure, no permanent or complete relief can come except by a fundamental change in our entire penal system. The defendant must be compelled to right the wrong that he has committed in so far as possible; he must become a producer and be

required to support himself, and, if possible, those dependent upon him, and in so far as possible and practicable to return to society that which he has wrongfully acquired.

Without further elaboration I refer to the Report of the Committee appointed to investigate the conditions at Fort Madison, which was transmitted to your Excellency on the 25th day of May, 1912, and urge a consideration of the recommendations therein made.

Another very great evil and source of crime and litigation is the miscellaneous use of carrying pistols and repeating revolvers. Investigation in this state and generally throughout the United States discloses that a very large part of the homicides are committed with the common revolver, and that nearly every person who commits serious offenses, such as burglary and larceny, always goes with a revolver concealed on his person. No one should be permitted to carry a concealed weapon except with a license duly obtained from proper authority and then only in the giving of a substantial bond. The carrying of revolvers or other dangerous weapons concealed should be made an indictable offense instead of a fine not to exceed one hundred dollars or a jail sentence of not to exceed thirty days as our law now provides.

The enactment of a wise and just workmen's compensation act would very materially lessen damage suits and civil litigation which constitute a considerable part of the business of our courts.

The passage of a blue sky law prohibiting the sale of fraudulent stocks and bonds would also lessen litigation for the reason that every person who has been defrauded seeks redress in our courts, in the state court if the person lives in the state; if not, in the federal court.

There is a growing demand by the bench and bar of the state for an increase in the number of supreme judges, because there is more litigation now than can well be looked after by our court. It will readily be agreed that our judges ought not to be overworked and that they should have ample time to consider each case, but I submit that the reform is starting at the wrong end. Before we increase the number of judges we had better ascertain how much of a demand there is for extra judges after needless litigation is prevented. It will be infinitely better to very materially lessen the business of the courts than to add new judges to look after needless litigation.

If the recommendations herein made with reference to reform in procedure are carried out and a change in our penal system is made, it will result in a reduction in the number of criminal appeals from at least one-half to two-thirds of the number now brought. It will cause many a defendant who is guilty to plead guilty and thus lessen the business of both the appellate and the lower court.

A law similar to the Wisconsin law would also lessen the appeals in civil cases and a workmen's compensation act and a blue sky law, or law prohibiting the sale of fraudulent stocks and bonds, would very materially lessen litigation in both the lower and appellate courts.

Court costs, both civil and criminal, would be materially lessened, thousands of dollars would be saved to the parties in interest. The wife or children of the laborer who was injured in some line of industry would not pay a substantial part of the damage received on account of his injury in litigation and attorney fees, the prisoner would be enabled to become a producer and to aid in the support of his family; the certainty of punishment would greatly increase its deterrent effect, and the indirect result to the state, the county and to society at large would be beyond calculation.

In recommending these fundamental changes nothing revolutionary is suggested. Almost every recommendation is now in successful operation either in some state in this country or has long since been an established policy in England.

NECESSITY FOR ARBITRATION.

The contest between capital and labor during the past two years has been so grave as to make imperative the necessity for legislation touching this question. In 1906 Canada passed a law which, while not providing for absolute compulsory arbitration, yet it has operated most successfully in the settlement of labor disputes. It is to be found in chapter 96 of the Revised Statutes of Canada, Vol. 2, and is known as "An act respecting conciliation and labor."

The state of Ohio has passed a law patterned after the Canada law and is known as "The state board of arbitration and conciliation act," and is found in chapter 14, commencing on page 382 of Page and Adams Annotated Ohio General Code. It provides for the appointment of a commission known as the state board of arbitration and conciliation. It provides for investigation of

the cause of labor disputes, including the subpoeaning of witnesses; provides for the report of the commission to be made public in the event that the board of arbitration fails to bring about an adjustment of differences, which report must set forth a finding of the person who is at fault and a finding as to who has the merits of such controversy and the reason of such finding; it provides that application may be made to the board by either party to the controversy by setting forth the grievances in concise form; provides that both parties may provide by stipulation to abide by the result of the decision, and further provides for the submission of the controversy to a local board of arbitration.

Massachusetts in 1909 passed a similar act. It is to be found in the Acts and Resolves of Massachusetts, 1909, chapter 514 on page 725. Other countries have passed arbitration acts, New Zealand being one of the first, also New South Wales and West Australia.

The absolute compulsory features of some of these acts, however, have been subject to such controversy and the enforcement of the law so difficult that the enactments in the United Stattes have not gone so far as to require an absolute compulsory submission to the findings of the board of arbitration, unless it was agreed to by both parties to the controversy. It has, however, generally resulted that a careful investigation and a finding by a non-partisan commission has had the effect of causing the party at fault to submit to the findings of the commission.

SUMMARY OF RECOMMENDATIONS.

Summarizing our conclusions, we recommend:

First. The passage of a law similar to the law of Wisconsin and England providing that no judgment shall be reversed or set aside or new trial granted in any action or proceeding, civil or criminal, on the ground of misdirection of the jury or the improper admission of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall affirmatively appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment or to secure a new trial.

Second. A better method of selecting jurors.

Third. A law similar to that of England and Massachusetts providing that when insanity is urged as a defense in any criminal case that the jury shall bring in a special verdict showing (a) as to whether the defendant committed the offense; and (b) as to his insanity, and providing for his detention for life in a hospital, unless released by the executive authority or proper tribunal.

Fourth. A reduction of the number of statutory offenses covering various degrees of the same generic offense, or a provision in our law similar to the law of England, giving the supreme court the power of substitution of sentence in the event that the evidence shows the defendant was guilty of a crime of the general nature of that charged in the indictment and distinguishable only by statutory refinement.

Fifth. An amendment to the law whereby the county attorney may comment upon the attitude of the defendant in the event that the defendant does not become a witness in his own behalf.

Sixth. Limiting the time of appeal in criminal cases to three months.

Seventh. The indeterminate sentence law for felons and a limited indeterminate sentence law for misdemeanants.

Eighth. The abolition of justice courts in the city and a provision for municipal courts, and an amendment to the constitution giving municipal courts power to inflict sentences for a period of at least one year in a workhouse or district farm.

Ninth. A fundamental change in the jail and penitentiary system in accordance with the Report of the Committee appointed to investigate conditions at Fort Madison filed with the governor on the 25th day of May, 1912.

Tenth. An amendment to our anti-trust laws by the passage of a bill similar to the Miller bill introduced in the Thirty-fourth General Assembly, known as House File No. 289, and the Stipe bill for the purpose of securing evidence, known as House File No. . . . ; and the Cunningham bill relating to unfair discrimination, known as House File No. 311; or the Stipe bill for the same purpose, known as House File No. 225.

Eleventh. A law prohibiting the carrying of revolvers or other dangerous weapons concealed except by a person who holds a license from the proper tribunal upon the giving of a bond, violation of which is made an indictable offense.

Twelfth. A special agent to secure evidence in cases similar to the Villisca tragedy and evidence of violations of the trust law and other violations of law, with the same power as peace officers to make arrests.

Thirteenth. Sufficient funds to gather data for the trial of the rate cases now pending in the United States circuit court of appeals.

Fourteenth. A provision made for a physical valuation of the trunk line railways of the state.

Fifteenth. The non-partisan election of supervisors at large, requiring them to give their entire attention to the business of the county.

Sixteenth. The non-partisan election of the judiciary.

Seventeenth. The passage of a workmen's compensation act and blue sky law prohibiting the sale of fraudulent stocks and bonds.

Eighteenth. A recognition in the medical practice act of chiropractors with a requirement that they shall have the same knowledge of anatomy and other fundamental knowledge required of osteopaths.

Nineteenth. The passage of a law relating to conciliation and arbitration in labor disputes.

Twentieth. An amendment to the removal bill making it applicable to all city, county or township officers, elective or appointive.

Twenty-first. A sufficient increase in the salary of the assistants to the attorney general to be able to retain experienced and competent lawyers; making the salary of the attorney general equal to that of the judges of the supreme court and requiring him to devote all of his time to the duties of his office.

During this biennial period I have devoted my entire attention to the duties of the office without earning a single dollar in private practice. This is not contemplated in the law and the salary is not fixed accordingly.

I have had very able and experienced assistants, most of whom have been required to work a great deal overtime without any additional compensation.

Mr. Robbins, special counsel, has had over twenty years' experience in the practice of law; has been county attorney of his county. Mr. Fletcher, assistant attorney general, has practiced law for over twelve years and has charge of the criminal appeals in

the supreme court. Mr. Sampson, special counsel, has practiced law for over seven years and assists in the general enforcement of the laws. Mr. Lee had practiced law for over sixteen years; was county attorney of his county two terms, city attorney; was a member of the Thirty-second and Thirty-third General Assemblies. Miss Gilpin, clerk and stenographer, has been connected with the office since the administration of General Mullan and understands and looks after every detail of her work, and Miss Leffert and Miss McNall are experienced and capable stenographers.

We cannot, however, retain help of such ability and experience on the present salaries. Mr. Lee left the office because it was impossible to pay him an adequate salary. He was very shortly thereafter nominated judge of the Fourteenth judicial district of Iowa and elected at the last general election without opposition from either party. The state should pay at least a living wage.

Respectfully submitted,

GEORGE COSSON,

Attorney General of Iowa.

Schedule A is a complete list of all appeals in criminal cases submitted to the supreme court during the years 1911 and 1912, and also all rehearings asked during that period, and shows the final disposition of the cases.

Schedule B is a list of all criminal cases pending on the first day of January, 1913.

Schedule C is a list of civil cases which were pending in the state and federal courts January 1, 1911, and have since been disposed of.

Schedule D is a list of civil cases which have been commenced and disposed of since January 1, 1911.

Schedule E is a list of civil cases which are now pending in the state and federal courts in which the state is a party.

Schedule F contains certain circular letters addressed to county officers and others concerning the road law, the duties of the county attorney, gambling and investigation of prisons.

Schedule G is the official written opinions given by this office during the years 1911 and 1912.

Schedule H contains a few of the many letters which were written in response to inquiries from county officers and others as to the construction and interpretation of statutes, and as to the law in cases which have arisen in the state. These letters are not official in their character, and frequently contain a simple suggestion instead of the expression of an opinion. They relate to matters of public interest as to which uniform action is desired in the state, and it is thought advisable to include the same in this report.

SCHEDULE F.

CIRCULAR LETTERS

ROAD LAW.—This circular letter was sent to all county attorneys, supervisors, township trustees and furnished generally upon request.

(Opinion construing House File No. 46, Acts of the Thirty-fourth General Assembly, commonly known as the road drag law.)

May 19, 1911.

HON. W. C. EDSON,

Storm Lake, Iowa.

DEAR SIR: This will acknowledge the receipt of your communication of the 12th inst. addressed to the Attorney General, in which you request his opinion as to whether it would be legal for the township trustees, at a special meeting, to levy the one mill tax for dragging fund, provided for in the act enacted by the last General Assembly, known as House File No. 46.

A great deal of doubt and uncertainty has arisen over the state regarding the provisions of the act referred to, and a large number of county attorneys, township trustees and other officers charged with duties with reference to the enforcement of the road laws, have requested an opinion from this department construing the various provisions of said act. Nearly all of these communications raise the same question contained in your letter, and in addition thereto, the following questions have been propounded with reference to this act:

When did said act take effect?

Chapter 101, acts of the Thirty-third General Assembly having been repealed on the taking effect of said act of the Thirty-fourth General Assembly, would township trustees have any authority to use money in the township road fund for dragging roads in the year 1911?

Are the township trustees required to appoint a superintendent of dragging, to divide the township into permanent road dragging districts and to cause the roads to be dragged under the said act of the Thirty-fourth General Assembly in the year 1911, and if they are required to drag the roads under said act this year, out of what fund is the expense thereof to be paid?

Is the one mill tax for dragging fund included in the six mills mentioned in Section 1528 of the Supplement to the Code, 1907, as amended by Chapter 96, Laws of the Thirty-third General Assembly?

Would trustees have authority to appoint one of their number or the superintendent of roads as superintendent of dragging?

If the said one mill tax for dragging fund provided for in said act of the Thirty-fourth General Assembly is to be levied this year, is it the duty of the township clerk to call a special meeting of the township trustees for that purpose?

In replying to your letter, I deem it advisable to discuss the so-called new road drag law in light of the foregoing questions that have been raised in relation to it, so that you may have the benefit of my views thereon and in answering the inquiries of one of the numerous persons who have written this department, I answer them all at the same time, and it may have some effect in bringing about a uniformity of action under the law, which all will agree is highly desirable.

The question which you submit is, I think, the most vital one involved. The act in question took effect on the 8th day of April last, by publication. It repealed Chapter 101, acts of the Thirty-third General Assembly, and was intended as a substitute for that chapter, so that since April 8th last the only statute in force which specifically provides for the dragging of roads is the said act of the Thirty-fourth General Assembly.

Among other things, Section 2 of the new act provides that "the township trustees at the time of making the annual levy for the township for road purposes, as provided in Section 1528 of the Supplement to the Code, 1907, shall each year levy one mill on the dollar on the amount of the township assessment for that year, which shall be designated as the dragging fund, and shall be expended only for the purpose of dragging the roads within the township." By said Section 1528 of the Supplement to the Code, 1907, the time fixed for making the annual levy for road purposes is the first Monday in April of each year. The first Monday in April this year fell on the 3d day of April, or five days before the said act of the Thirty-fourth General Assembly took effect. At the date of the holding of the April meeting of the trustees, there was no duty resting upon them with reference to levying a tax expressly for dragging purposes or for a dragging fund. If the said

act of the Thirty-fourth General Assembly, which, for convenience, I will designate the new road drag law, had been in effect April 3d last, and the township trustees had for any reason neglected and failed to levy the one mill tax for dragging roads, the problem would present less difficulties, as in such a case they would have the right to make the levy at any later date before the levy thereof by the board of supervisors. The language quoted does not negative the right of the trustees to levy said tax at any other time than at the time for making the annual levy for road purposes, and it seems clear that it was the intention of the legislature that such tax should be levied each year, including the present year. All of the other provisions of the act were to be complied with and carried into effect this year, in so far as it is possible, and to say that this one mill tax for dragging was not intended to be levied until the year 1912 and thus not available for use until the year 1913, certainly could not have been the intention of the legislature. Such a construction would tend to defeat rather than give effect to all of the other provisions of the act. It would be absurd to argue that the legislature fixed a date before the taking effect of the law on which to levy the tax. The thought that was uppermost in the legislative mind was to make the law effective at once in all its provisions, and while the language employed with reference to the time of levying the tax might have been much more definite and certain, yet read in connection with all of the other provisions of the act, I think there is sufficient justification for construing the act to authorize the township trustees to levy the one mill tax for road dragging at any time before September 1, 1911, or in time to enable the levy to be certified to the board of supervisors before they make the annual levy of taxes. As already stated, the language of the act making provision for the levy of the one mill tax for dragging is not free from ambiguity, in so far as it relates to the present year, and while the interpretation placed upon it is not entirely satisfactory, yet it is the only interpretation, it seems to me, that is consistent with the act as a whole. The intention of the legislature and the object aimed at being the fundamental inquiry in judicial construction, they are to control the literal interpretation of particular language in the statute, and language capable of more than one meaning is to be taken in that sense which will harmonize with such intention and object and give effect to the purpose of the enactment. It will follow, then, from what has been said on this question, that it will be the duty of the township

trustees to levy the one mill tax for dragging purposes under the new road drag law, in time to be certified to the board of supervisors before that body makes the annual levy of taxes.

One of the questions propounded was as to the time of taking effect of the new road drag law. That question has already been answered.

Another question raised is, are the township trustees required to divide the township into permanent road dragging districts, appoint a superintendent of dragging and to cause the roads to be dragged this year under the new road drag law? And if they are required to have dragging done under the new law, how is the expense thereof to be paid?

Section 1 of the act provides that "It shall be the duty of the township trustees at their regular meeting in April, 1911, or at a special meeting called for that purpose, to divide the public roads of the township into permanent road dragging districts." Then follows the method to be pursued in dividing the townships into districts, and how they are to be numbered, etc. The language employed makes it very plain that the township is to be divided into road dragging districts this year. It says that this shall be done at the regular meeting in April, 1911. But as we have seen, the act did not take effect until five days after such regular meeting in April of the township trustees. The persons having this legislation in charge may have contemplated that it might be passed and approved and published and become a law before such regular April meeting of the trustees, and if so, that such districting of the township should be made at that time, but to provide against the contingency that the act should not take effect by that time, it is provided that such division of the township into road dragging districts shall be made at a special meeting called for that purpose. It is equally clear that it was the intention of the legislature, as gathered from the wording of this act, that a superintendent of dragging should be appointed this year. The time fixed for such appointment is not so specific as that used in connection with the duty of the trustees to divide the township into road dragging districts, but read in connection with that provision, and construing all of the provisions of the act together, it appears reasonably certain that such officer was to be appointed for the present year. One provision which lends support to and emphasizes the construction given is the one requiring the township trustees at their regular meeting in

November in each year to settle with the superintendent of dragging, and pay all claims for dragging, etc. This certainly contemplates that a superintendent has been appointed and has been acting as such when the November meeting in this year is held. The third division of the last question must also be answered in the affirmative. The township trustees are required from time to time to designate what districts shall be dragged, and they are to furnish road drags for that purpose. There is nothing to indicate that this duty is not to be performed this year. If it was the intention of the legislature not to make the provisions of this act as to the dragging of the roads effective this year, it would not have repealed Chapter 101 of the acts of the Thirty-third General Assembly. The evident purpose in enacting the new road drag law was to place upon the statute books a more mandatory, complete and effective statute with regard to the dragging of the public roads. This is very apparent when we note the evolution of the law of this state regarding the dragging of roads. The first statute which gave specific authority and made definite requirements as to the dragging of roads is found in Sections 1570-b and 1570-c of the Supplement to the Code, 1907, which were respectively Sections 1 and 2 of Chapter 62, acts of the Thirty-first General Assembly. This act was superseded by Chapter 101, acts of the Thirty-third General Assembly, which was a more comprehensive statute and more mandatory and specific in respect to the dragging of roads than the statute it repealed, and the new road drag law furnishes a much more complete and effective scheme for the dragging of roads than the law it repeals. Unless the trustees, therefore, are required by the provisions of the new law to cause the roads to be dragged this year, the most important object sought to be accomplished by the passage of the new law would be defeated. If it was the intention that the roads were not to be dragged under the new law this year, the legislature, undoubtedly, would not have repealed Chapter 101, acts of the Thirty-third General Assembly.

The last part or division of the last question, viz., how is the expense of the dragging for this year to be paid, is not so easily nor satisfactorily answered. Conceding that the trustees are authorized to levy the one mill tax for dragging this year, it will not be available as a dragging fund, under the provisions of the new road drag law, until the year 1912, and there is no specific requirement that any particular portion of the road taxes available for this year be set aside as a dragging fund, but, nevertheless, I think

ample authority exists for the payment of the expense of dragging the roads under the new law out of the road funds of the township. While there has been a law on the statute books for several years requiring that the roads be dragged, yet there has been no special fund with which to meet the expense thereof. I think the former statutes regarded the dragging of roads in the nature of repair, and properly payable out of any road funds of the township, the same as the expense of any other road construction or road repairs. There is no statement in the road drag law prohibiting the township trustees from devoting any of the road taxes to the dragging of roads, in addition to the one mill levy or dragging fund. The law states that the dragging fund is to be used for no other purpose than defraying the expense of dragging roads, but the dragging of roads would still be in the nature of road work, and an expense properly paid out of any road funds of the township. The township trustees in making their levy for road purposes in the year 1910 did so in light of the law then existing with respect to their duty in causing the roads to be dragged. That law was mandatory to the extent that all the main traveled roads, including mail routes, should be dragged at certain times, so that if the township trustees in making their levy for road purposes in 1910 made provision for the expense of dragging the roads in the year 1911, which we must presume they did, there would be a fund available this year with which to meet the expense of making a substantial compliance with the new road drag law. The legislature in providing for the one mill levy for dragging fund did not require that it be paid at a different time or in any different manner than are ordinary taxes, and it would seem reasonable that when the legislature made the new law effective at once in all of its provisions, it had in mind and contemplated that the expense in putting the law into operation should be paid out of any funds that would be available for that purpose.

Answering another question propounded, and noted in the forepart of this opinion, will say that the township trustees would have ample authority aside from the new road drag law to expend road funds in the dragging of roads, under their general authority and duty to cause the roads to be worked and kept in repair.

Another query is, is the one mill tax for dragging fund included in the six mills that the township trustees are authorized to levy under Section 1528 of the Supplement to the Code, 1907, as amended? I do not think the one mill is to be included in the maxi-

mum levy fixed in said section as amended by Section 5, Chapter 96, acts of the Thirty-third General Assembly, but is in addition thereto. In connection with this, I may call your attention to the fact that by the provisions of another act enacted by the Thirty-fourth General Assembly, and known as Senate File No. 421, and which will become a law on July 4th next, said Section 1528 of the Supplement to the Code, 1907, as amended, was repealed and a substitute enacted therefor, and which provides, among other things, that the township trustees at their April meeting may levy a tax not to exceed four mills, for the same general purposes now mentioned in said section. The act just referred to also repeals Section 5, Chapter 96, acts of the Thirty-third General Assembly, and strikes out the last sentence of Section 1, of Chapter 97, acts of the Thirty-third General Assembly.

Another query noted is, may a township trustee or the superintendent of roads be appointed as superintendent of dragging? I do not think that the same person could hold the office of trustee and act as superintendent of dragging at the same time. There would be a conflict in the duties of the two offices. One of these offices, too, is subordinate to and under the control of the other, and for other reasons, it would be contrary to sound public policy to permit the same person to hold both of said positions. The salary of the superintendent of dragging is fixed by the township trustees. If one of the trustees were permitted to accept the position of superintendent of dragging and act as such, he would have a voice in fixing his own compensation. The trustees also are required to audit and allow other claims and accounts of the superintendent of dragging. But I can see no objection to the same person acting as superintendent of dragging and as superintendent of roads at the same time. Their duties would be very similar and I cannot think of any instances where there would be a conflict in their duties, and it might, and undoubtedly would, result in economy in permitting the same person to hold both of said positions.

The last question noted is, is it the duty of the township clerk to call a special meeting of the township trustees for the purpose of levying the one mill tax for dragging fund, if such tax is to be levied this year?

There is nothing in the law which would make this the duty of the clerk, but it would be entirely proper and tend to a more effective and uniform enforcement of the new law, if the township clerks

would take upon themselves the burden and duty of calling such meeting.

Very truly yours,

N. J. LEE,
Special Counsel.

May 31, 1911.

To the County Attorneys of the State of Iowa.

DEAR SIR: There have been so many requests for an interpretation of House File No. 46, known as the new road drag law, passed by the Thirty-fourth General Assembly and effective by publication on April 8, 1911, that Special Counsel N. J. Lee of this department has in one letter covered the questions most frequently asked in a carefully prepared opinion.

Under separate cover I am sending you copy of said opinion and several copies of a condensed summary of said opinion for your use so that the same may be given members of the board of supervisors and township trustees.

The conclusions reached in the opinion are not entirely free from doubt but the holdings therein are certainly in harmony with the legislative intent, and an opposite construction would render the law nugatory until 1913, because under a narrow construction, the levy could not be made until 1912, and would not be available for use until its collection in 1913. That a construction producing such results is not warranted, unless the language clearly indicates that that was the intention of the law-makers, is too self-evident for argument.

The very purpose of the passage of House File No. 46 by the Thirty-fourth General Assembly and the repealing of Chapter 101 of the acts of the Thirty-third General Assembly was to remove all discretion from the trustees as to the necessity of dragging roads, and to provide a fund which could be used for no other purpose; in other words, it was to strengthen and not to weaken the law that induced the Thirty-fourth General Assembly to pass House File No. 46.

Mr. John Foster of Guthrie Center, who has given great attention to road construction, states it as his opinion that the matter of good roads is of more concern to the farmers of the state than the question of railroad rate regulation. Without determining the

accuracy of this statement, it is conceded by all that the question of good roads is a matter of immense importance to the people of the state, and I am of the opinion that the several county attorneys of the state can do more by advising township trustees and local officers in securing good roads and the enforcement of the law than all other agencies.

I desire to further direct your attention to Chapter 96, acts of the Thirty-third General Assembly which provides for the destruction of noxious weeds.

Mr. Charles R. Brenton, a large land owner, writes me concerning the importance of the weed law as follows:

"The time has come when weeds are beginning to need attention. This is particularly true of sourdock that is showing itself very prominently along the roadsides and seeding early in June. I consider the enforcement of the weed law very much more important than the road law."

Large areas of land can be destroyed in a few years by noxious weeds and hence there is no reason why the law should be considered of slight importance or that it should be assumed by the trustees that it is to remain a dead letter.

The duty of enforcing this law is placed upon the township trustees and county supervisors. The law is mandatory in its nature, and the work is expressly made a part of the road work of the trustees and the supervisors. They are authorized to expend road funds and it is also made the duty of the county supervisors to call a meeting of township trustees and road supervisors between November and April of each year to consider the best methods of road work and weed destruction. A failure to comply with the provisions of said act is a misdemeanor.

While the law places the duty on the trustees, road superintendents and members of the board of supervisors, the duty of seeing that these several officers are properly advised as to their duties and that they in good faith perform such duties, devolves upon the several county attorneys of the state and the attorney general, and hence in the matter of enforcing these laws, I will be glad to cooperate with you and with the several officers who have the work in charge to the end that a failure to secure good roads in this state will not be due to a lack of enforcement of the statutes of the state. In other words, it is my desire that if Iowa fails to

secure good roads, that the fault is not with the law enforcing officials or the failure to enforce the law, but with the legislature in not providing proper funds and methods of road construction.

Yours very truly,

GEORGE COSSON,
Attorney General.

GAMBLING.

November 6, 1911.

To the County Attorneys and Mayors of Iowa:

GENTLEMEN: During the past few months so many complaints have been made to the Department of Justice and so many requests have been received for opinions concerning the operation of slot machines, gambling devices and various other forms of raffles and lotteries, that I feel it incumbent upon me to direct a general letter to each county attorney in the state and mayor of every city and town of Iowa, to the end that the county attorney may direct his sheriff, and the mayor his marshal, chief of police and other police officers, with reference to these evils.

I am pleased to say that Mayor Hanna of Des Moines, as well as other mayors and law enforcement officers of the state have already taken action, looking to the suppression of all raffles, lotteries and gambling devices.

All forms of gambling, gaming and lottery schemes are made illegal and prohibited by the statutes of Iowa. See the following sections of the Code: 4962, 4963, 4964, 5000 and 702; also 704 Supplement to the Code, (1907).

Former Attorney General Remley held, in interpreting these statutes, that:

"Any game in which a person parts with his money in the hope or with the expectation of receiving either a sum of money or property in return therefor, the amount of which depends upon some chance or result of the game, is gambling. It has been held by our supreme court that playing at billiards or pin pool with the agreement that the losing party shall pay for the games played is gambling. A game of chance resulting upon a drawing is a species of gambling or lottery. Slot machines by which one, for a given sum, will obtain one cigar, or by a lucky turn more than one, are unquestionably gambling devices."

Attorney General's Report, 1899, p. 208.

Attorney General's Report, 1910, p. 228.

This has been the holding of the Department since that time and it is clearly in harmony with the decisions of our supreme court. See

Guenther v. Dewein, 11 Iowa, 133.

Bell v. State, 37 Tenn. (5 Sneed), 407.

State v. Maurer, 7 Iowa, 406.

State v. Crogan, 8 Iowa, 523.

State v. Cooster, 10 Iowa, 453.

State v. Leicht, 17 Iowa, 28.

State v. Bishel, 39 Iowa, 42.

State v. Book, 41 Iowa, 550.

State v. Miller, 53 Iowa, 154.

State v. Boyer, 79 Iowa, 330.

State v. White, 123 Iowa, 425.

Blodgett v. McVey, 131 Iowa, 552.

McClain's New Digest, Vol. I, page 1085.

Arkansas v. Sanders, 19 L. R. A., N. S., 913, note.

Therefore, all schemes or transactions for which a consideration is paid, and in which the person paying the consideration receives something each time, but the amount received depends upon luck or chance, are gambling transactions, as well as the recognized gambling transactions where the game is purely one of chance for a money consideration, and hence, the person operating these illegal games or enterprises is guilty of operating a gambling house in violation of the city ordinances of his city or town, and also in violation of the statutes of the state.

My attention has recently been directed to various slot machines and candy raffles. The complaint is made that so great has become this evil of candy raffles, that a merchant who refuses to handle these gambling schemes cannot compete in business with those who do. Formerly, wholesale houses which put out these candy raffle boards confined the prizes to candy, but the evil has so multiplied and competition has become so great that within the past ten days I have received complaints that diamond rings, silverware, clocks, gold watches and other articles of jewelry, spurious as well as genuine, are being disposed of as prizes in connection with the

candy raffle. It is common knowledge that the larger part of the money received in disposing of these candy raffles is from boys and girls, some of them immature.

I can see no reason for prosecuting the man who operates the shell game and the roulette, and at the same time, permit merchants to operate gambling houses in the form of raffles, slot machines and other gambling schemes, and by a petty form of gambling, illegally collect from the boys and girls thousands of dollars for which no just return is made.

I, therefore, suggest and request that the several mayors and superintendents of public safety direct their chief of police and police officers to cause all forms of gambling to be suppressed, including all schemes of raffles, lotteries, and all slot machines containing an element of chance, and if the offenders continue the illegal operations of these gambling enterprises, that they be immediately arrested under the city ordinance, and that the county attorneys also cause them to be indicted by the grand jury of their respective counties for operating gambling houses in violation of law, and that the paraphernalia be condemned, as by law provided.

Yours truly,

GEORGE COSSON,
Attorney General of Iowa.

COUNTY ATTORNEYS LEGAL ADVISER OF LOCAL OFFICIALS.

To all County and Township Officers of Iowa:

So many requests for opinions are being daily received by the Department of Justice and the number is increasing so rapidly that it is now very seriously interfering with the regular official duties of this office. These requests come from all county and township officers and many private citizens. One man is giving substantially his entire attention to these opinions but is unable then to answer the multitude of inquiries constantly being received.

The county attorney is the official legal adviser of all county officers. Paragraph 7 of section 2 of chapter 17, Acts of the Thirty-third General Assembly, provides that it shall be the duty of the county attorney "to give advice or his opinion in writing without compensation to the board of supervisors and other coun-

ty officers when requested so to do by such board or officer, upon all matters in which the state or county is interested" etc.

Inasmuch then as county attorneys are by law made the official legal adviser of all other county officers, all requests for opinions from county and township officers should first be made direct to the county attorney, and in the event that he has doubt about the proposition after duly considering the matter he may receive an opinion from the attorney general.

Generally speaking in matters of local concern the opinion of the county attorney should be accepted as conclusive but in matters of state wide interest, if the question is doubtful and the law subject to various interpretations, the county attorney by submitting his request and stating specifically his views upon the question and his reason and authority relied upon, can receive an opinion from this office, but in all requests for opinions the county attorney should set forth his views specifically and the authorities relied upon for his position.

This will save confusion, greatly relieve this office and tend to uniformity.

Very respectfully,
GEORGE COSSON,
Attorney General of Iowa.

PRISON INVESTIGATION.

February 1, 1912.

To the County Attorneys of Iowa:

Gentlemen: As chairman of the committee appointed to investigate and report upon the penal institutions of this state and in behalf of the committee, I am desirous of obtaining certain information relative to county and city jails, and I respectfully request that you answer the list of questions pertaining to this subject which I enclose.

In order that the work of the committee may be expedited and the report made in due time, it is necessary that the answers to these questions be received not later than February 10th, and I will appreciate it very much if you will interest yourself in this matter to the extent suggested.

Yours very truly,
GEORGE COSSON,
Attorney General of Iowa.

1. Physical condition of county and city jails.

2. Number of persons now confined, giving age and sex.

3. Number committed during year 1911 and offense charged.

4. Average number during year 1911 in confinement, average time each person held in confinement, and between what ages was the majority.

5. Number, if known, held for intoxication.

6. Whether or not a number served more than one jail sentence.

7. What labor, if any, required or performed by prisoners.

8. What means, if any, of segregating or separating women, minors and first offenders from hardened criminals.

9. What proportion of men had wife and children dependent upon them for support (may be estimated).

10. Cost of prosecution and cost of keeping prisoners in county jails.

11. Recommendations, comments or suggestions.

SCHEDULE G.

BONDS.—Are binding ordinarily only for the term of office for which the principal is elected or chosen, and while by special agreement it might be extended beyond this term, the agreement extending it should be definite as to duration.

SIR: I am in receipt of your communication of the 21st of October enclosing copy of official bond given by Mr. Swisher as treasurer of the State University of Iowa. The bond covers the term beginning July 1, 1909, and ending June 30, 1910, inclusive, and further provides that said bond shall cover said entire period, "also the terms of any and all successive re-elections by the State Board of Education of the said Lovell Swisher to the said office of treasurer of the State University of Iowa." You request an opinion as to whether this is a valid, continuous bond covering successive terms of his election as indicated in the clause above mentioned, and whether it will obviate the necessity of giving a new bond at each successive re-election.

It is elementary law, in the absence of a special agreement to the contrary, that a bond is only valid for the term for which it

is given, and without passing upon the validity of the bond where it is given in perpetuity, I am of the opinion that it would be unwise to accept a bond which is unlimited as to time. I suggest that in order to avoid the necessity of the giving of a bond each year with each succeeding election, that the bond be made for the current term, and for the term of each and every successive re-election not to exceed four years from the date thereof. The bond ought to be made to cover the duties then existing with any additional duties devolving upon said treasurer or created by law.

The term of four years of course is wholly arbitrary but a four-year period commends itself as reasonable and in consonance with good business principles.

Yours very truly,

GEORGE COSSON,
Attorney General.

January 14, 1911.

HON. D. A. EMERY, *Secretary,*
Iowa State Board of Education.

GAME WARDEN.—May with consent of executive council pay expense of reprinting his report from the fund provided in section 7, chapter 154, acts of the Thirty-third General Assembly.

SIR:—I am in receipt of your communication of the 31st ultimo requesting on behalf of the executive council an official opinion as to whether the state fish and game warden, with the consent of the executive council, is warranted in reprinting the 1910 report of the fish and game warden and paying the expenses thereof from the funds authorized to be expended under the provisions of section 7, chapter 154, acts of the Thirty-third General Assembly.

Section 7 of chapter 154 of the acts of the Thirty-third General Assembly provides in part that "The state fish and game protection fund shall be used for the payment of the expenditures made necessary under the provisions of section 2539 of the Code * * * for the expenditures made necessary under the operation or enforcement of this statute."

Section 2539 of the Code expressly provides that the fish and game warden shall make a biennial report to the governor of his doings, together with such information upon the subject of culture

of fish and the protection of game in the country, as he may think proper.

I am therefore of the opinion that the expenditure in question is clearly covered by section 7 of the act in conjunction with section 2539 of the Code.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

February 2, 1911.
HON. A. H. DAVISON,
Secretary Executive Council.

NOTARY PUBLIC.—A minor may hold the office in Iowa, the office being ministerial and not elective.

SIR:—I am in receipt of your communication of the 3d instant requesting a written opinion as to whether or not a male citizen under twenty-one years of age may act as a notary public within this state.

Our supreme court has held that no one except a qualified elector may hold an elective public office unless otherwise specially provided.

State vs. Van Beek, 87 Iowa, 569.

And courts generally have held that an office which involves judicial duties can only be held by a qualified elector unless otherwise authorized. It is however generally considered that the duties of a notary public are purely ministerial, and therefore, in the absence of some constitutional or statutory prohibition, a minor may properly hold the office. This is the common law rule.

United States vs. Bixby, 9 Fed., 78;
29 Cyc. page 1072;
Am. & Eng. Enc. of Law, Vol. 16 p. 266; Vol. 21 p. 556.

I conclude therefore that since there is no prohibition in the constitution or statutes of Iowa, a minor may legally hold the office of notary public in this state. I believe however that it is for you to determine in each individual case as to whether the minor has

attained the age and has the general ability to properly discharge the duties of the office.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

February 6, 1911.
HON. B. F. CARROLL,
Governor of Iowa.

COSTS.—There is no authority for the payment of costs from any state fund in cases where judgment for costs is rendered against the state.

SIR:—I am in receipt of your communication of the 2d instant enclosing papers from Mr. E. A. Burgess of Sioux City relative to the costs taxed to the state in the case of *Dumbarton Realty Company vs. E. H. Stone,* et al, defendants, State of Iowa, Intervener, and requesting an opinion as to whether there is any money available under the laws for paying the court costs therein referred to; or whether the executive council should refer the claim to the General Assembly for an appropriation.

There is no authority for the payment of these costs from any funds other than the attorney general's contingent fund and the governor's special counsel and contingent fund, and as these funds are required to meet current expenses, I suggest that the claim be referred to the General Assembly for an appropriation. This is in accordance with the method pursued by former Attorney General Mullan.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

February 21, 1911.
HON. A. H. DAVISON,
Secretary Executive Council.

CORPORATIONS.—Where a corporation is engaged in both interstate and intrastate business, the filing fee should be computed on the capital to be used in intrastate business only.

SIR:—I am in receipt of your communication of the 24th instant submitting therewith a letter from Mr. James C. Davis, attorney

for the Mississippi River Power Company, and requesting an opinion as to whether under the present laws of this state, and in view of the recent decisions of the supreme court of the United States relative to the right of states to collect a filing fee on the total authorized capital stock of a foreign corporation desiring to transact business in this state, it would be within the powers and rights of your official duties to accept and file a certified copy of the articles of incorporation of the above named company under the provisions of section 1637 of the Code as amended, upon receipt of a fee based upon the proportionate amount of the capital stock which said company proposes to employ in the transaction of its business in this state.

From the letter of Mr. Davis addressed to you, together with the certified articles of incorporation of the said company, it appears that said company is now constructing and will maintain a large dam across the Mississippi river at Keokuk, Iowa, for the purpose of the manufacture, production, sale and transmission of electricity, the same to be transmitted and sold in various parts of the states of Iowa, Illinois and Missouri, and that therefore said company will be engaged in both intrastate and interstate commerce.

I am thoroughly convinced that under the holding of the supreme court of the United States in the case of *Western Union Telegraph Company vs. Kansas,* 216 U. S., 1, which case has been followed and confirmed by later decisions of said court, that the state of Iowa cannot exact a filing fee from foreign corporations doing an interstate business, which may hereafter desire to file their articles in the office of the secretary of state of the state of Iowa under section 1637 of the Code as amended, in excess of the amount of capital used or authorized to be used within the state of Iowa.

My conclusion is therefore that it will be both entirely legal and proper, upon the presentation of articles of foreign corporations desiring to do business in Iowa and engaged in both intrastate and interstate commerce, to accept a filing fee based upon the proportionate amount of the capital stock which said company proposes to employ or will employ in the transaction of its business in this state.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

February 24, 1911.
HON. W. C. HAYWARD,
Secretary of State.

CITIES AND TOWNS.—The fiscal year in all cities and towns of the state begins with the first day of April of each calendar year.

SIR:—I am in receipt of your communication of the 1st instant requesting an official opinion as to what date, if any, is fixed by law for the beginning of the fiscal year of municipal corporations of the several classes; or as to whether chapter 14-A, Supplement to the Code, 1907, implies that there is a uniform municipal fiscal year beginning on April 1st of each calendar year.

Section 667 of the Code provides that:

> "In all cities, each officer or board in charge of any department shall furnish and file in the city clerk's office, *thirty days before the beginning of each fiscal year, which shall be the first day of April of each year,* a sworn detailed statement of the supplies necessary for his or their department during the next fiscal year."

This section definitely fixes the beginning of the fiscal year on April 1st.

Section 1056-a10 Supplement to the Code, 1907, recognizes by implication, if not directly, that the fiscal year of all cities and towns shall commence on the first day of April, and many other sections may be found in the Code in which reference is made to the fiscal year of cities and towns.

Chapter 14-A of the Code Supplement above referred to provides that "the provisions of said chapter shall apply to cities under special charters;" and section 1056-a19, as amended by chapter 64, Acts of the Thirty-third General Assembly, provides that all laws governing cities of the first and second class, and not inconsistent with the provisions of chapter 14-C, Supplement to the Code, 1907, (the same being the chapter relating to the commission plan of government) shall apply to and govern cities organized under said chapter.

In view of these provisions of the law, I am therefore of the opinion that the fiscal year of all cities and towns commences on the first day of April of each calendar year.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

March 2, 1911.

HON. JOHN L. BLEAKLY,
Auditor of State.

PRIMARY LAW.—By its express provisions, does not apply to special elections to fill vacancies, and nominations in such cases should be made without reference thereto, unless otherwise controlled by additional legislation.

SIR:—I am in receipt of your communication of the 9th instant advising that a vacancy in Congress from the Ninth Congressional District of Iowa will soon exist, and requesting an opinion as to what method should be pursued by the various political parties of that district in naming candidates for the position above mentioned.

Section 1087-a1 of the Supplement to the Code, 1907, provides among other things:

> "That from and after the passage of this act the candidates of political parties for all offices which under the law are filled by the direct vote of the voters of this state at the general election in November, (except candidates for the office of judge of the supreme, district and superior courts), * * * shall be nominated by a primary election, and delegates to the county conventions of said political parties or organizations and party county committee-men shall be elected at said primary election, at the times and in the manner hereinafter provided."

It was held by our supreme court in the case of *Pratt vs. Secretary of State,* 141 Iowa, 198, that the requirement is mandatory and the method of nomination provided for in the primary statute exclusive, except as otherwise expressly provided.

In an official opinion given by former Attorney General Byers to the then Governor of the state, it was held proper to reconvene in the various counties of the state the delegates selected at the preceding primary for the purpose of holding county conventions to select delegates to a state convention to nominate candidates to fill the office of judge of the supreme court, and pursuant to said opinion, the various county delegates of the state were reconvened in county convention and selected delegates to the state convention, which state convention nominated Hon. W. D. Evans, now associate justice of the supreme court of Iowa; and at the succeeding session of the general assembly, the legislature ratified the act in question by providing that "the term of office of delegates (referring to county delegates selected at the primary election) shall begin on the day following the final canvass of the votes by the board of

supervisors, and shall continue for two years and until their successors are elected," so that at the present time county delegates chosen at a primary election are public officers and hold their terms of office for a period of two years and until their successors are elected and qualified.

Section 1087-a30, Supplement to the Code, 1907, however, clearly provides that the primary law shall not apply to special elections to fill vacancies.

It is a cardinal principle of statutory construction which has many times been recognized by the supreme court of Iowa and the supreme court of the United States, that repeals by implication are not favored, and that various provisions of the law are, if possible, to be reconciled so as to give expression to all.

There is no necessary conflict between the provisions of section 1087-a30 and chapter 69, acts of the Thirty-third General Assembly, which expressly provides that delegates hold office for two years and until their successors are elected and qualified.

I am therefore of the opinion that in view of the provisions of section 1087-a30, the primary law will not apply to special elections to fill vacancies, and hence the proper political committees of the various parties should provide independently of the primary law for the selection of delegates to county conventions to be held for the purpose of selecting delegates to a congressional convention to place in nomination a candidate for the office of Congressman of the United States from the Ninth Congressional District of Iowa; or such nominations may be made by petition under the conditions prescribed by law.

A bill however has been introduced in the legislature to repeal section 1087-a30, Supplement to the Code, 1907. If the legislature should repeal section 1087-a30 before the nomination in question is made, I am of the opinion that the various political parties entitled to place in nomination a candidate for the office in question may reconvene in county convention the county delegates of such party, who were selected at the last primary election, and that such county delegates in convention assembled should select delegates to a congressional convention, which convention should place in nomination a candidate for the office of representative in Congress for the Ninth Congressional District of Iowa.

If further statutory machinery for the time and manner of holding county conventions and a congressional convention should be desired, the legislature should so amend the bill previously referred to.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

March 11, 1911.
HON. B. F. CARROLL,
Governor of Iowa.

PRIMARY ELECTION LAW.—It was not the design of the primary law to authorize delegates to the county convention to be reconvened for the purpose of electing delegates to district and state conventions to be convened for the purpose of electing delegates to national conventions, but such procedure might be legal if in harmony with the call for such national convention.

SIR:—I am in receipt of your communication of recent date requesting an official opinion as to whether delegates selected at the last preceding primary held in June, 1910, should be reconvened in the several counties of the state in county convention, for the purpose of selecting delegates to district and state conventions which in turn elect delegates and alternates to the national convention to be held in 1912, to place in nomination candidates for the office of president of the various political parties.

The answer to this question presupposes two other questions:

First. Was it the intention of the legislature in passing the primary law, as the same appears in chapter 2-A, Supplement to the Code, 1907, and amendments thereto, to provide the machinery and the method for the selection of delegates to the various national conventions of the respective political parties?

Second. Would the method provided by our legislature govern in the event there was a conflict between the method provided and the rules prescribed by the respective national committees?

With reference to the first question, I have examined the provisions of the primary law with extreme care because I fully appreciate the importance of the question involved, and the fact that good lawyers may honestly differ in their interpretation of the law.

After a minute and painstaking examination of the entire act, I am unable to discover a single statement or sentence in the law that indicates it was expressly used for the purpose of authorizing the reconvening of the delegates of the various political parties in the several counties of the state, to select delegates to district and state conventions, which in turn select delegates to the national conventions of the various political parties; that is to say, no language can be found in said act which is not entirely consistent with the theory that it was not the legislative intent to provide a method of selecting delegates to national conventions.

In the first section it is provided that: "From and after the passage of this act the candidates of all political parties for all offices which under the law are filled by the direct vote of the voters of this state at the general election in November, (except candidates for the office of judge of the supreme, district and superior courts), for the office of senator in the congress of the United States, and for the office of elector of the president and vice-president of the United States, shall be nominated by primary election, and delegates to the county conventions of said political parties," etc.

From this it may be claimed that under this section, the delegates to all political county conventions should be selected under the primary. This, however, could not have been intended for the reason that the time, place and purpose of the county conventions referred to therein are specifically provided for elsewhere in said act. See section 1087-a25. In the latter part of said section, the nominations which the legislature made it mandatory for the county conventions to make, are designated and no reference is made to national conventions or the selection of delegates thereto.

Again section 1087-a30 provides that "this act shall not apply to special elections to fill vacancies."

In an official opinion given to your Excellency on the 11th ultimo, I held that in view of this provision in the law, nominations to fill vacancies in the case of special elections should be made independently of the primary law.

It, however, was never seriously contended that the primary law, as it was originally enacted, made any provision for the selection of delegates to national conventions, but it has been argued that the Thirty-third General Assembly gave the delegates elected in

the various counties a term of office to begin on the day following the final canvass of the votes by the board of supervisors, and to continue for two years and until their successors are elected; and it is said that such delegates should be reconvened in county convention for any and all purposes which may be necessary and proper for political delegates to perform.

There is much merit in this contention, but as just before stated, it was evidently not the intention of the legislature that such delegates should act for all purposes, including the filling of vacancies at special elections, else section 1087-a30 would have been repealed.

Prior to the convening of the Thirty-third General Assembly and the general election next preceding, but after the primary had been held, a vacancy occurred in the office of judge of the supreme court, and under an official opinion given by Hon. H. W. Byers, then Attorney General, the county delegates were reconvened in county convention for the purpose of selecting delegates to a state convention which placed in nomination Hon. W. D. Evans as the republican nominee for the office of judge of the supreme court, and whatever other purpose the legislature may have had in making delegates officers and giving them a term for the period of two years, it evidently had in mind the contingency just referred to, and the act of the legislature was a ratification and approval of the opinion given by the attorney general.

I conclude therefore that it was not the intention of the legislature in passing the primary law and amendments thereto, to make it mandatory to reconvene the county delegates selected at the last preceding primary election in county conventions, for the purpose of selecting delegates to district and state conventions to elect delegates to national conventions of the various political parties; or if it was, no appropriate language has been used to express such intention. To hold otherwise would result in allowing delegates selected upon entirely different issues, and oftentimes selected because of the personality of certain candidates at a primary election two years previous to the holding of national conventions to determine the issues and policy of the respective parties upon political matters of the highest importance. I am well aware that if this was the legislative intent, the wisdom of the law is one solely for the legislature, but it is nevertheless true that in construing ambiguous and doubtful provisions of the law, courts are not only permitted, but it is their duty, to consider the result and effect of an act for the purpose of arriving at its meaning. To warrant such a con-

struction to be given to the act, would necessitate the use of more adequate and definite language than is found therein.

In reply to your second question, it is certain that in case of conflict, regardless of how the question ought to be answered from a theoretical point of view, in practice it would be necessary to conform to the rules prescribed by the national convention and the national committee in order that the delegates be seated at the national convention.

The last call issued by the national republican chairman and secretary provided in part that the delegates at large and their alternates should be elected by popular state and territorial conventions, and further provided that all delegates should be elected *not earlier than thirty days after the date of the call,* and not later than thirty days before the meeting of the republican national convention.

Wihout going so far as to hold that a similar call would require the county delegates to be elected within the time named, it is evident that it is contemplated that the delegates represented in the national convention shall not be elected at a time so long in advance as to preclude the idea that they were elected with reference to the issues then pending and the personality of the candidates then seeking the nomination at the hands of the various political parties.

In holding however that it is not mandatory to reconvene the delegates in county conventions which were selected at the last preceding primary election, nothing herein should be construed as holding that delegates selected to national conventions would be illegally elected because of the reconvening of delegates in county conventions which were selected at the last preceding primary election, provided the delegates in the several counties of the state were reconvened pursuant to the action of the state and district committees of the several political parties working in harmony and in pursuance to the call of the national committees of such political parties. This question however may never arise and therefore upon this point I express no opinion.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

April 5, 1911.

HON. B. F. CARROLL,
Governor of Iowa.

APPROPRIATION.—The six thousand dollars appropriated by section 2575-a9 of the Code Supplement, 1907, is in effect under the control of the state board of health for bacteriological purposes and for the purposes enumerated in the section and in sections 2575-a7 and 2575-a8.

SIR:—In your letter of March 22, 1911, you call attention to the $6000 appropriation provided for by section 2575-a9 of the Supplement to the Code, 1907, and propound the following inquiries:

1st. "Has the state board of health absolute control of this laboratory?

2d. "Must this $6000 be expended for the state board of health alone, or can any part or all of this $6000 be used for any purpose whatsoever, provided it is for bacteriological purposes?

3d. "Can any part of this $6000 be used for experimental purposes relating to the state university work? In brief, how may this $6000 be used and under whose direction must it be expended?"

Section 2575-a7 of the Code Supplement, 1907, provides:

"The bacteriological laboratory of the medical department of the state university at Iowa City is hereby established as a permanent part of the medical department of the university work, and it shall, *in addition to its regular work, perform all* scientific analyses and tests, chemical, microscopical or other scientific investigations which may be required by the state board of health, and it shall make prompt report of the results thereof under such rules and regulations as the state board of health may from time to time adopt."

The following section provides:

"The professor of bacteriology shall be the director of said laboratory and shall make analyses, tests and investigations required by the state board of health as provided in the preceding section, without delay, giving the preference to same in point of time over other work and make report thereof to the board of health or other persons designated by rule of such board."

Section 2575-a9 of the Code Supplement, which is the one making the appropriation, enumerates the purposes for which the appropriation is made, and they are as follows:

"1. More perfectly equipping the present bacteriological laboratory at the state university.

"2. Enabling it to perform the duties hereby imposed.

"3. To provide it with the necessary apparatus and assistance to render the same effective.

"4. Additional salary of the director and assistants.

"5. Additional expenses of said laboratory as made necessary by this act, including postage, stationery and other contingent and miscellaneous expenses which may be incurred in the maintaining of said laboratory and performing the duties required herein by the provisions of this act."

The section further provides:

"The director shall receive such additional salary, not to exceed $1200 per year, as the state board of health may fix."

"The appropriation hereby provided shall be expended in the manner provided in section 2575 of the Code."

By reference to section 2575, it will be seen that it does not specify how funds are to be expended, but rather how they are audited and paid, the provisions of the section being as follows:

"All such contingent and miscellaneous expenses to be itemized, verified, certified, audited and paid as other expenses of the board."

This involves the further inquiry as to how other expenses of the board are certified, audited and paid, and the answer to this inquiry will be found in the previous section (2574 of the Code) which provides:

"The secretary of the state board of health shall receive such salary as the board may fix, not to exceed $1200 annually, payable upon the certificate of the president to the state auditor, who shall issue a warrant for the amount due upon the state treasurer. Each member of the board shall receive only actual traveling expenses, and other expenses incurred in the performance of his duties, such expenses to be itemized, verified, certified, audited, and a warrant drawn therefor in the same manner as the secretary's salary."

In view of the foregoing provisions, I am inclined to the view that while the state board of health may not have absolute control of the laboratory, yet their control over the same with reference to the matters enumerated in sections 2575-a7, 2575-a8, 2575-a9 of the Code Supplement is absolute.

I am also of the opinion that the $6000 appropriation was intended for the purpose of paying the additional salaries, furnishing the additional equipment and paying the additional expenses imposed upon the laboratory by the board of health with reference to the matters authorized by the foregoing sections, to be required by the board of health at the hands of the director of said laboratory. And that, therefore, the whole of said fund is in effect under the control of the state board of health, for use in connection with the matters specified in said section, subject to the limitation only, that not more than $1200 of the $6000 appropriated should be paid as an additional salary to the director each year.

Subject to the limitation mentioned, I think the fund could be used under the direction of the board for any purpose whatever connected with bacteriological experiments, but I doubt if the board would have the right to use any portion of the same or authorize it to be used in experimental work relating to the state university, which is not connected with or proper to be done at the bacteriological laboratory of the university, or which is not a part of its regular work as contemplated by section 2575-a7 of the Code Supplement, 1907.

Respectfully submitted,
GEORGE COSSON,
Attorney General of Iowa.

April 14, 1911.
DR. G. H. SUMNER,
Secretary State Board of Health.

APPROPRIATIONS.—Where an appropriation is made for a biennial period and payment required to be made in quarterly installments, one-half of the appropriation should be paid each year in quarter yearly installments.

SIR:—I am in receipt of your communication of the 20th instant enclosing a letter from Homer H. Seerley, President of the Iowa State Teachers College at Cedar Falls, in which he directs atten-

tion to section 6, acts of the Thirty-fourth General Assembly, making appropriations to the educational institutions under the control of the state board of education.

Section 6 provides as follows:

> "There is further appropriated out of any money in the state treasury not otherwise appropriated, to the State Teachers College, the sum of five thousand dollars ($5000) for the following purpose:
>
> For pipe organ $5000.00
>
> Said sum to be paid in quarterly installments on order of the Iowa State Board of Education."

You request an opinion as to whether under said section the amount may all be paid in the year beginning July 1, 1911, and ending June 30, 1912; or whether the quarterly installments referred to therein cover the biennial period, the result of which would be that only one-half of said amount could be legally paid during the year ending June 30, 1912.

Previous legislatures have used language similar to the language in question, and it has generally been construed that the quarterly installments cover the entire biennial period. It is also true that all funds which are appropriated by the legislature are to cover the ensuing biennial period and are not covered into the state treasury until the end of such biennial period, unless otherwise expressly provided.

I am therefore of the opinion that the quarterly installments cover the entire biennial period, and hence that only the pro rata amount of the appropriation may be paid on or before June 30, 1912.

Respectfully,

GEORGE COSSON,
Attorney General of Iowa.

April 21, 1911.

HON. JOHN L. BLEAKLY,
Auditor of State.

COMMERCE COUNSEL.—May on his own motion institute proceedings before Railway Commissioners and in such cases his action is not subject to interference by either the board or the attorney

general. He must institute such proceedings when directed by the Board of Railway Commissioners. It is his duty to appear before the Interstate Commerce Commission when requested by the Board of Railway Commissioners and his action in this respect is subject to the control of said board. He should, when requested by the Railway Commission, co-operate with the attorney general in cases pertaining to his office in state and federal courts, but cannot assume control of such cases to the exclusion of the attorney general.

GENTLEMEN:—I am in receipt of your communication of the 18th instant submitting the following questions:

"First: Does the commerce counsel and his assistants have exclusive jurisdiction in presenting all matters involving intrastate rates to the board of railroad commissioners?

"Second: Is he the attorney to represent the board before the interstate commerce commission in all matters in which this state may be interested?

"Third: (a) Can this board, or any member thereof, assume charge of the control and management of cases in state and federal courts involving orders made by this board? (b) Can this board, by resolution, direct the said commerce counsel to co-operate with your department, in all cases in federal and state courts, involving orders made by this board?"

Your inquiry is so framed that it not only calls for an opinion as to the duties and authority of the commerce counsel and his assistant, but necessarily involved therewith is also the question of the duty and authority of the board of railroad commissioners, and the duty and authority of the attorney general; that is to say, it is impossible to give complete answer to your questions without also defining the relationship and authority of the three departments.

First. Section 1 of the bill creating the office of commerce counsel and defining his duties provides in part that said commerce counsel shall be appointed by the board of railroad commissioners, and may be removed by said board for cause with the advice and consent of the Senate.

Section 5 of said act defines the duties of the commerce counsel as follows:

> "It shall be the duty of the commerce counsel to diligently investigate the reasonableness of the rates charged, or to be charged, for services rendered, or to be rendered by the railroad companies, express companies, and all other individuals, parties or corporations subject to the jurisdiction of the said board of railroad commissioners, and it shall also be his duty to diligently investigate the reasonableness of rates, charges, rules and practices of common carriers on interstate transportation, and whenever he is so directed by the board of railroad commissioners, or whenever in the judgment of the said attorney any of the said rates, charges, rules or practices are undue, unjust, unreasonable, unlawful, unduly prejudicial, or unjustly discriminatory against any of the citizens or industries of the state of Iowa, it shall be the duty of the said attorney, if they pertain to intrastate business, to institute proceedings relative to said matters and to prosecute the same before the board of railroad commissioners; if they concern interstate transportation, he shall assist the board of railroad commissioners, when so directed by the said board, and in such manner as the said board shall specify, in the prosecution of cases involving said matters before the interstate commerce commission."

It is clear from said section that the commerce counsel must advise himself as to the reasonableness of state rates or rates concerning intrastate business, and whenever in his judgment rates affecting intrastate business are unjust, unreasonable, unlawful, unduly prejudicial or unjustly discriminatory against any of the citizens or industries of this state, that he shall on his own motion institute proceedings before the board of railroad commissioners of Iowa relative to said matters. In this regard he may institute proceedings and his actions and conduct with reference thereto, if he determines to act, are not subject to control, interference or regulation of either the board of railroad commissioners of Iowa or the attorney general.

It is also clear from said section that the board of railroad commissioners may direct him to institute proceedings before said board.

While the law, however, authorizes the commerce counsel to institute proceedings before the board of railroad commissioners relative to intrastate business without control or interference from any other state department, it does not in any manner attempt to limit or abrogate the authority of the attorney general of the state, and therefore it becomes necessary to determine the authority and jurisdiction of the attorney general in order to answer your question as to whether the jurisdiction of the commerce counsel, in the presentation of matters involving intrastate rates before the board of railroad commissioners, is exclusive.

In determining this question and the other two questions presented by you, it should be borne in mind that the powers and duties of the commerce counsel and the board of railroad commissioners of Iowa are purely statutory; whereas, the office of attorney general is a constitutional office and is invested with both statutory and common law powers and duties.

In England, the office of attorney general has existed from a very early period.

4 Reeves Eng. Law, Chap. 25, page 122.

"He is the chief legal representative of the Crown and represents it for all forensic purposes."

3 Am. & Eng. Enc. of Law, page 475.

"The attorney general has the powers belonging to that officer at common law in addition to those conferred by statute, and in both England and the United States, he is the principal law officer of the government, and his authority is co-extensive with the public legal affairs of the whole community."

4 Cyc., page 1028;

State vs. First Judicial Court, 55 Pac. 916.

"An attorney general, in the exercise of the functions incident to his office, is endowed with a large discretion over matters of public concern, and generally the exercise of such discretion is in its nature a judicial act, over which the courts have no control."

3 Am. & Eng. Enc. of Law, page 484.

In a Minnesota case entitled *State ex rel Young, Attorney General, vs. Robinson,* 112 N. W. 269, in which former Attorney

General Young brought an action to oust the mayor from office for failure and neglect to perform the duties of his office, and also to collect a penalty, it was strenuously urged and contended that the attorney general had no authority to institute a suit for the purpose of collecting a penalty, because of the fact that this was expressly made the duty of the county attorney. The supreme court of Minnesota, speaking through Brown, Justice, in discussing the duties and authority of the attorney general, said:

> "Where the question has come up for consideration, it is generally held that the office is clothed, in addition to the duties expressly defined by statute, with all the power pertaining thereto at the common law. (Cases cited.) From this it follows that as the chief law officer of the state, he may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may from time to time require. He may institute, conduct and maintain all such suits and proceedings as he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights. * * * The statute under consideration, imposing specific duties upon county attorneys in the matter of its enforcement is in no proper view a limitation upon, nor does it exclude, the general authority of the attorney general upon the same subject. We have numerous instances where particular duties are expressly imposed upon the county attorney, yet it is clear that the attorney general has the right, in virtue of his office, to co-operate with or act independently of that official in all cases where the public interests justify it. * * * The authority conferred upon that officer and the general power of the chief law officer of the state may stand together without conflict; and we so hold."

And to the same effect, see

4 Cyc., pages 1028, 1029;

People vs. Kramer, 68 N. Y. Supp. 383;

People vs. Miner, 2 Lansing, 397; and

Attorney General vs. Williams, 174 Mass. 476.

Many other citations could be given in support of the general authority of the attorney general under the common law, and specifically upon the point that if a duty is imposed upon another

officer other than the attorney general, that it does not limit or restrict the authority of the attorney general, unless the statute expressly so declares; and also to the effect that the attorney general has not only the authority delegated to him expressly by statute, but also all of the authority which inheres in and is incident to the office of attorney general under the common law. But while his authority under the common law is definite and general, there is also express authority covering this matter. The law creating the Department of Justice provides that there shall be at the seat of government a department to be known as the department of justice, and the attorney general shall be the head thereof; that "when requested to do so by the governor, executive council, or general assembly, *or when in his judgment the interests of the state require it,* he shall appear for the state before any other court or tribunal, prosecute or defend all actions and proceedings, civil or criminal, in which the state may be a party or interested."

And paragraph 6 of section 3 of said act expressly provides that "It shall be the duty of the attorney general to prosecute or defend all actions or proceedings brought by or against any state officer in his official capacity."

Hence it follows that with reference to prosecution of cases before the board of railroad commissioners respecting rates and charges concerning intrastate business, the commerce counsel must institute proceedings, if directed so to do by the board of railroad commissioners; that he may also on his own initiative institute proceedings respecting such matters, in which event, he will not be subject to the interference or the control of either the board of railroad commissioners of Iowa or the attorney general; but that these rights and duties imposed upon the commerce counsel do not in any way limit or restrict the jurisdiction or authority of the attorney general to institute such proceedings before said board in the name of the State of Iowa upon the relation of the attorney general, as the attorney general thinks necessary and proper under the circumstances, in which event, he will not be subject to the control or interference of any other state department. That where both the commerce counsel and the attorney general appear before the board of railroad commissioners of Iowa respecting state matters, their relationship must be governed by the comity and courtesy due between state departments interested

in a like cause and serving the same client, viz.: the state and the public.

Second. With reference to your second question, it is clear it was contemplated by the legislature that the commerce counsel would be called upon to appear before the interstate commerce commission of the United States at least in some cases, otherwise the law would not have made it mandatory upon him to investigate and advise himself as to the reasonableness of rates and charges affecting interstate business; but in this respect, the language of the act makes the commerce counsel entirely subject to the control and under the direction of the board of railroad commissioners of Iowa.

Section 5 of the act provides in part that "If they (rates or charges of transportation companies) concern interstate transportation, he (commerce counsel) shall assist the board of railroad commissioners, *when so directed by the said board, and in such manner as the said board shall specify,* in the prosecution of cases involving said matters before the interstate commerce commission."

The act creating the office of commerce counsel did not, either expressly or by implication, repeal section 2120-a, Supplement to the Code, 1907. This section makes it mandatory upon the board of railroad commissioners to inform themselves as to the reasonableness of rates, charges, rules and practices of all common carriers with reference to the transportation of interstate business. And section 2120-b of the Code Supplement authorizes and directs the board to prosecute cases before the interstate commerce commission when such board deems necessary.

The next section authorizes the board to call for the services of the attorney general, and provides that "he (the attorney general) shall represent them, whenever called upon to do so, before the interstate commerce commission."

What was said, however, under the first inquiry with reference to the general common law and statutory authority of the attorney general applies equally with reference to your second question.

My conclusion, therefore, with reference to your second question is that it is made the duty of the board of railroad commissioners of Iowa to investigate the reasonableness of the charges of common carriers and transportation companies respecting interstate business, and that after investigation, if they find they are unjust, illegal or discriminatory, said board should make an effort

to cause the common carriers to adjust the same. In the event of a failure or refusal of such common carriers to adjust said rates, it is made the duty of the board of railroad commissioners, if the facts and circumstances warrant, to institute prosecution. In so doing, I am of the opinion that they may proceed upon their own motion and prosecute said cause before the interstate commerce commission without requesting the services of either the commerce counsel or the attorney general; or they may receive upon request, the services of the commerce counsel, in which event, the commerce counsel is subject to their direction; or they may place the cases in the hands of the attorney general, direct the commerce counsel to assist and co-operate and themselves assist and co-operate; or the attorney general, under his common law and statutory authority, may independently prosecute any action or proceeding before the interstate commerce commission of the United States, which he deems proper and necessary. In the event that all parties appear in the prosecution, the attorney general would have charge of the prosecution if the cases were placed in the hands of the attorney general by the board of railroad commissioners. If, however, the board of railroad commissioners, by themselves or the commerce counsel, should appear before the interstate commerce commission without requesting the services of the attorney general, and the attorney general should also appear by intervention upon behalf of the state in the same cause independently of said board, and under his statutory and common law authority, then neither would have any control or jurisdiction over the other. The work would have to proceed under the comity and courtesy which ought to exist between two state departments representing the same general interests and the public welfare, and in case of conflict, it would be the plain duty of both to make every effort to get together upon a harmonious and working basis, and to that end to eliminate any personal interests or considerations; but in the event of some fundamental and deep-seated difference of policy, then the duty would devolve upon the interstate commerce commission to determine which theory adopted by the different departments was the more reasonable and which therefore ought to prevail.

Third. With reference to your third question, it is clear from the principles announced under the first division that the attorney general has charge of all cases in the state and federal courts involving orders made by the board of railroad commissioners of Iowa, and in this connection and in addition to what was said

under the first division of this opinion, I again direct your attention to paragraph 6 of section 3 of chapter 9 of the acts of the Thirty-third General Assembly creating the Department of Justice, which provides that "It shall be the duty of the attorney general to prosecute or defend all actions or proceedings brought by or against any state officer in his official capacity."

And to the case of *State vs. Fremont,* 35 N. W. page 118, which involves the enforcement of the order of the board of transportation of the state of Nebraska respecting rates. While the attorney general was absent from the state, the board of transportation entered into a compromise with the transportation companies, and appeared in court and filed the same and asked that the case be continued. Upon the return of the attorney general, he insisted that the case proceed. In determining the conflict of authority, the supreme court of Nebraska, speaking through Maxwell, Chief Justice, said:

> "The first question presented, therefore, is the authority of the attorney general to proceed with the prosecution of the case against the protest of a majority of the board of transportation."

The chief justice then quoted the Nebraska statute relative to the duties of the attorney general, as follows:

> "The attorney general shall appear for the state, and prosecute and defend all actions and proceedings, civil or criminal, in the supreme court in which the state shall be interested or a party, and shall also, when requested by the governor, or either branch of the legislature, appear for the state and prosecute and defend in any court, or before any officer, any cause or matter, civil or criminal, in which the state may be a party or interested."

And concluded:

> "The attorney general is thus the law officer of the state, and intrusted by law with the management and control of all cases in which the state is a party or interested. The majority of the state board of transportation, therefore, cannot control his actions in the premises, and the motion to continue the cause must be overruled."

Replying to the second division of this question, it is also clear that the act creating the office of commerce counsel places absolutely no responsibility or obligation upon such commerce counsel

to appear in either the state or the federal courts respecting the question of rates or involving the orders made by the board of railroad commissioners of Iowa. Not a sentence or word can be found with reference to this matter. Not only that, but it is provided in section 2 of said act that "said commerce counsel shall not engage in any other business, vocation or employment than herein specified."

I have been advised by the person who says he drafted the bill, that it was his intention to primarily place upon the commerce counsel the responsibility of prosecuting matters before the board of railroad commissioners respecting state or interstate business, and to furnish an attorney which the board could call upon in matters respecting interstate transportation before the interstate commerce commission, and that it was not the intent to have said commerce counsel appear as an attorney in court, for the reason that it would interfere with other duties which it was sought to expressly enjoin upon said commerce counsel.

It will be freely admitted that the act as a whole fairly indicates this intention, and as before stated, it is clear from the act that no responsibility or duty with respect to this matter is placed upon the commerce counsel.

The exact point, however, which I understand I am to decide is this: Would it be either illegal or improper for the commerce counsel, if directed by resolution of the board of railroad commissioners, to co-operate with the department of justice in the prosecution of cases in the state and federal courts, involving orders made by the board?

Knowing the purpose for which the act was passed, and the general legislative intent in passing said act to furnish the state with a specialist respecting these matters, I think no one would contend that it would be either illegal or improper for said commerce counsel to appear, if directed by the board, and co-operate with the department of justice in these matters, if it did not interfere with his other duties, unless he is prohibited thereby from the language above quoted.

In determining this question, the private intention of the draftsman cannot control. The criterion is, what is the reasonable construction to be placed upon the language, and what was the legislative intent, considering the purposes of the bill as a whole.

The particular place in which the language is found is important in determining this matter. If the language in question had been found in section 5, which section expressly limits and defines the duties of the commerce counsel, I should incline to the view that the legislature as a body intended thereby to prohibit the commerce counsel from appearing in any manner, other than as defined in said section. In other words, I would construe it as a specific limitation, instead of a general limitation.

Section 2 of the act prohibits the commerce counsel from owning any stocks or bonds, or having any pecuniary interest in any corporation or business subject to the jurisdiction of the state board of railroad commissioners, or of the interstate commerce commission; or from being a candidate for any political office, and further contains the statement hereinbefore referred to, that said commerce counsel shall not engage in any other business, vocation or employment than therein specified.

I am therefore of the opinion that it was the legislative intent in the use of said language to expressly prohibit the commerce counsel from devoting his attention to any public or private enterprise, business, vocation or employment, and that the language would also prohibit him from generally engaging in the law business or acting as a counsellor or attorney concerning any matters other than a question of rates, and matters subject to the jurisdiction of the board of railroad commissioners and the interstate commerce commission; but that it is not so specific as to make it absolutely illegal or improper for him, if directed by resolution of the board, to appear in the state or federal courts and co-operate with the department of justice in proceedings involving the orders of the board of railroad commissioners. To hold otherwise would be to deprive the state of an attorney who is to become a specialist in one line, and upon matters concerning which he may have had personal charge before the commission. Such a narrow construction is not, in my opinion, warranted from the language of the whole act, nor do I believe it was the intent of the legislature, provided always that the services he renders in court must not interfere with the other duties expressly enjoined upon him by said act.

In conclusion, it should be borne in mind that while the burden and responsibility of presenting cases in the federal and state courts, involving orders made by the board of railroad commissioners, devolves upon the attorney general, the board of railroad

commissioners of Iowa are not in any manner nor to any extent relieved from furnishing all the evidence and data required which it is possible for them to procure with the facilities and funds at their disposal.

The Thirty-fourth General Assembly appropriated the sum of fifty thousand dollars to be used by said board for the purpose of establishing and maintaining just and reasonable rates, both state and interstate. The commission is given general supervision over the railways and transportation companies of the state, including express companies. These common carriers are required to file their reports and otherwise keep the commission advised of their actions. The commission is invested with the facilities for securing evidence upon which to determine the reasonableness of rates, both state and interstate, and it is therefore the plain duty of the board to co-operate with and assist the attorney general and furnish him with all the evidence and data, statistical, documentary or otherwise, which it is possible for them to procure in order to sustain any orders or decisions made or promulgated by said board, for use in any court or before any tribunal in which the attorney general appears representing said board.

Respectfully submitted,
GEORGE COSSON,
Attorney General of Iowa.

April 29, 1911.

HONORABLE BOARD OF RAILROAD COMMISSIONERS OF IOWA.

INSURANCE.—House File No. 506 should be construed to authorize reinsurance in companies authorized to do business in Iowa, and not to limit such reinsurance to companies authorized to do business in Iowa alone.

SIR:—I am in receipt of your communication of the 2d instant directing my attention to House File No. 506, and specifically that part of said act amendatory of section 1711 of the Code, so that said section as amended will read as follows:

> "Such company may lend money on bottomry or respondentia, and cause itself to be insured in companies only authorized to do business in this state against any loss or risk it may have incurred in the course of its business, and upon

the interest it may have in any property on account of any such loan, and generally to do and perform all other matters and things proper to promote these objects."

You request an opinion as to whether or not if the act becomes a law, it will restrict companies in their right to reinsure in other companies only authorized to do business in this state and not elsewhere; or whether the same may be construed as simply requiring reinsurance in companies which are authorized to do business in Iowa as well as in other states.

After carefully considering the act, the section which the same amends and the purpose the legislature evidently had in mind, I am of the opinion that the legislature intended to require that reinsurance must be had in some company which had been authorized to do business in this state, but not to limit the same to companies authorized to do business in Iowa and not elsewhere.

Respectfully,

GEORGE COSSON,
Attorney General of Iowa.

May 4, 1911.
HON. B. F. CARROLL,
Governor of Iowa.

INSANE PERSONS—SETTLEMENT.—Where a wife has resided with her husband in a county of this state for six months when she is adjudged insane and committed to the hospital, and the husband continues to reside in such county for the remainder of the year required to establish his settlement in the county, that county becomes the legal settlement of the wife.

SIRS:—I am in receipt of your communication advising that a Mrs. Sloan was adjudged insane by the Commissioners of Insanity of Wapello County, Iowa, something like one year ago, and committed to the State Hospital at Mt. Pleasant. That prior to May 12, 1909, Mrs. Sloan had been confined in the State Hospital for the Insane in the State of Minnesota, and on said date was paroled from that institution and later was discharged from said hospital. Immediately after May 12, 1909, Mrs. Sloan, with her husband, came to Iowa with the intention of establishing their residence in this state. They first came to Bremer County, Iowa, where they remained for about four months and then removed to Wapello County, Iowa, where Mr. Sloan procured employment and estab-

lished a home and they continued to live there until Mrs. Sloan was adjudged insane and committed to the hospital as stated; that the period they so resided in Wapello County before her commitment was about six months and that Mr. Sloan, after his wife's commitment in said hospital, continued to make Wapello County his legal residence and home, and is his legal residence at this time. I understand further that no notice was served either upon Mr. Sloan or Mrs. Sloan to prevent them, or either of them, from acquiring a legal settlement within Wapello County.

Upon the foregoing state of facts, you request an opinion as to whether Mrs. Sloan acquired a legal settlement in Wapello County such as to charge that county with liability for her maintenance in the hospital.

I am of the opinion that under the facts and circumstances set forth, Mrs. Sloan acquired a legal settlement in Wapello County, and that Wapello County is liable for her maintenance in said hospital. This conclusion is supported by Sections 2224 and 2226 of the Code, Sections 2270 and 2727-a-28-a of the Supplement to the Code, 1907, and the following cases:

Washington County vs. Mahaska County, 47 Ia., 57;
Scott County vs. Polk County, 61 Ia., 616;
Gilman vs. Heitman, 137 Ia., 333,

and other cases and provisions of the statute.

Respectfully,

GEORGE COSSON,
Attorney General of Iowa.

May 8, 1911.

HON. BOARD OF CONTROL OF STATE INSTITUTIONS OF IOWA.

COMPENSATION.—For active service of guard on order of the governor is paid from providential contingent fund provided for in subdivision 17, section 3, chapter 241, Thirty-third General Assembly, and as provided in section 170 of the Code, on approval of the governor and executive council.

SIR:—In compliance with your request for my opinion as to how the per diem, transportation, expense, maintenance, etc., of Companies B, D and I of the 54th Infantry, which were ordered

to Muscatine by General Logan under your direction for duty in connection with the disturbances recently made at that place, are to be paid, I beg to submit the following:

It is my understanding that said companies were by you ordered into service of the state pursuant to the authority conferred in section 20 of chapter 131, laws of the Thirty-third General Assembly, and I assume from the foregoing statement of fact, and from the statement submitted by General Logan in connection with your said communication, that no question is made as to either the authority or necessity for your action in ordering into service the said companies, and that the claims involved are just and correct and should be paid.

What is designated as the Military Code of Iowa is found in chapter 131, laws of the Thirty-third General Assembly. Section 24 of said chapter provides for the compensation and allowance for the military force when in active service of the state upon the call of the governor, and for other service and duty; and further provides that when in actual service of the state, pursuant to the order of the governor, the compensation of the military force shall be paid out of the state treasury, and the claims for such services shall be audited and allowed by the governor.

Section 43 of said act makes an annual appropriation for the support of the guard under the provisions of said chapter "not applying to active service." From this it will be seen that no provision is made in the said chapter for the compensation of services rendered by the guard when in active service of the state by order of the governor, except that such compensation shall be made by the state and that claims therefor must be audited and allowed by the governor.

Section 170 of the Code provides:

> "The executive council is authorized to draw warrants upon any contingent fund set apart for its use for the purpose of paying the expenses of suppressing any insurrection or riot actual or threatened, when state aid has been rendered by order of the governor, and for repairing, rebuilding or restoring any state property injured, destroyed or lost by fire, storm, theft or unavoidable cause, and for no other purpose whatever."

By subdivision 17 of section 3 of chapter 241, laws of the Thirty-third General Assembly, the sum of fifty thousand dollars

is appropriated and set aside as a providential contingent fund to be expended in accordance with the provisions of the section of the Code just quoted, the said amount to be under the control of the executive council, and all payments therefrom to receive the unanimous approval of the council. The said subdivision of said section also provides that all expenditures made in pursuance thereof shall be reported in detail by the auditor of state in his next report.

In view of these provisions of the statute, it is my opinion that the claims to which your inquiry relates are properly payable out of the contingent fund appropriated in subdivision 17 of section 3 of chapter 241, acts of the Thirty-third General Assembly and in accordance with the terms of section 170 of the Code. The claims, however, should first be audited and allowed by the governor and also receive the unanimous approval of the executive council before warrants therefor are drawn.

The language used in section 170 of the Code, standing alone, apparently would require the executive council to draw warrants for expenditures made thereunder, but when we have in mind that the auditor of state is the officer who draws warrants on the treasurer for money directed by law to be paid out of the state treasury, and that the statute in which the said appropriation is made for providential contingencies requires that all expenditures made thereunder shall be reported in detail by the auditor of state in his next report, and the further provision of the statute that prohibits the treasurer of state from paying any money from the state treasury except upon the warrants of the auditor, and construing all of the provisions of the statute bearing upon the question together, it is my opinion that the legislature by the language referred to intended no more than to authorize the executive council to expend funds of the state for the purposes mentioned, and that the warrants for these claims, after they have been duly audited and allowed by you, as governor, and have received the unanimous approval of the council, should be drawn by the auditor of state upon the state treasurer and by him paid out of said contingent fund.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

May 25, 1911.
HON. B. F. CARROLL,
Governor of Iowa.

BOARD OF RAILROAD COMMISSIONERS.—Cost of transcript of testimony taken before Interstate Commerce Commission ordered by Iowa Commission may be paid from the appropriation made by Senate File No. 307, Acts of the Thirty-fourth General Assembly.

GENTLEMEN:—I am in receipt of your communication of the 25th instant advising that during the year 1910 the railroads of the United States generally attempted an advance of class rates; that the railroads operating in the state of Iowa are among those attempting such raise; that a hearing was had upon the question before the Interstate Commerce Commission at Chicago; that by resolution your board attended such hearing; that it developed that a daily record of the testimony was essential for the protection of the Iowa interests, and that your board, after consultation with the executive council, ordered such transcript at a total cost of $1,227.87; that this record was received, used and is now in the possession of the board in its office for reference, contains much information of value and will be of great assistance to the board in pending and future cases, both state and interstate.

In view of these facts, you request to be advised as to whether you have authority to pay for the transcript above referred to out of the funds appropriated under the provisions of Senate File No. 307.

Senate File No. 307 passed by the Thirty-fourth General Assembly, which became effective by publication, appropriates the sum of twenty-five thousand dollars, or so much thereof as may be necessary, "the same to be expended by the state railway commission in preparing cases submitted to the interstate commerce commission involving interstate rates affecting Iowa."

This testimony having been secured pursuant to a resolution of the board in the resistance of an advance in interstate rates, and it now being the judgment of your board that the transcript in question is of value and will be used in the preparation of cases now pending and which may be brought in the future affecting interstate rates, I am of the opinion that the cost of this transcript may properly be paid from the sum appropriated by Senate File No. 307.

Yours very truly,

GEORGE COSSON,
Attorney General of Iowa.

May 27, 1911.

HONORABLE BOARD OF RAILROAD
COMMISSIONERS OF IOWA.

SCHOOLS.—The one dollar fee provided for in section 2738, Supplement to the Code, 1907, as amended by section 11, Senate File 77, Thirty-fourth General Assembly, is to be collected from all who apply for certificates and from all those who teach in the county the ensuing year, and the collection of the fee is not limited to time of holding institute.

SIR:—I am in receipt of your communication in which you request to be advised as to what fees the county superintendent is authorized and required to collect by virtue of the provisions contained in section 2738 of the Supplement to the Code, 1907, as amended by section 11 of an act of the Thirty-fourth General Assembly, known as Senate File No. 77, and from whom and under what circumstances any such fees are to be collected.

Said section 2738 of the Supplement to the Code, 1907, requires the county superintendent to hold annually a normal institute for the instruction of teachers and for those who may desire to teach, and, among other things, provides for the payment of certain fees to be devoted to defraying the expense of conducting such institutes. The provision in said section relating to such fees is as follows: "To defray the expenses of said institute, he (county superintendent) shall require the payment of a registration fee of one dollar from each person attending the normal institute, and the payment in all cases of one dollar from every applicant for a certificate; provided that if the applicant is granted a two years' certificate, he shall pay one dollar additional."

The last part of the provision quoted, the one requiring the payment of one dollar by every applicant for a certificate and an additional dollar if a two-year certificate was granted, was by implication repealed and superseded by section 2734-p of the Supplement to the Code, 1907, which section originally was section 16 of chapter 122, acts of the Thirty-first General Assembly, which latter section provides that each applicant for a certificate shall pay a fee of one dollar, one-half of which shall be paid into the state treasury on or before the first day of the succeeding month, and one-half of which shall be paid into the county institute fund. As I understand the question you propound, it does not involve a construction of section 2738 of the Supplement to the Code, 1907, so far as it relates to the provision which was repealed by section 2734-p of the Supplement to the Code, 1907, and I understand that the interpretation just given the section last mentioned, is universally accepted and that the only fee collected from an appli-

cant for a certificate since the taking effect of said chapter 122, acts of the Thirty-first General Assembly, is the one dollar mentioned in section 16 of said chapter, now known as section 2734-p of the Supplement to the Code, 1907. The only fee, therefore, that was collected by the county superintendent under section 2738 of the Supplement to the Code, 1907, since the taking effect of said chapter 122, acts of the Thirty-first General Assembly, was the one dollar fee from each person attending the normal institute.

Section 11 of Senate File No. 77 of the Thirty-fourth General Assembly amends section 2738 of the Supplement to the Code, 1907, by striking out of lines seven and eight the language "attending the normal institute," and inserting in lieu thereof the words "desiring to secure a certificate, or teach in his county for the ensuing year," so that the provision in said section relating to the collection of fees now reads: "To defray the expenses of said institute, he (county superintendent) shall require the payment of a registration fee of one dollar from each person desiring to secure a certificate, or teach in his county for the ensuing year." It will be seen, then, from what has been said, that the fee last mentioned is the only fee that the county superintendent is authorized or required to collect under section 2738 of the Supplement to the Code, 1907, and that answers the first part of your question and brings us to the next question: From whom and under what circumstances is said fee to be collected?

An answer to this question requires us to ascertain what the legislature meant by the language of said amendment, "desiring to secure a certificate, or teach in his county for the ensuing year." The language quoted, as we have seen, takes the place of the words "attending the normal institutes" and the legislature must have intended the amendment to mean something different than the language so stricken, and it is equally clear that the scope of section 2738 of the Supplement to the Code, 1907, in respect to those liable for said fee is very much broadened by the amendment, as under the present form of said section only those who attend the normal institute are required to pay the one dollar fee, while in its amended form it requires a fee of one dollar to be paid by all those desiring to secure a certificate or desiring to teach the ensuing year in the county where such institute is held. There can be no doubt as to who is liable to pay the fee of one dollar referred to in section 2738 of the Supplement to the Code, 1907, as so amended, for that is as certain as language can make it.

As to when and under what circumstances such fee is to be collected, is the more perplexing phase of the question to be answered with entire satisfaction. Assuming that all those who desire to secure a certificate, and all those who desire to teach in the county the ensuing year are liable for the payment of this fee, it cannot always be ascertained with certainty at the time of holding the normal institute just what persons may be required to pay said fee. In view of this and other considerations, it cannot have been the intention of the legislature to limit the right and power of a county superintendent to collect said fee to the time of holding the institute. A person presenting himself to be enrolled for attendance upon the institute may not have formed an intention at that time either as to securing a certificate or as to teaching in that county the ensuing year. Again, there may be those who procure certificates or teach in the county the ensuing year who do not attend the institute, and yet it is perfectly clear from the language of the amendment that the right to require the payment of the fee is not limited to those who attend the institute but is placed upon one of the two conditions, the desire to secure a certificate or the desire to teach in the county the ensuing year. To say, then, that this fee may not be collected except from the persons who attend the institute and desire either to secure a certificate or to teach in the county the ensuing year, is placing entirely too narrow a construction upon the language of section 2738 of the Supplement to the Code, 1907, as amended by section 11 of Senate File No. 77 of the Thirty-fourth General Assembly. Further, applications for certificates are not made in connection with the normal institute. No examinations are held in connection with such institute upon which certificates are granted, and as I understand the law, attendance upon a normal institute has no effect or bearing whatever upon the right to procure a teacher's certificate nor upon an existing certificate. Such institutes are held for the instruction of teachers and for those who desire to teach, generally, I can find nothing in the language of the amendment nor in any other sections of the statute which would justify the interpretation that the fee in question be paid by those who desire to secure a certificate only when the normal institute is held. The best evidence of a person desiring to procure a certificate is the making of the application for a certificate in the usual way, and I am of the opinion that this one dollar fee should be collected by the county superintendent from every per-

son who applies for a teacher's certificate, in addition to the one dollar fee required to be paid under section 2734-p of the Supplement to the Code, 1907. But if a person pays the one dollar fee provided for by section 2738 of the Supplement to the Code, 1907, as amended by the act of the Thirty-fourth General Assembly, on the ground or condition that he desires to secure a certificate, he would not be required to pay another dollar because he taught school in the same county the ensuing year.

Likewise, the best evidence of a person's desire to teach for the ensuing year is the entering into a contract to teach and actually entering upon the work of teaching thereunder, and every person who teaches in a given county should be required to pay a fee of one dollar to defray the expense of holding the normal institute in such county. This the county superintendent is readily enabled to do, as he is required to keep a roll of the teachers of his county. All of the teachers of the county are under his supervision and reports are made to him, and there could be no evasion in the payment of this fee. However, it would be entirely proper for the county superintendent to collect the one dollar fee mentioned in section 2738 of the Supplement to the Code, 1907, as amended, at the time of holding the county institute, from those attending the same, who declare their desire to either secure a crtificate or to teach in that county for the ensuing year.

The foregoing interpretation of the section of the statute in question is the only one that harmonizes the various provisions of the law relating to this subject. We must assume that it was the intention of the legislature and that it is the policy of the law to perpetuate county normal institutes and that adequate means were provided for their support. Under the present law the county institute fund is made up from at least five sources: First, by one-half of the fees paid under section 2734-p of the Supplement to the Code, 1907; second, by a small appropriation out of the state treasury; third, by the fees provided for in section 2738 of the Supplement to the Code, 1907; fourth, by the fees for registering teachers' certificates as provided in section 2734-q of the Supplement to the Code, 1907, and fifth, by a possible appropriation out of the county treasury. The said act of the Thirty-fourth General Assembly amended said section 2734-q of the Supplement to the Code, 1907, so as to abolish entirely the fee for registering teachers' certificates, and after the taking effect of said act of the Thirty-fourth General Assembly there will

be no revenue from that source available for paying the expenses of the county institutes, and while more money may be collected under section 2738 of the Supplement to the Code, 1907, as amended, than under that section in its present form, yet the aggregate amount of fees collected under said section in its present form plus the fees collected under section 2734-q of the Supplement to the Code, 1907, would amount to considerably more than the fees that can be collected under said section 2738 as so amended.

Furthermore, the foregoing interpretation of said section does not result in any injustice but establishes a rule and practice which is fair and equitable to all teachers and discriminates against none.

Said Senate File No. 77 will not take effect until July 4th next and the present law will govern the holding of county institutes until that date.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

June 12, 1911.

SUPERINTENDENT OF PUBLIC INSTRUCTION.

INSURANCE.—Under subdivision 5, Code Supplement, section 1709, hospitals and druggists may insure against loss by reason of errors and mistakes of their employes, but not against loss by reason of malpractice of physicians employed by them.

SIR:—Your letter of May 17th addressed to the attorney general has just been referred to me for investigation and reply, and the question which you desire the opinion of this department upon as stated by you is as follows:

> "Herewith I am handing you two policies of insurance issued by the Fidelity and Casualty Company of New York, the one entitled 'Hospital Liability Policy' the other 'Druggists Liability Policy.' Both seek to indemnify the assured against his own as well as the acts of his employes.
>
> "I believe the insuring of individuals under the provisions of subdivision 5, section 1709, Code, whether employers, or otherwise, against the sequence of their own acts, has already been passed upon adversely by former attorneys general. But

whether applicable to errors or mistakes made by the employes of druggists and hospitals is the question which I desire you to pass upon. In a word, is a druggist employing licensed pharmacist clerks, or an incorporated hospital to be considered insurable employers in the sense contemplated by the provisions of subdivision 5 of section 1709 Code?''

Subdivision 5 of Code Supplement, section 1709, authorizes insurance of ''employers against loss in consequence of accidents or casualties of any kind to employes or other persons * * * resulting from any act of an employe or any accident or casualty to persons or property or both, occurring in or connected with the transaction of their business.'' While it would hardly be claimed that errors or mistakes made by employes would in all cases amount to accidents, yet in view of the construction placed upon the word ''casualty'' as used in other subdivisions of this section by our own supreme court, I am inclined to the view that such errors and mistakes might be construed as casualties within the meaning of this subdivision.

In the case of *Casualty Co. vs. National Bank*, 131 Ia., 456, the court, after quoting the definition of the word ''Casualty'' as given in the Standard Dictionary, further said:

> ''But in ordinary usage, 'casualty,' like 'accident,' is quite commonly applied to losses and injuries which happen suddenly, unexpectedly, not in the usual course of events, and without any design on part of the person suffering from the injury. Nor does the fact that the conscious or intended act of some other person produces it take from such injury its character as an accident or casualty.''

I am, therefore, of the opinion that your question should be answered in the affirmative.

I would not, however, wish to be understood as sanctioning the hospital policy in so far as they seek to provide indemnity against ''malpractice'' of an employe, nor am I willing to sanction subdivision 2 of either of the policies.

It will be noticed that by subdivision 2 the companies agree to defend in the name of the assured any suit brought against the assured to enforce a claim, ''whether groundless or not.'' It seems to me that this kind of an agreement should not be tol-

erated, for it would require the company to defend against claims, against which there is and should be no defense.

Respectfully submitted,
C. A. ROBBINS,
Special Counsel.

July 6, 1911.
HON. JOHN L. BLEAKLY,
Auditor of State.

BANKS AND BANKING.—(a) A bank may not transact any or part of its principal business at a place other than the bank building; (b) Therefore a branch office to receive deposits and pay checks is in violation of law.

SIR:—I am in receipt of your communication requesting to be advised as to whether under the Iowa statutes a savings bank may lawfully establish and maintain a branch office for the receiving of deposits and the paying of checks drawn on the main bank.

It has been the universal holding of this department that state and savings banks had no authority to maintain branch banks. Opinions to this effect have been given by former Attorneys General Stone, McPherson, Mullan and Byers. Indeed, it is conceded that savings banks may not establish branch banks either in the same city or elsewhere. It is contended, however, that a separate agency for the purpose of receiving deposits and paying checks, in the absence of making loans, discounting notes and doing other banking business, does not constitute the establishment of a branch bank.

This question has received a great deal of consideration in this state by the several state auditors and the several attorneys general. It appears that Hon. J. A. Lyons was auditor of state during the year 1899 when application was made by the Scott County Savings Bank to operate a branch office, and that he gave his express consent, stating that the branch office should have posted in a conspicuous place over the door a sign reading:

"Branch Office of the Scott County Savings Bank."

When the question was submitted to Hon. Smith McPherson, then attorney general, he expressly held that a savings bank could not maintain a branch bank, but did hold that a savings bank might have an agency at another place for the purpose of receiv-

ing deposits, making discounts, etc., but that the receiving of deposits and making discounts, etc., must be the business and acts of the bank authorized by law to act.

General Mullan seems never to have passed specifically upon the question as to whether or not the agency maintained by the Scott County Savings Bank was in compliance with law.

I am of the opinion that a great deal of confusion might be avoided by a proper statement of the proposition involved. The question as I view it resolves itself into this: May a savings bank in Iowa conduct all or part of its regular banking business in more than one office or place?

After a most careful consideration of the question, I am of the opinion that this cannot be done, and generally speaking, I think this has been the universal position taken by this department. It is the position generally taken by courts and text writers.

This doctrine was announced by the federal court in the case of *Armstrong vs. Second National Bank of Springville*, 38 Fed. 883-886. It was held in that case that the bank had no authority to provide by contract for the cashing of checks at any other place than at its banking office. If, then, a bank may not transact all or a part of its regular banking business at more than one office or place, the next question for determination is: Is the receiving of deposits and the cashing of checks a part of the regular banking business of a savings bank; in other words, is the receiving of deposits one of the essential elements of a savings bank, or is it a mere incident or by-product, if I may be permitted to use the term.

The supreme court of the United States in the case of *Oulton vs. Savings Institution*, 84 U. S., 109 at 118, said:

> "Banks in the commercial sense are of three kinds, to-wit: 1, of deposit; 2, of discount; 3, of circulation. Strictly speaking the term bank implies a place for the deposit of money, as that is the most obvious purpose of such an institution. Originally the business of banking consisted only in receiving deposits, such as bullion, plate, and the like, for safe-keeping until the depositor should see fit to draw it out for use, but the business, in the progress of events, was extended, and bankers assumed to discount bills and notes and to loan money upon mortgage, pawn, or other security, and at a still later

> period to issue notes of their own intended as a circulating currency and a medium of exchange instead of gold and silver. Modern bankers frequently exercise any two or even all three of those functions, but it is still true that an institution prohibited from exercising any more than one of those functions is a bank in the strictest commercial sense."

Bouvier defines a bank to be: "A place for the deposit of money; an institution, generally incorporated, authorized to receive deposits of money, to lend money, and to issue promissory notes—usually known by the name of bank notes—or to perform some one or more of these functions."

Abbott defines a bank to be: "A place for the custody of money, or for the loaning and investing of money, or for the issue, exchange and circulation of money; or for one or all of these purposes."

The supreme court of Ohio in the case of *Niagara County Bank vs. Baker,* 15 Ohio St. 68, held that banks are establishments intended to serve for the safe custody of money, and to facilitate its payment by one individual to another, and sometimes for the accommodation of the public with loans.

Under the title "Banks and Banking" 5 Cyc. 513, it is said. "The chief business of a bank is to receive and loan money."

See also the definition of a bank under Words and Phrases.

The authorities are unanimous in holding that the receiving of deposits and the paying of checks constitute some of the principal, if not the chief, functions of a bank; and as was stated by the supreme court of the United States, "Originally the business of banking consisted only in receiving deposits."

It follows then as a necessary corollary that if the receiving of deposits and the paying of checks are the chief functions or characteristics of a savings bank, and that if a bank may not transact its regular banking business in more than one office or place, that it will not be permitted to provide for the receiving of deposits and the payment of checks at other places than its bank building.

If a bank can arrange for doing a part of its banking business at a branch office, it can also arrange for doing another part of its banking business at branch offices, and if a bank can have one branch office, it can have an unlimited number; and if this

can be done by one bank, it can be done by every state and savings bank in the state of Iowa.

In my opinion, this is in contravention of our statutes and the holding of the courts. This conclusion is arrived at with some reluctance owing to the fact that the practice has been expressly permitted by former state auditors and at least acquiesced in by some attorneys general; but I am persuaded that no careful investigation of the subject was then made.

In any event, no discrimination may be allowed, and the state is confronted with either prohibiting or permitting all state and savings banks establishing branch offices. This being true, I am not at liberty through deference to former state officials to announce any other ruling of law except that which I believe to be the position taken by the highest courts.

Respectfully,
GEORGE COSSON,
Attorney General of Iowa.

July 12, 1911.
HON. JOHN L. BLEAKLY,
Auditor of State.

PHARMACY COMMISSION.—Salary of secretary of the commission should be fixed by the commissioners at not to exceed $1,800 per annum.

SIR:—I am in receipt of your communication directing my attention to section 2585 of the Supplement to the Code, 1907, and also Joint Resolution No. 8, acts of the Thirty-fourth General Assembly, and requesting an opinion as to whether the secretary and treasurer of the pharmacy commission is governed by the provisions of section 2585 of the Code Supplement relative to salary in view of the provision in Joint Resolution No. 8 which provides for one secretary at a salary of not to exceed fifteen hundred dollars for the office of the State Pharmacy Commission.

Senate Joint Resolution No. 8 makes provision for employes other than the regular employes expressly provided by statute. In view of this fact and considering that the statute provides that the Commissioners of Pharmacy shall elect a suitable person who shall be known as secretary and treasurer, and that in the Joint Resolution the person named is designated "Secretary of the Pharmacy Commission," I am of the opinion that the officer known

as secretary and treasurer is elected pursuant to the provisions of section 2585 Supplement to the Code, 1907, and that his salary is not limited by the provisions of Joint Resolution No. 8, and that therefore the Commissioners of Pharmacy may fix his salary at any amount not to exceed the amount named in said section, to-wit: eighteen hundred dollars per annum.

Respectfully,

GEORGE COSSON,
Attorney General of Iowa.

July 17, 1911.
HON. E. J. MOORE,
Secretary Pharmacy Commission.

APPROPRIATIONS.—The $3,000 appropriation for summer term fund provided by section 5, chapter 200, acts of the Thirty-fourth General Assembly, is payable July 1, 1911, and annually thereafter.

SIR:—Your letter of the 18th instant addressed to the attorney general requesting the opinion of this department upon the question of whether or not you would be justified in making immediate payment of the $3,000.00 appropriation for the summer term fund of the state teachers' college, provided by section 5 of chapter 200 of the acts of the Thirty-fourth General Assembly, in view of the fact that the time of payment is not specified in the act and in view of the fact that payment of said appropriation has been requested by the Board of Education, has been referred to me for reply.

In view of the fact that this appropriation is to be used for the same purposes and is in effect an increase of the annual appropriation of $8,000.00 for the same fund provided for by section 3 of chapter 212 of the acts of the Thirty-second General Assembly, and in view of the fact that said appropriation is payable "on the 1st day of July of each year on the order of the board of trustees" I am of the opinion that in the absence of a specific provision as to the time of payment in the act making the appropriation, it was the intent of the legislature that the same be paid at the time fixed for the payment of the other appropriation for

said fund, and hence, your inquiry should be answered in the affirmative.

Respectfully submitted,

C. A. ROBBINS,
Special Counsel.

July 18, 1911.

HON. JOHN L. BLEAKLY,
Auditor of State.

TEACHERS' CERTIFICATES.—When once registered need not be re-registered; a single registration is sufficient and extends throughout the life of the certificates.

SIR:—Your letter of the 17th instant addressed to the attorney general has been referred to me for reply.

You call attention to section 11 of chapter 130, acts of the Thirty-fourth General Assembly and propound the following question:

> "May the county superintendent fix any time limit as to the registration of certificates? In other words, may the county superintendents require certificates to be registered annually?"

Prior to the acts of the Thirty-fourth General Assembly Code Supplement section 2734-q provided:

> "No person shall teach in any public school in this state whose certificate has not been registered with the county superintendent of the county in which such school is located. *A registration fee of one dollar shall be charged for each year, or part of the year, for which the certificate or diploma is registered. All registration fees shall be paid into the county institute fund.*"

Under the law as it then stood it is clear that a registration fee of $1.00 could be charged for each year or part of a year for which the certificate is registered and it would indicate that same should be registered each year, but by section 12 of chapter 130 of the Thirty-fourth General Assembly, all of the underscored portion of the section above quoted was stricken out, with the intention, doubtless, to repeal the provisions requiring payment of registration fee. So that under the section as it now stands, no fee is provided for registration of certificates, hence, I am of the opin-

ion that a certificate once registered in a particular county need not be registered but would be effective in that county without further registration during the entire period for which it was issued. There would be no purpose in having same registered inasmuch as the registration fee is abolished.

The registration fee of $1.00 now provided for by section 2738 of the Code Supplement as now amended, is not a fee for registration of certificate but registration of person applying for certificate or desiring to teach and must be paid each year as follows:

First. Each applicant for certificate, $1.00.

Second. Each person desiring to teach in the county not having already paid under above provision for the year and in the county in which she desires to teach, $1.00. If this $1.00 is not paid at time of enrollment at the normal institute it should be paid when certificate is applied for and each year thereafter when the certificate-holder engages by contract to teach.

Respectfully submitted,

C. A. ROBBINS,
Special Counsel.

July 19, 1911.
HON. A. M. DEYOE,
Superintendent of Public Instruction.

INSURANCE.—Chapter 78, acts of the Thirty-fourth General Assembly, in terms authorizes companies operating under subdivision 5 of Code section 1709 to also operate under subdivision 2, if the company has a capital of $500,000; also authorizes subdivision 2 companies to operate under subdivision 5 if the company has $500,000 capital.

SIR:—I am in receipt of your communication of the 13th instant directing my attention to section 1709 of the Code, and especially to subdivisions 1, 2, 5 and 6 thereof; also to chapter 112 of the acts of the Thirty-third General Assembly, which provides:

> "No company organized by either of the methods provided in this chapter, or authorized to do business in this state, shall issue policies of insurance for more than *one* of the nine (10) purposes mentioned in the preceding section, or expose itself to loss on any one risk or hazard, to an amount exceeding ten

per cent of its paid-up capital, * * * *except* as in this section provided, as follows:''

And, also:

''If such company is possessed of a paid-up capital of $300,000 it may, in addition to insuring against the casualties specified in subdivision 5, insure against the casualties specified in subdivision 6, (steam boiler explosions) and also insure plate glass against breakage from accident.''

Also to chapter 78 of the acts of the Thirty-fourth General Assembly which provides:

''And if said company is possessed of $500,000 paid-up capital, it may in addition to insuring against the casualties specified in subdivision 5, insure against the casualties specified in subdivisions 2 (fidelity) and 6.''

You then propound the following questions:

''1. Does this extension of authority to a health and accident company operating under subdivision 5, to do a fidelity business under subdivision 2, apply wth equal force under the same conditions governing capital, by permitting a company now doing a fidelity business under subdivision 2 to extend *its* activities to the privileges accorded subdivision 5? In a word, is the law applicable to the companies of both divisions notwithstanding it is not so nominated in the act?

''2. If the application is not universal, if the law does not work both ways, then are not subdivision 2 companies discriminated against, and would the law be regarded as constitutional?

''Section 1721 of the Code provides that no company organized or operating for the purpose specified in chapter 4, Title IX., Code, of which section 1709 is a part, shall transact business in this state unless possessed of a paid-up capital of at least $200,000. It will be observed from the reading of chapter 112, above cited, that a fidelity (subdivision 2) company cannot expose itself to loss on any one risk (without reinsuring) for more than ten per cent of its paid-up capital. Therefore:

''3. As $200,000 is the minimum requirement upon which a company's admission to write business in Iowa is based,

then under the new law, (chapter 78, 34th G. A.) is a company now operating under subdivision 5 and having a paid-in capital of $500,000, and extends its jurisdiction to cover fidelity business, subdivision 2, as per new law, justified in writing a bond for say $50,000, ten per cent of its capital, or must the original $200,000 capital required to operate the health and accident business which they continue to operate be set out as necessary to cover the original purpose?

"4. In any event what is to hinder, under this new law which allows a company to write both branches, a company which has already entered the state under subdivision 5, with $200,000 capital, under provision of section 1721, from entering subdivision 2 by adding another $200,000 to their capital, $400,000 in all, chapter 78 laws 34th General Assembly notwithstanding?"

Bearing in mind the well established rule that statutes should be so construed as that when construed they would be constitutional rather than unconstitutional, I am of the opinion that your first question should be answered in the affirmative. In other words, a company already operating under subdivision 2 and having a capital of $500,000 should have the same right to engage in the business covered by both subdivisions 2 and 5 as is to be enjoyed by the company operating under subdivision 5. While the statute was doubtless framed in the interest of parties already operating under subdivision 5, yet, notwithstanding the statute, before they would be permitted to operate under subdivision 2, they should be required to so amend their articles of incorporation as to cover the business specified in subdivision 2, and, without any specific authority in the statute, a company operating under subdivision 2 and having the $500,000 paid up capital, might amend its articles so as to include the business covered by subdivision 5, and if this should be done, then we would have two companies, each of which would be authorized by its articles to transact the business covered by subdivisions 2 and 5 and each with a paid-up capital of $500,000. A construction of the statute that would permit the company which originally operated under subdivision 5 alone to operate under both, and to exclude the company which originally operated under subdivision 2 alone, from operating under both would, in my judgment, be an arbitrary and unwarranted discrimination against the company originally operating under sub-

division 2. A construction of this nature should not be placed upon the act unless this was clearly the intention of the legislature.

What has already been said dispenses with any further answer to your second question.

With reference to your third question I am inclined to the view that the company having a paid-up capital of $500,000 and having extended its business operations to both subdivisions 2 and 5, would be authorized to write a bond not exceeding 10 per cent of its capital, i. e., for $50,000, notwithstanding the fact that section 1721 of the Code provides that "no company * * * shall transact business in this state unless possessed of a paid-up capital of at least $200,000." The provision requiring an increase of the capital stock to $500,000 without requiring that $200,000 of that amount should be set apart to operate the health and accident business, and without specifying that the limit of 10 per cent of the remaining $300,000 should be the extent of liability to which the company might expose itself on any one risk, should be regarded as a waiver or implied repeal of such provisions as to companies having a $500,000 paid-up capital stock; and that the additional $100,000 required over and above the $200,000 required under subdivision 2 and over and above the $200,000 required under subdivision 5, is intended to furnish security sufficient to make compensation against the provision permitting the increased liability.

While under section 1721 a company doing business under subdivision 5 is only required to have a capital of $200,000 and while under the same section a company doing business under subdivision 2 is only required to have $200,000, and while a separate company might be organized to do business under each subdivision and have practically the same individuals as stockholders, yet if a single company undertakes to do the business specified under both subdivisions 2 and 5, it must do so pursuant to the statutes, and it must therefore have a paid-up capital of at least $500,000 as required by section 3 of chapter 112, acts of the Thirty-third General Assembly, as amended by chapter 78, acts of the Thirty-fourth General Assembly.

Respectfully,

GEORGE COSSON,
Attorney General of Iowa.

July 22, 1911.

HON. JOHN L. BLEAKLY,
Auditor of State.

APPROPRIATIONS.—The appropriation for the College for the Blind made by chapter 139 of the acts of the Thirty-fourth General Assembly is not repealed, but by chapter 141 of the acts of the Thirty-fourth General Assembly, the control of said fund is transferred from the Board of Control to the State Board of Education.

SIR:—I am in receipt of your communication of the 12th instant directing my attention to the apparent conflict between chapters 139 and 141 acts of the Thirty-fourth General Assembly, in this: that chapter 139 makes appropriation for the support of the college for the blind, and provides that "said sum shall be placed to the credit of the college on the certificate of the board of control of state institutions," while chapter 141 provides that the control and management of the college for the blind shall be transferred from the board of control of state institutions to the state board of education.

You request an opinion as to whether in view of the provisions of chapters 139 and 141, the fund appropriated in chapter 139 is subject to the control and management of the board of education.

The conflict is more apparent than real. Chapter 139 merely repealed and re-enacted section 2718-a Supplement to the Code, 1907. This act, while it provides that the funds should be placed to the credit of the college on the certificate of the board of control, went into effect on publication, the last publication being on April 20, 1911, while chapter 141 did not become effective until July 4, 1911, and contained the following provision:

> Section 3. "That all the powers heretofore granted to and exercised by the board of control over the college for the blind are hereby transferred to the state board of education and the state board of education is authorized and empowered to take charge of, manage and control said college for the blind.
>
> Section 4. "All funds now in the hands of the treasurer of state to the credit of the said college for the blind are transferred from the board of control to the state board of education."

Manifestly then there is no conflict in these two acts. The last pronouncement of the legislature will govern. The first act will

stand as valid in so far as the appropriation is concerned, but it will be modified and repealed in so far as the control of the funds is concerned, the same being by section 4 transferred from the board of control to the state board of education.

Respectfully,

GEORGE COSSON,
Attorney General of Iowa.

July 22, 1911.
HON. W. R. BOYD,
Chairman Finance Committee,
State Board of Education.

STATE INSTITUTIONS.—The state is not liable to an inmate of a state institution for loss occasioned by the negligence of an employe thereof.

GENTLEMEN:—I am in receipt of the following communication requesting my opinion upon the facts and question arising thereon as stated therein:

> "During the recent prevalence of small pox and scarlet fever in the School for the Deaf at Council Bluffs there was frequent fumigation of various rooms of the institution. In one of these rooms an explosion of the fumigating material occurred, due to the use of an excessive charge, and this resulted in the destruction of the wardrobe of two young ladies without any fault whatever on their part. While the negligence on the part of the officers employed in the institution was not of gross character, yet we are satisfied that the disaster might have been readily avoided.
>
> "We desire to know whether in this and similar cases, where we are satisfied that an officer, employe or other person has without fault on his part sustained loss due to carelessness or lack of due diligence on the part of an officer or employe of the state, we can authorize the payment of the amount of the loss."

It is fundamental that an action cannot be maintained against the State in its own courts without its consent. But even if the State could be sued, it is extremely doubtful if it would be liable in damages to third persons for the negligent acts of its employes,

agents and officers, under the general rules of law governing the liability of public corporations for their neglect of public duty.

By the weight of authority, no action can be maintained against quasi corporations, such as townships, school districts, counties and the like, by a private person, for their neglect of public duty, unless such right of action is expressly given by statute. There is no provision in our statute authorizing one who has suffered injury because of the negligent act of an employe, agent or officer of the State to bring an action against the State to recover therefor. Redress against the State in such cases must be voluntary and cannot be coerced, and I am unable to discover any authority vested in the Board of Control of State Institutions to audit and pay any damages or loss suffered by an employe or inmate of any of the institutions under its control, or by any other person, because of the negligent act of an employe, agent or officer of the State and, hence, the question you submit must be answered in the negative.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

July 24, 1911.

HON. BOARD OF CONTROL OF STATE INSTITUTIONS.

TOWNSHIPS.—The word "townships" as used in section 33, chapter 72, acts of the Thirty-fourth General Assembly refers to civil as distinguished from congressional townships. It is the duty of the auditor of state to issue the warrants referred to in said act.

SIR:—I am in receipt of your communication of the 10th inst. requesting my opinion as follows:

First, does the word "townships" as used in Section 33 of Chapter 72, Acts of the Thirty-fourth General Assembly, refer to civil or congressional townships?

Second, is it the duty of the Auditor of State to issue warrants to the several county treasurers of the State for the amounts found to be due the counties of the State under the apportionment provided for in said Section?

Section 33 of Chapter 72, Acts of the Thirty-fourth General Assembly, in so far as the same is material to a consideration of the questions submitted, reads as follows:

> "Eighty-five per centum of all moneys paid into the State treasury pursuant to the provisions of this Act shall be apportioned among the several counties of the State in the same ratio as the number of townships in the several counties bear to the total number of townships in the State, said apportionment to be made by the State Treasurer on the 1st day of April and the 1st day of August of each year. When such apportionment has been made, the State Treasurer shall forthwith remit to the county treasurer of the several counties of the State the amount of money so apportioned to the respective counties. * * *"

Our statute enjoins upon the Board of Supervisors of each county the duty to divide the same into townships, as convenience may require, to define the boundaries thereof and to make such changes and alterations in the number and boundaries thereof as it may deem proper, and the lines of the congressional townships need not be followed in their formation. A township, under our system of government, is a legal subdivision of the county for governmental purposes and such subdivisions are known in our law as civil townships and generally when the word "township" appears in a statute of this State, it refers to civil townships.

Under a former statute of this State, which provided that notice of the presentation of a petition for the establishment of a public highway should be posted in three public places in each township through which the proposed highway was to extend, the Supreme Court, in the case of *McCollister vs. Shuey, et al,* reported in the 24th Iowa, page 362, construed the word "township" to mean townships as duly organized and defined by the law of this State, and not the so-called congressional townships created by federal enactment. On principle, this case seems to be decisive of the question under consideration and this interpretation, moreover, is just and reasonable, violates no rule of statutory construction and gives effect to what was the evident intent of the legislature in enacting Section 33 of Chapter 72, Acts of the Thirty-fourth General Assembly.

I am clearly of the opinion, therefore, that the word "townships" as used in said Section refers to civil townships and not to what are commonly designated as congressional townships.

Answering your second question, I have to say that I would consider it to be the duty of the Auditor of State to issue the warrants referred to therein. Construing together Section 33 of Chapter 72, Acts of the Thirty-fourth General Assembly, and the provisions of our statute relating to the duties of the Treasurer of State and Auditor of State in respect of disbursing funds of the State and issuing warrants therefor, I can reach no other conclusion.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

July 26, 1911.
HON. W. W. MORROW,
Treasurer of State.

PARDONS.—A notice of an application for parole published in accordance with section 5626, Supplement to the Code, 1907, prior to the session of the Thirty-fourth General Assembly does not suffice to take the place of the notice required by said section as amended by chapter 186, acts of the Thirty-fourth General Assembly before the application is submitted to the board of parole.

SIR:—I am in receipt of your recent communication in which you request my opinion upon the following question:

If notice of an application for pardon was duly given and published by you as Governor in accordance with Section 5626 of the Supplement to the Code, 1907, for presentation thereof to the Thirty-fourth General Assembly for its advice thereon and said application was not presented to nor the advice of said assembly had thereon, will it be necessary to cause a new notice of said application to be published in accordance with said Section 5626 of the Supplement to the Code, 1907, as amended by Chapter 186, Acts of the Thirty-fourth General Assembly, before the same may be presented to the board of parole for its advice thereon?

Your question must be answered in the affirmative. Article 4, Section 16, of the Constitution of Iowa, confers upon the governor the power to grant pardons, after conviction, for all offenses except treason and cases of impeachment, subject to such regulations as may be provided by law. The only regulations or conditions imposed by the General Assembly upon the exercise of the pardoning power by the governor so conferred by the Constitution, prior to the regular session of the Thirty-fourth General Assembly, are

found in Section 5626 of the Supplement to the Code, 1907, which require that in cases of conviction for murder in the first degree no pardon should be granted until he had presented the matter to and obtained the advice of the General Assembly thereon, save that he might commute a sentence of death to that of imprisonment in the penitentiary for life, and that before presenting said matter to the General Assembly he should cause a notice containing the reasons assigned for granting the pardon to be published in certain newspapers at a certain time before the convening of the General Assembly to which the same was to be presented. The Thirty-fourth General Assembly, in chapter 186, amended Section 5626 of the Supplement to the Code, 1907, so as to require such applications for pardon to be presented to the Board of Parole instead of the General Assembly. In other respects said section remains unchanged.

It is plain that one of the purposes the Legislature had in view in providing that notice of such applications for pardon should be published in the manner specified before they were submitted to the General Assembly for its advice thereon was to afford not only publicity of the making of the application but of the reasons upon which the pardon was sought as well, and thus give opportunity to anyone desiring to do so to appear and resist the application.

The notice referred to in your question was published in pursuance of Section 5626 of the Supplement to the Code, 1907, and gave notice that the application referred to therein would be presented to the Thirty-fourth General Assembly. At that time there was no provision authorizing such applications for pardon to be presented to the Board of Parole and said notice conveyed no information or hint that said application would be presented to the Board of Parole for its consideration. The fact that Section 5626 of the Supplement to the Code was amended so as to authorize the submission of such applications to the Board of Parole for its advice thereon upon the same kind of notice that such applications were submitted upon to the General Assembly prior to the taking effect of said amendment by the Thirty-fourth General Assembly does not alter the case. It must be assumed that the application in question and notice thereof to the public were made in light of the provisions of the law as they existed at the time. It probably would have been competent for the Legislature to have provided that the notices that were published as to such applications that

were submitted or to be submitted to the Thirty-fourth General Assembly should suffice for the submission of the same applications to the Board of Parole. Or the Legislature might have provided that such applications might be presented to the Board of Parole without any notice whatever. But it did neither. The Thirty-fourth General Assembly so amended Section 5626 of the Supplement to the Code, 1907, that it provides that before presenting such applications for pardon to the Board of Parole the Governor shall cause a notice containing the reasons assigned for granting the pardon to be published in two newspapers of general circulation, one of which shall be published at the Capital and the other in the county where the conviction was had, once each week for four successive weeks, the last publication to be at least twenty days prior to the session of the Board of Parole to which the matter shall be presented. I think the only way this provision can be complied with is to have such notice published after the taking effect of the amendment to said Section by the Thirty-fourth General Assembly, which was February 17, 1911. That must have been the intention of the Legislature and unless the notice is so published the Board of Parole would not acquire jurisdiction to pass upon the application.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

July 31, 1911.
HON. B. F. CARROLL,
Governor of Iowa.

COLLEGE FOR BLIND.—Chapter 141 of the acts of the Thirty-fourth General Assembly conferred upon the board of education the same authority and control over the college for the blind at Vinton that the board has over other educational institutions.

DEAR SIR:—I am in receipt of your communication of the 21st instant requesting an opinion as to whether the board of education by virtue of the authority conferred upon it by chapter 141, acts of the Thirty-fourth General Assembly has power to govern the college for the blind as it governs other institutions under its control pursuant to the authority granted by chapter 170, acts of the Thirty-third General Assembly.

Section 2 of chapter 141, acts of the Thirty-fourth General Assembly provides that section 1 of chapter 170, acts of the Thirty-third General Assembly be amended by adding to the educational institutions under the control of the board of education, the college for the blind at Vinton.

Section 3 of said act provides that the powers heretofore granted to and exercised by the board of control over the college for the blind be transferred to the state board of education; and section 4 provides for the transferring of the funds from the board of control to the state board of education.

It seems to me clear, therefore, that it was the intention of the legislature to give the board of education the same authority and control over the college for the blind that it has over the other educational institutions specified in section 1 of chapter 170, acts of the Thirty-third General Assembly.

Respectfully,

GEORGE COSSON,
Attorney General of Iowa.

July 31, 1911.
HON. W. R. BOYD,
Chairman Finance Committee,
State Board of Education.

SOLDIERS.—The wife of a soldier who is dependent may be received into the Soldiers' Home at Marshalltown although the husband elects not to remain in the Home.

GENTLEMEN:—I am in receipt of your communication of the 1st instant advising that "a soldier and his wife married prior to the year 1885; were properly received in the Soldiers' Home at Marshalltown and remained therein for considerable time as members. The husband, without the consent of the wife, asked for the discharge of both, and both were discharged. When this fact came to the knowledge of the wife, she protested and asked that she be reinstated. It appears that she has not been provided with any home by the husband;" and requesting an opinion as to whether under the above facts she may now be reinstated; or in other words, as to whether the wife of a soldier, where both are qualified for membership, may be received into the Home or retained therein after admission if the husband be not a member of the Home.

Under the facts stated by you, that both husband and wife are qualified for membership, and that both were duly and legally admitted into the Home, I am of the opinion that she may now be received and reinstated considering that she is dependent and that her husband neglects or refuses to furnish her a home, notwithstanding that the husband prefers to remain away from the Home.

Section 2601 of the Code;
Section 2602, Supplement to the Code, 1907.

Respectfully,

GEORGE COSSON,
Attorney General of Iowa.

August 3, 1911.
HONORABLE BOARD OF CONTROL
OF STATE INSTITUTIONS.

SCHOOLS.—Chapter 131 acts of the Thirty-fourth General Assembly does not authorize the employment of assistants to outline subjects taken up in the high school normal course, nor can the appropriation therein provided be used for that purpose.

SIR:—I am in receipt of your communication of the 31st ult. in which you request my opinion as to whether you are authorized to employ such assistance as may be necessary in order to properly outline the necessary subjects that will be taken up in the high school normal course and to pay for the same out of the fund that was appropriated for the establishment of the high school normal course.

The act which provides for the establishment of normal courses in high schools is known as chapter 131, Laws of the Thirty-fourth General Assembly, and certain money is appropriated by said act for the purpose of carrying out its provisions. From a careful reading of the act it appears that the money appropriated may be used for certain specified purposes only, viz., the payment of certain sums to the high schools in which such normal courses are established and to defray the expense of inspection and supervision of instruction in such courses, and for the payment of the salary of an inspector of normal training in high schools and private and denominational schools and the necessary traveling expenses of such inspector while in the discharge of his duties.

Section 6 of said chapter provides that the Superintendent of Public Instruction shall prescribe the conditions of admission to the normal training classes, the course of instruction, the rules and regulations under which such instruction shall be given and the requirements for graduation subject to the provisions of said act, but I find no language in the act which would authorize you as Superintendent of Public Instruction to expend any portion of the money appropriated by said chapter for the purposes mentioned in your question and it must, therefore, be answered in the negative.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

August 17, 1911.
HON. A. M. DEYOE,
Superintendent of Public Instruction.

CITIES AND TOWNS.—Where the specified population is reached, a town or city should be changed to the next higher class as required by section 639 of the Code, but this section does not require a change to the next lower class by reason of any decrease in population.

SIR:—I am in receipt of your communication of the 18th instant with enclosure from Lundy, Wood & Baskerville, and requesting an opinion as to whether it is the duty of the executive council in publishing the notice required by section 639 of the Code to list in said statement all cities which by reason of decrease in population have been reduced below the number specified in section 638 of the Code of their respective classes, and advising that the executive council has issued the notice required by section 639 of the Code, but only included therein such cities and towns as were changed by reason of an increase in population.

It is conceded that all cities organized as cities of the second class and all cities organized as cities of the first class at and prior to the time the present Code became effective are not affected by reason of a subsequent decrease in population; but it is suggested that all such cities organized subsequently to the taking effect of the Code may be affected by a decrease in population. There is argument in support of this contention, but after a careful consideration of sections 638 and 639 of the Code, together with an exam-

ination of the original sections covering this question as found in the Revision of 1860 and the Code of 1873, I am of the opinion that it was the legislative intent to require of the executive council a publication of a list of only such cities and towns as are affected by reason of an increase in population.

Section 639 of the present Code provides that "within six months after the publication of any state or federal census, the executive council shall cause a statement and list of each city or town affected thereby * * * to be published in some newspaper at the seat of government, and in each city or town the class of which is changed *by an increase of population.*"

You will note that this section contains neither direction nor authority to the council to publish the list except in "each city or town the class of which is changed *by an increase of population.*" This language applying and referring only to increase evidently was used advisedly. Section 509 of the Code of 1873 provides that the governor shall cause a statement to be published in some newspaper in the city of Des Moines, and in some newspaper printed in each of the cities and incorporated towns "*the grade of which shall have been so advanced.*" There is nothing contained in said section with reference to the publication in case the population has decreased; and in section 1709 of the Revision of 1860 substantially the same language is used; that is to say, the governor is directed to publish a statement in a newspaper published in the city of Des Moines and in some newspaper printed in each of the cities and incorporated towns *the grade of which shall have been advanced.*

I am therefore of the opinion that it was not the legislative intent to require of the executive council a publication of the list of cities and towns in which the population has decreased below the number specified in section 638 of the Code.

Respectfully,

GEORGE COSSON,
Attorney General of Iowa.

August 22, 1911.

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

SCHOOLS.—School corporations may legally adopt or change text books without advertising for bids, but must advertise for bids when they purchase text books either for cash or exchange.

SIR:—In yours of the 13th inst. you request an opinion upon the following question:

> "Can the school board of cities, towns, or any school corporation, under sections 2824 to 2837 legally adopt text books, change text books and contract for the same without advertising for bids?"

The question as written really embraces three distinct matters, and might be subdivided as follows:

1st. Can the school corporation legally adopt text books, without advertising for bids?

2nd. Can it change text books without advertising for bids?

3rd. Can it contract for the same without advertising for bids?

Clearly, there is no reason or necessity for advertising for bids in connection with the adoption of text books, as provided in Code section 2824, nor would there be any reason or necessity for advertisement for bids, in order that a change in books may be made in accordance with the provisions of Code section 2829.

Where, however, it is sought to purchase books already adopted, whether they are to be paid for in cash or part cash and the remainder by the exchange of old books, as provided in Code section 2826, then and in each instance the contract of purchase or exchange should not be made until bids have been advertised for and made in accordance with Code section 2828.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

September 15, 1911.

HON. A. M. DEYOE,
Superintendent of Public Instruction.

PRISONERS.—The labor of female prisoners confined in the penitentiary cannot be leased, or required to be performed outside of the penitentiary and its appurtenances.

GENTLEMEN:—I have yours of July 13th in which you state:

> "We have an application to hire a prisoner now serving a term in the reformatory at Anamosa. The prisoner is a woman

> and the labor would be in the nature of domestic service in property belonging to the state and occupied by an officer of the prison. However, the labor would not be performed under the direction or in the presence of the officer, but under the direction merely of a member of his family."

and propound the following question:

> "We desire from you an opinion as to our right to contract for such service where the labor will not be performed under the supervision of a guard or other officer of the prison, and perhaps not on state property, and certainly not on or in property occupied by the state."

We are confronted in the outset with the proposition that in each instance the judgment of the court provides that the prisoner is to be confined in the penitentiary or reformatory, as the case may be.

Contracts for the hiring or leasing of prisoners have no vitality except by virtue of the statute authorizing them, and, generally speaking, they must be made by the public officials authorized by statute to act in that capacity, and all the statutory requirements must be substantially complied with, both as to the terms of the contract and the manner of performance.

9th Cyc., p. 879.

Looking to our own statute, we find that Code section 5654 provides for the working of prisoners by the sheriff of the county and "that such labor shall not be leased."

Code section 5707 when in force provided:

> "Able-bodied *male persons* sentenced to imprisonment in the penitentiary may be taken to that at Anamosa, there confined and worked upon the state stone quarries near said penitentiary, but the labor of such convicts shall not be leased."

Code Supplement, section 5707, which repealed the section last referred to contains substantially the same provision, with the further provision that the prisoners might be "there confined and worked in places and buildings owned or leased by the state outside of the penitentiary enclosures."

Code section 5702 provides:

> "The warden, with the consent of the executive council, shall make contracts for the labor of convicts *at the penitentiary* of

the state at *Ft. Madison* for such time, not exceeding ten years and such prices as said council may think for the best interests of the state."

By Code Supplement, section 2727-a9 the power of the governor and executive council with reference to penitentiaries was transferred to the board of control, yet the language requiring the work to be done "at the penitentiary" was not changed.

It will thus be seen that there is no statutory provision authorizing the leasing or hiring of the labor of female prisoners, nor is there any provision for working male prisoners at any other place than in the penitentiary enclosures and in the buildings owned or leased by the state outside of the penitentiary enclosures. It, therefore, follows that the right of the board to contract for the labor of such prisoners at any other place does not exist.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

September 15, 1911.
BOARD OF CONTROL OF
STATE INSTITUTIONS.

CALENDAR YEAR.—The words "in any one year" mean a calendar year.

GENTLEMEN:—I am in receipt of your communication of the 21st instant requesting an opinion as to the meaning of the words "in any one year" as found in section 2489-c Supplement to the Code, 1907.

Personally I am of the opinion that it was the legislative intent in using the phrase "in any one year" in our statute to mean a period of twelve months, unless there was something in the context clearly indicating that a fiscal or calendar year was intended; but our supreme court in the case of *Sawyer vs. Steinman,* 126 N. W., page 1123, held that the phrase "in any one year" meant the year of our Lord and therefore a calendar year. There was a dissenting opinion filed in this case. The majority opinion, however, having announced this rule of law, it becomes my duty to follow the ruling of the supreme court and I therefore in answer to your

inquiry hold that the words "in any one year" mean a calendar year.

Respectfully submitted.

GEORGE COSSON,
Attorney General of Iowa.

September 22, 1911.

HONORABLE EXECUTIVE COUNCIL
OF THE STATE OF IOWA.

PRINTING.—(1) May be done on state account at the reformatory; (2) If procured for other institutions, it should be paid for from appropriations for state institutions; (3) If for the use of the board of control in its administrative capacity, it should be paid for under sections 2727-3 and 4 Code Supplement, 1907; (4) If procured from the executive council, it should be paid under sections 165 and 168 of the Code.

GENTLEMEN.—I am in receipt of your communication of some time ago submitting the following questions:

Does printing for the board of control as an office and of a character used and required to enable it to carry on the affairs of the several institutions under said board of control come under articles authorized to be procured by the board of control under section 1 of chapter 43, acts of the Twenty-eighth General Assembly (section 2727-a47 Code Supplement, 1907); or does the provision of section 7 of chapter 192, acts of the Thirty-second General Assembly (section 5718-a11) authorize the board of control to procure printing for the purpose above named at the printing office conducted in connection with the reformatory at Anamosa; in other words, do the words "on state account" in the second line of that section include the necessary printing above referred to for the office of the board of control.

If such printing is authorized to be procured from the institutions should it be paid for out of the appropriation authorized under section 2727-a47 Supplement to the Code, 1907; or should it be paid out of the appropriation under section 165 of the Code.

It will be well to first determine whether the words "on state account" in section 5718-a11 Supplement to the Code include the necessary printing above referred to.

It is clear that said section is sufficiently comprehensive to include such printing and that there is nothing therein to in any manner prohibit the inmates of the reformatory from engaging in the necessary printing above referred to. The section was passed for the purpose of encouraging employment on state account and limiting contract labor and therefore throws some light upon the remaining questions to be answered; that is to say, it being the legislative intent to eliminate contract labor at the reformatory and establish in lieu thereof work and industry on state account, it follows that since lines of occupation which can profitably be pursued at the reformatory are limited, other sections of the Code authorizing work and labor at the reformatory ought not to receive a construction which would be subversive of the legislative intent as expressed in section 5718-a11.

With these principles in mind we shall consider the first branch of your question which amounts to this: Does section 2727-a47 empowering said board to direct the purchase of materials or any articles of supply for any institution subject to its management from any other institution under its control at the reasonable market value, authorize said board to secure printing from the reformatory at Anamosa for other institutions under its control and for the use of the board of control in its government and control of other institutions?

Undoubtedly this section permits the board of control to secure from the reformatory printing necessary for the use and management of other institutions, and I think this would also include the Bulletin published at the reformatory.

A more difficult question, however, is presented if we consider the authority of the board to secure printing to be used exclusively by the board as such in its office at the statehouse as a part of its general administrative duties. In the light, however, of the legislative intent in the enactment of section 5718-a11 before referred to, and considering that it has been the continuous custom of the board for a period of thirteen years last past with the knowledge and acquiescence of each successive general assembly and the various state departments, and considering further that the board of control has requested appropriations and received the same from two general assemblies for the purpose of enlarging the printing plant at Anamosa and at the industrial school at Eldora to the end that the printing hereinbefore referred to could be properly and capably handled at such institutions, and that such institutions

are now equipped to do such work and even additional work, I am of the opinion that the executive council should not now attempt by a change of construction to prevent the continuance of the long established principle, but that the board should be permitted to continue as before to secure printing at the reformatory at Anamosa and the industrial school at Eldora.

A construction of law adopted and acquiesced in by executive and administrative officers for a long period of time is entitled to very great weight, especially if this is done with the knowledge and apparent sanction of successive legislatures.

Our supreme court in the case of *Prime v. McCarthy*, 92 Iowa, 576 to 578, under facts very similar to the facts in this case, announce this doctrine; and see also the case of *Banker's Mutual Casualty Company vs. First National Bank*, 131 Iowa, 456; and the case of *United States vs. Hill*, 120 U. S. at 183.

If the printing is secured from the reformatory for other institutions, the same should be paid for from the funds appropriated by the general assembly for the use of state institutions under the board of control; if, however, the printing is secured from the reformatory for the use of the board of control in its administrative capacities, the authority and appropriation therefor is found in section 2727-a3 and 2727-a4 Supplement to the Code, 1907; if, however, the board secures for its use in its administrative capacity printing from the executive council, it should be furnished under the provisions of sections 165 and 168 Supplement to the Code, 1907.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

September 29, 1911.
HONORABLE EXECUTIVE COUNCIL
OF THE STATE OF IOWA.

APPROPRIATIONS.—No part of the biennial appropriation provided for by section 2502 of the Supplement to the Code, 1907, can be used to pay expenses incurred during a previous biennial period.

GENTLEMEN:—I am in receipt of your communication of the 21st instant in which you state in substance that the expenses of the geological survey during the biennial period ending July, 1911,

exceeded the $16,000 appropriation by $248.87, and call attention to the $8,000 annual appropriation made by section 2502 of the Supplement to the Code, 1907, and further state:

> "It appears that the expenses are allowed to aggregate an amount in excess of this annual appropriation and are disposed of by paying the excess after the beginning of the next biennial period out of the appropriation for the succeeding year. I am directed by the executive council to ask you for a written opinion as to whether the laws of Iowa permit a department to make expenditures or indebtedness in excess of the amount of the appropriation and permit of the paying of the excess out of annual appropriations for succeeding periods."

Section 2502 of the Code Supplement, 1907, provides:

> "And the *entire expenses* provided for under this chapter, aside from the above exception relating to office supplies, * * * *shall not exceed the sum of eight thousand dollars per annum.*"

An examination of the Code, the Code Supplement and the various acts of the general assembly discloses the fact that there is considerable diversity of phraseology in appropriation acts, hence I deem it inadvisable to attempt in this opinion to state a general rule of law applicable to all appropriations, but content myself with the specific question presented.

In view of the language found in section 2502 of the Code Supplement above referred to, a part of which is set out herein, I am of the opinion that none of the funds appropriated for the biennial period commencing July 1, 1911, is available to pay any expenses incurred previous to the beginning of said biennial period.

This holding finds support in the opinions given by former Attorney General Remley. See Attorney General's Report, 1898, page 210; and Attorney General's Report, 1902, page 61.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

September 30, 1911.
HONORABLE EXECUTIVE COUNCIL
OF THE STATE OF IOWA.

FISH AND GAME WARDEN.—Section 7, chapter 154, acts of the Thirty-third General Assembly authorizes the fish and game warden to employ necessary clerical assistants as a part of his office expenses.

GENTLEMEN:—I am in receipt of your communication of the 30th ultimo requesting an opinion as to whether the fish and game warden would be justified in employing the necessary clerical assistance to perform the duties of his office under the provisions of section 7, chapter 154, acts of the Thirty-third General Assembly.

You state that:

> "There are certain duties of the warden which he cannot personally attend to it appears and for which he needs one or more assistants. Such labor is not in every case entirely within the office but it is labor which would require the warden's personal attention or the attention of a competent office person. The larger part of the labor, however, is strictly office work."

Section 7 of said act provides:

> "The state fish and game protection fund shall be used for the payment of the expenditures made necessary under the provisions of section 2539 of the Code, for the traveling, contingent and office expenses of the warden; for deputy wardens' salaries and expenses; for the protection and propagation of fish and game; for gathering and distributing fish in the public waters of the state; for the care and preservation of the lakes of the state; *for the expenditures made necessary under the operation or enforcement of this statute or any other laws enacted affecting the fish and game service;* and shall be paid out only on verified vouchers approved by the executive council."

In view of the provisions of this section, I am of the opinion that the fish and game warden is justified in employing clerical assistants which may properly be said to be a part of the office expenses of the warden, or if it is an expenditure *made necessary under the operation or enforcement of this statute* (section 7, chapter 154 aforesaid) or any other laws enacted affecting the fish and game service.

Respectfully,

GEORGE COSSON,
Attorney General of Iowa.

November 6, 1911.

HONORABLE EXECUTIVE COUNCIL
OF THE STATE OF IOWA.

INDETERMINATE SENTENCE.—A judge has no authority to direct a warden to release a prisoner after he has served any portion of his time.

DEAR SIR:—I am in receipt of a communication from your predecessor, Warden Barr, advising that a prisoner from Mahaska county was sentenced by Judge B. W. Preston for a term not to exceed ten years for the crime of breaking and entering; that Judge Preston also made an order (citing chapter 184 acts of the Thirty-fourth General Assembly) directing the warden to release said prisoner on parole after having served six months at the reformatory at Anamosa.

The warden requested an opinion as to whether authority to release a prisoner, after he is placed in the reformatory or penitentiary, can be exercised by a judge of the district court, or whether the power is lodged with the board of parole and the governor. A copy of the commitment is attached to the request for the opinion showing that one Tony Vilelo was duly indicted for breaking and entering; that on the 30th day of October, 1911, he was tried and convicted for the crime of breaking and entering, and that on the 30th day of October, 1911, he was duly sentenced to be confined in the reformatory at Anamosa for a term not exceeding ten years from the date of sentence at hard labor, as appears of record in District Court Record No. 30.

It also appears that the court made the following order:

> "It appearing to the court that defendant is over sixteen years of age and under twenty-five and that he has never been convicted of a felony before, and on account of his youth and the showing made, it is ordered and made a part of this judgment and the record that after the said defendant shall have been confined at Anamosa six months that the balance of his sentence be suspended as provided in chapter 184 of the laws of the Thirty-fourth General Assembly and at the end of said six months the defendant shall be placed in custody and under the care and guardianship of Fred Trico, of Oskaloosa, Iowa, during good behavior of said defendant who will make reports as provided in said chapter."

It appears then from the letter of the warden, together with the copy of the judgment of the court and the order entered by said court that Tony Vilelo was duly indicted, duly tried and sentenced

for a term not exceeding ten years for breaking and entering as by law provided, and that the court then made an order directing that he be released at the end of six months from the reformatory at Anamosa and placed in the custody and care of Fred Trico, of Oskaloosa, Iowa, during good behavior.

The only question, therefore, to be determined is the validity of the order made by Judge Preston in which he attempts to direct the release of the prisoner Vilelo at the end of six months.

Section 5718-a13 Supplement to the Code, 1907, provides:

> "Whenever any person over sixteen years of age is convicted of a felony, committed subsequent to July 4, 1907, except treason or murder, the court imposing a sentence of confinement in the penitentiary shall not fix the limit or duration of the same, but the term of such imprisonment shall not exceed the maximum term provided by law for the crime of which the prisoner was convicted."

After the law was passed, some courts in the state did not take kindly to the law and regardless of its provisions continued to impose definite sentences. The supreme court, however, in a number of cases has expressly held that: "While the district court has the power under the law to imprison in the penitentiary by the terms of this statute (section 5718-a13) it is denied the power to fix the term of such imprisonment and that such term is the maximum term provided for the punishment of the crime."

State vs. Duff, 144 Iowa, 142;
State vs. Perkins, 143 Iowa, 60.

In the case of *State vs. Davenport,* 149 Iowa, 294. wherein the lower court fixed a definite sentence, to-wit: the maximum punishment for the offense, the supreme court said:

> "While the sentence was for a definite period contrary to the indeterminate sentence law, this will not interfere with the punishment as prescribed therein."

And in response to the argument that the sentence was excessive, the court held that if there were mitigating circumstances, these were matters of consideration for the board of parole, and not a matter for the court to determine.

Judge Preston, however, relies upon chapter 184 acts of the Thirty-fourth General Assembly. It is true that the legislature in the

passage of chapter 184 has authorized district judges to suspend the sentence of a person over the age of sixteen and under the age of twenty-five years, if the defendant has not previously been convicted of a felony; but the legislature did not in said act either directly or indirectly authorize the district court to commit a prisoner to the reformatory or the penitentiary and at the same time direct the time said prisoner should be released.

The power to suspend a sentence is quite different than the power given to the governor and the board of parole to determine the time a prisoner should be released from the penitenitary or reformatory. This may not be known in advance but should be determined largely by the conduct of the prisoner while in confinement. Indeed, if the order of the court should stand, it would place in the hands of the district judges of the state the absolute power to nullify the indeterminate sentence law in so far as it applies to all persons over the age of sixteen years and under the age of twenty-five, and as all prison statistics show that more persons are sentenced to prison who are between fifteen and twenty-five years of age than at any other age, the major part of the authority and duty of the parole board would be abrogated.

It was certainly not the intention of the general assembly in the passage of this act to repeal by implication the indeterminate sentence law or to render it nugatory by transferring the authority vested in the board of parole to the district judges of the state.

I am, therefore, clearly of the opinion that that part of the court's order in which he assumes to confine the prisoner Vilelo for a definite term, and also that part of the order in which he directs that the prisoner Vilelo be released at the end of six months is null and void, and that the court was wholly without authority to make the same. It follows from this that the prisoner Vilelo should be received and restrained by you in the same manner as though no such order had been made.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

January 27, 1912.

MR. C. C. MCCLAUGHREY,
Warden of the Reformatory,
Anamosa, Iowa.

COUNTY SUPERINTENDENT.—A special primary state certificate issued under section 2630-b of the Code Supplement does not render the holder eligible to the office of county superintendent under Code section 2734-b. To be eligible, the party must have a first grade certificate, a state certificate or a life diploma, as provided by the last section. The state superintendent cannot obtain at the expense of the county superintendent a special report unless the report is one required by law to be made by the county superintendent. Code Supplement, section 2622.

SIR:—In yours of the 26th ultimo you propound the following question:

> "Will a special primary state certificate, issued under section 2630-b, Supplement, enable a candidate to qualify for the office of county superintendent under section 2734-b, Supplement?"

The first section to which you refer provides:

> "The educational board of examiners may issue a *special certificate* to any teacher of *music, drawing, penmanship* or other special branches, or to any primary teacher, of sufficient experience who shall pass such examination as the board may require in the branches and methods pertaining thereto for which certificate is sought. Such certificate shall be designated by the name of the branch and shall not be valid for any other department or branch."

The last section referred to in your inquiry reads:

> "The county superintendent, who may be of either sex, shall be the holder of a *first grade certificate* as provided for in this act, or of a *state certificate* or a life diploma."

It would seem to be clear that the special certificate mentioned in the first section quoted is in no sense either a first-grade certificate or a state certificate, and hence, this inquiry should be answered in the negative.

Your second question is:

> "Can the Superintendent of Public Instruction send a representative to secure a *special report,* which he deems necessary, requested of a county superintendent, but which the county superintendent neglects or refuses to give? If so, must the

county superintendent defray the expenses of such representative?''

Code Supplement, section 2622, provides:

> ''When any county superintendent fails to make any report as *required of him by law,* the superintendent of public instruction may appoint some suitable person to perform such duties and fix reasonable compensation therefor, which shall be paid by the delinquent county superintendent.''

Hence, it will be observed that the county superintendent would not be required to pay the expense of procuring a special report which was deemed necessary by the state superintendent, but only such ''report as required of him by law.''

If the delinquent report was one required by law, then the expenses of the representative in procuring the same should be paid by the delinquent county superintendent.

Respectfully yours,

GEORGE COSSON,

Attorney General of Iowa.

April 27, 1912.

HON. A. M. DEYOE,

Superintendent of Public Instruction.

SCHOOLS.—A high school is one where the higher branches of a common school education are taught. There is no legal objection to a high school course being taught in a rural school consisting of one room and conducted by one teacher in addition to the regular grades. The objection, if any, is one of impracticability rather than illegality.

SIR:—In your letter of March 26th you call attention to chapter 146 of the Acts of the Thirty-fourth General Assembly and then propound the following question:

> ''Can a rural district maintaining a one-room school, conducted by one teacher, instructing the first eight grades, establish in addition thereto a high school course of one or more years, and thereby become legally exempt from the payment of tuition in high schools of pupils residing in that district who have completed eighth grade?''

The chapter referred to evidently contemplates that school corporations may exist in rural districts where a four year high school course or less may be offered.

Subdivision 3 of Code section 2749, provides:

> "The voters assembled at the annual meeting shall have power: * * *
>
> "3. To determine upon added branches that shall be taught, but instruction in all branches except foreign languages shall be in English."

A high school may be defined as a school where the higher branches of a common school education are taught.

Whitlock vs. The State, 47 N. W. 284.

By the term "high school" is meant a public school in which higher branches of learning are taught than in the common schools.

Attorney General vs. Butler, 123 Mass. 304.

A high school is one designed for scholars who have passed through the primary grades and are supposed to be able to read, write and spell correctly, and to be familiar with other branches which need not be noticed.

State vs. School District, 48 N. W. 393.

Hence, it would seem that no legal objection exists against a high school course of one or more years being established in any school corporation. The inquiry is evidently propounded on the theory that it would be impossible, or at least impracticable, for one teacher conducting a school in a one-room building to establish a high school course in addition to instructing the first eight grades. The objection, however, is one of impracticability rather than illegality.

Respectfully yours,

GEORGE COSSON,
Attorney General of Iowa.

April 27, 1912.

HON. A. M. DEYOE,
Superintendent of Public Instruction.

COMPENSATION.—A member of the Iowa-Vicksburg Park Commission who acts as secretary is not entitled to extra compensation for such services where the statute under which he acts provides: "Said commissioners shall be paid the necessary expenses incurred by them in the performance of the duties aforesaid, but shall receive no other compensation." Chapter 196, Twenty-ninth General Assembly.

SIR:—You submit to me the action of the Iowa-Vicksburg Park Monument Commission in which by resolution it was provided that H. H. Rood, a member of said commission, who acted as secretary and did a large part of the work of the commission, should be allowed the sum of five hundred dollars as compensation for his extra labors.

You request an opinion as to whether the auditor of state may legally draw a warrant for this amount.

Chapter 196, Acts of the Twenty-ninth General Assembly, provides for the creation of the commission and the appointment by the governor of nine persons to serve thereon. After specifying the duties, it is further provided:

> "Said commissioners shall be paid the necessary expenses incurred by them in the performance of the duties aforesaid, but shall receive no other compensation."

And section 4 of the act provides:

> "The auditor of state is hereby authorized and directed to draw warrants upon the treasury upon presentation to him of proper vouchers certified by said commission from time to time and approved by the governor in payment *of the expenses of the commissioners, and in payment of said monuments and tablets,*" etc.

In view of the fact that you are not authorized to draw warrants for any other purpose than the expenses of the commissioners and the payment of the monuments and tablets, and considering that section 3 expressly provides that the commissioners shall receive no other compensation, I am of the opinion that you would not be legally authorized to draw warrant for the amount in question, notwithstanding the unusual amount of labors performed by Mr. Rood in the faithful discharge of his duties.

It is probable that the commission could have selected a secretary outside of their members and paid a reasonable compensa-

tion therefor under the language of the act, but undoubtedly it was the legislative direction that no member of the commission should receive any compensation for services performed.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

May 3, 1912.

HON. JOHN L. BLEAKLY,
Auditor of State.

PRIMARY ELECTIONS.—Candidates for nomination for state senators and representatives whose names are not printed on the primary ballot may be nominated at the primary election by receiving 35 per cent of the votes cast for that office, even though they receive less than 10 per cent of the whole number of votes cast for governor on the party ticket with which he affiliates, as required for certain offices by Code Supplement section 1087-a19, as amended by chapter 59, Thirty-fourth General Assembly.

SIR:—I am in receipt of your communication of the 27th ultimo directing my attention to the provisions of section 1087-a19, and specifically that part of said section which reads as follows:

> "And the candidate or candidates of each political party for each office to be filled by the voters of any sub-division of a county having received the highest number of votes shall be duly and legally nominated as the candidate of his party for such office. Provided, however, that no candidate whose name is not printed on the official primary ballot, who receives less than five per centum of the votes cast in such sub-division for governor on the party ticket with which he affiliates, at the last general election, nor less than five votes shall be declared to have been nominated to any such office;"

Also the provisions of section 1087-a20 of the primary law, which provides that the county board of canvassers shall also make a separate abstract of the canvass as to the offices of electors of the president and vice-president, all state officers, representative in congress and senators and representatives in the general assembly; and also that part of section 1087-a22 which provides for the canvass of votes by the state board, which section includes the canvass of the votes for the offices of members of the general assembly,

and requesting an opinion as to whether or not that part of section 1087-a19, which provides that no candidate whose name is not printed on the official ballot, who receives less than ten per centum of the whole number of votes cast in the county for governor on the party ticket with which he affiliates, at the last general election, shall be declared to have been nominated to any such office, applies to the canvass and certificate made and issued by the said board with reference to the office of representative in the general assembly, and also the office of state senator in the event that the senatorial district is composed of one county only.

Your question briefly stated is: May a person be placed in nomination at the primary for the office of representative in the general assembly, in the event that he receives the highest number of votes, and not less than thirty-five per centum of the whole number of votes cast by his party for such office, without having also received at least ten per centum of the whole number of votes cast at the last general election in the county for governor on the party ticket with which he affiliates?

As to whether the provision requiring ten per cent of the whole number of votes cast in the county for governor on the party ticket applies to representatives in the general assembly, and state senators in which the senatorial district is composed of one county only, depends upon the construction to be placed upon the phrase found in section 1087-a19, "elective county office," it being provided in said section that "such canvass and certificate (the canvass and certificate of the county board of supervisors) shall be final as to all candidates for nomination to any *elective county office,*" etc.; and also the meaning to be given to the words "to be filled by the voters of the county," found in said section, said words being a part of the following provision: "And the candidate or candidates of each political party for each office, to be filled by the voters of the county having received the highest number of votes, and not less than thirty-five per centum of all the votes cast by the party for such office, shall be duly and legally nominated as the candidate of his party for such office," this latter paragraph immediately preceding the paragraph providing that "no candidate whose name is not printed on the official ballot, who receives less than ten per centum of the whole number of votes," etc., "shall be declared to have been nominated to any such office."

That the term "elective county office" as used in section 1087-a19 does not include a representative in the general assembly, or a

senator in the event the senatorial district is composed of one county only, is so clear as to be beyond the pale of legitimate discussion.

Courts have generally held that a county officer is one whose duties apply only to the county in which he is located and for which he is elected or appointed. See the term "county officer," Words and Phrases, Vol. 2, page 1663.

While a member of the general assembly is elected by the voters of a county, he legislates for the entire state, moreover the legislature itself in the passage of the primary law made it clear that it did not intend to include members of the general assembly as elective county officers, for the reason that in section 1087-a19 it is provided that "the canvass and certificate of the board of supervisors shall be final as to all candidates for nomination to *any elective county* office," etc., and expressly provides in the very next section that "the county board of canvassers shall make a separate abstract of the canvass as to electors of the president and vice-president, state officers, representative in congress and *senators and representatives in the general assembly,*" and section 1087-a22 provides that the canvass and certificate made by the state canvassing board, which is composed of the executive council, shall be final as to the candidates for the offices designated in section 1087-a20; in other words, by the provisions of sections 1087-a20 and a22, the legislature expressly provided that the office of member of the general assembly should not be considered an "elective county office," but it is urged that a member of the general assembly, and a senator in which the senatorial district is composed of one county, is an office "to be filled by the voters of the county." Undoubtedly this is true, but these particular words cannot be detached not only from the other sections and provisions of the primary law, but from the section in which they are found, and considered independently. To do so would of course include a member of the general assembly, and it would also include a state senator in the event the senatorial district was composed of one county, but it would not include a senatorial district composed of more than one county.

To give the words then their literal meaning would be to assume that the general assembly would require at least ten per centum of the party vote to nominate in the event that no name had been

printed on the primary ballot in a senatorial district composed of one county, which in a county like Polk might require from seven hundred to a thousand votes, and yet in a senatorial district composed of more than one county, a single vote might be sufficient to nominate a person to the office of state senator.

It would be preposterous to assume that the legislature intended such extreme inconsistency. Not only that, but in section 1087-a22, which section governs the action of the executive council in making its canvass, finding and certificate, the only condition there found is that a person must receive the highest number of votes, and he must also receive not less than thirty-five per centum of all votes cast for such office. It is evident then that if the general assembly intended that a member of the general assembly should receive at least ten per centum of the whole number of votes cast at the last general election for governor, in addition to the other requirements, that it would have been so stated in section 1087-a22.

My conclusion is then that the words "to be filled by the voters of the county" were used in a careless way and interchangeably and synonymous with the phrase an "elective county office," and that therefore the requirement that the candidate must receive at least ten per centum of the whole number of votes cast in the county for governor on the party ticket with which the party affiliates refers only to the offices concerning which the action of the county board of supervisors is final in the making of the canvass and the issuing of the certificate of nomination, and as the county board of supervisors has no authority to make any finding or issue any certificate for candidates for representatives in the general assembly, senators and district and state offices, they are not governed by the provisions of section 1087-a19, but are required only to secure the highest number of votes cast for the office, and not less than thirty-five per centum of the votes cast by such party for such office as provided in section 1087-a22.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

May 4, 1912.
HON. W. C. HAYWARD,
Secretary of State.

INSANE.—Chapter 129, Acts of the Thirty-fourth General Assembly, construed and held to apply to inmates of state institutions, other than penal institutions, regardless of the time when they were committed.

GENTLEMEN:—I am in receipt of your communication of the 15th instant in which you state that you are called upon to aid in the administration of the law as found in chapter 129, Acts of the Thirty-fourth General Assembly, and you submit five specific questions looking to the construction of said act, questions two and three being as follows:

> "2. Do the provisions of that act apply to inmates of hospitals for insane who are not idiotic, feeble-minded or imbeciles, or to put it in another form, are persons who have been normal and are now simply suffering from some form of insanity, included in the provisions of the act?"
>
> "3. Can the provisions of that act be enforced against inmates of the institutions of the state other than the penal institutions who were committed to said institutions prior to the taking effect of same?"

Section 1 of said act provides in part:

> "That it shall be the duty of the managing officer of each public institution in the state, intrusted with the custody or care of criminals, idiots, feeble-minded, imbeciles, drunkards, drug-fiends, epileptics and syphilitics, and they are hereby authorized and directed to annually, or oftener, examine into the mental or physical condition of the inmates of such institutions, with a view of determining whether it is improper or inadvisable to allow any of such inmates to procreate; and to annually, or oftener, call into consultation the members of the state board of parole. The members of such board and the managing officer and the surgical superintendent of such institution shall judge of such matters."

The reply then to this question will depend upon whether or not persons confined in an insane hospital, who have previously been normal but who are suffering from some form of insanity which may not be permanent in its nature, may properly be embraced or included in the words "idiots," "feeble-minded" and "imbeciles," the other designations clearly not referring to an insane person.

Code section 2298 provides that the term "idiot" is restricted to persons foolish from birth, supposed to be naturally without mind. No idiot shall be admitted to a hospital.

The word "insane" or "insane person" is generic and would embrace the several classes mentioned, but the words "idiot," "feeble-minded" and "imbecile" are specific terms and do not include an insane person; that is to say, these terms refer to a loss of mind either from birth, old age or disease, but permanent in nature, and therefore should not in a statute of this kind receive an enlarged construction so as to embrace persons who may be temporarily insane.

Replying to question three, I am of the opinion that the act in question applies to inmates of state institutions other than penal institutions regardless of the time they were committed.

The state and federal constitutions prohibit *ex post facto* laws but our supreme court in the case of *Polk County vs. Hierb,* 37 Iowa, page 361, and the case of *State vs. Squires,* 26 Iowa, page 341; and the supreme court of the United States in the case of *Calder vs. Bull,* 3 U. S., page 385, held that an *ex post facto* law refers only to criminal laws. The act in question is not a criminal law. The only crimes in Iowa are such as are made so by statute. The act in question is nothing more nor less than a health measure passed pursuant to the police powers of the state and is similar in nature to all health, quarantine and sanitary measures.

As there was not sufficient time for considering other questions, the same were not set out in this opinion.

Yours very truly,

GEORGE COSSON,
Attorney General of Iowa.

May 18, 1912.

IOWA BOARD OF PAROLE,
Des Moines, Iowa.

OSTEOPATHS.—Applicants holding a diploma from a legally incorporated school of Osteopathy which is recognized as of good standing by the Iowa Osteopathic Association, has complied with Section 2583-a, Supplement to the Code of 1907.

Dear Sir: I am in receipt of your communication of the 28th inst. requesting an opinion as to whether the State Board of Medi-

cal Examiners should grant to all persons holding a diploma from a legally incorporated school of Osteopathy, recognized as of good standing by the Iowa Osteopathic Association at the time the diploma was granted but not recognized by the Iowa Osteopathic Association at the time the applicant in question commenced his course of study at such school of Osteopathy, assuming that the term of such school and the branches taught were in compliance with Section 2583-a, Supplement to the Code of 1907.

Section 2583-a of the Code Supplement provides:

> "Any person holding a diploma from a legally incorporated school of Osteopathy *recognized as of good standing by the Iowa Osteopathic Association*, and wherein the course of study comprises a term of at least twenty months, or four terms of five months each in actual attendance at such school, and which shall include instruction in the following branches, to-wit: anatomy," etc.

The Board of Medical Examiners then must require as conditions precedent that a person (a) should have pursued a course of study comprising a term of twenty months, or four terms of five months each, (b) that he shall have instruction in the branches named in Section 2583-a of the Code Supplement, (c) that he should be the holder of a diploma from a legally incorporated school of Osteopathy, and (d) that this school must be recognized as of good standing by the Iowa Osteopathic Association.

If it be admitted that the school in question furnished instruction in the branches named and for the length of time prescribed in said Section 2583-a, and that said school is a legally incorporated school of Osteopathy and in addition thereto that it is now recognized, and was recognized as of good standing by the Iowa Osteopathic Association at the time the diplomas were granted, then the conditions of the statute are complied with, unless we read into the statute something which is not now expressed, namely, that the school must have been recognized as of good standing at the time applicant commenced to pursue his course of study at such school. It may be that this is a necessary requirement but the necessity of the case cannot operate to import either a meaning or language into the section which is not there.

My conclusion is therefore that all of the conditions of the section will be met if the applicant is the holder of a diploma from a legally incorporated school of Osteopathy which was recognized

as of good standing by the Iowa Osteopathic Association at the time the diploma was granted and that the school of Osteopathy in question had a course of study and instruction in compliance with Section 2583-a of Supplement to Code, 1907. A contrary interpretation would require that the school in question should have been recognized from the time the holder of the diploma commenced to pursue his course of study in said school. As before stated this may be a proper requirement but in view of the language used the remedy is with the General Assembly.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

May 31, 1912.

DR. G. H. SUMNER,
Secretary State Board of Health.

PHYSICIANS.—An Osteopath is a physician within the meaning of the term "attending physician" used in Code Supplement, Section 2575-a12. See Code section 2579; see also *Bandel vs. City of N. Y.*, 21 L. R. A., (N. S.,) 49; and contra *Nelson vs. State Board*, 50 L. R. A. 389.

Sir: I am in receipt of your communication of the 14th ultimo requesting an opinion as to whether an osteopath may be considered an attending physician as the term is used in section 2575-a12, Supplement to the Code, 1907, which provides that a person in charge of a funeral shall cause a certificate of death to be filled out, with statement of cause of death by attending physician, or in his absence, by the health officer or coroner.

In determining this question we must not be confused as to the usual and proper meaning of the term "physician." The only question for consideration is the sense in which the term is used in the Iowa statute.

Section 2579 of the Code in defining who shall be deemed a practitioner provides:

> "Any person shall be held as practicing medicine, surgery or obstetrics, *or to be a physician,* within the meaning of this chapter, who shall publicly profess to be a physician, surgeon

or obstetrician, and assume the duties, or who shall make a practice of prescribing or of prescribing and furnishing medicine for the sick, *or who shall publicly profess to cure or heal;"* etc.

Under the Iowa law then there are two kinds of physicians, a real physician, a person who understands medicine and surgery, and then there is included within the class all others *who profess to cure or heal.*

It goes without saying that an osteopath professes to cure and heal. The only remaining question is whether the practice of osteopathy is included within the chapter in question, viz.: Chapter 17 of title 12 of the Code.

The practice of osteopathy, the rules and regulations governing the same are to be found in sections 2583-a to 2583-f, Supplement to the Code, 1907, and is known as chapter 17-A, and is nothing more nor less than an amendment to chapter 17 of the Code and forms a part of said chapter and must necessarily therefore be considered as a part of said chapter in construing the word "practitioner" as the same is defined in section 2579 of the Code.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

June 14, 1912.

DR. G. H. SUMNER,
Secretary State Board of Health.

VACANCY—JUDGESHIP—FILLED BY APPOINTMENT—LENGTH OF TERM—METHOD OF NOMINATING CANDIDATES FOR JUDGE.—Where a vacancy occurs in the office of judge of the district court and the vacancy is filled by appointment at the hands of the governor, the appointee will hold only until the next general election. (Constitution of Iowa, Article XI, Section 6.) Judges of the district court may be nominated by petition in accordance with the provisions of code section 1100; 2d, by a bar association or convention of attorneys, as authorized by code section 1106; and 3d, by conventions held by the respective political parties independent of the primary law.

SIR: In yours of the 8th instant you request the opinion of this department upon the following questions:

"First, When will the term of office of Honorable W. A. Springer, appointed to succeed Judge Fellows on the district bench of the Thirteenth Judicial District, expire, and when should his successor be elected?

"Second, What is the manner or method of making a nomination if it shall be determined that a successor is to be elected at the election in November of this year?

"Third, What is the duty of the governor with reference to issuing of a proclamation, whether a special proclamation should be issued, and whether this office should be included in the list of offices to be filled at the coming general election and covered by the same proclamation?"

Your letter fails to state, and I do not know the exact date of Judge Springer's appointment and the following opinion is based upon the assumption that said appointment was made early in the present month.

"The judges of the supreme and district courts *shall be chosen at the general election;* and the term of office of each judge shall commence on the first day of January next after his election."

Section 11, article 5, Constitution of Iowa.

"Vacancies in the office of * * * judges of courts of record * * * shall be filled * * * by the governor, except when some other method is specifically provided, and he shall issue the proper commission to the appointee."

Code section 1272.

"An officer filling a vacancy in an office which is filled by election of the people shall continue to hold until the next regular election *at which such vacancy can be filled,* and until a successor is elected and qualified. Appointments to all other offices, made under this chapter, shall continue for the remainder of the term of each office, and until a successor is appointed and qualified; except that, when the office is one to be filled by the general assembly, the appointee shall hold only until the general assembly elects."

Code section 1276.

On first reading one might think from the language of code section 1276, above cited, "the next regular election *at which such*

vacancy can be filled," that the legislature had in mind instances which might occur where the vacancy could not be filled at the next general election, and that the words underscored above were intended to qualify the words "next regular election," and this was my first impression upon reading the section.

The constitution, however, provides:

> "In all cases of election to fill vacancies in office occurring before the expiration of a full term, the person so elected shall hold for the residue of the unexpired term; and *all persons appointed* to fill vacancies in office, shall hold until the next general election, and until their successors are elected and qualified."
>
> Article 11, section 6, Constitution of Iowa.

See also,

Dyer vs. Bagwell, 54 Iowa, 487,

Boone County vs. Jones, 58 Iowa, 273, and

State vs. Cathburn, 63 Iowa, 659.

Hence the language found in code section 1276, "at which time the vacancy can be filled" must be deemed mere surplusage, for if not it would be in conflict with the constitutional provision above cited and void. Hence I am of the opinion that an appointment made by the governor prior to the next general election that the appointee would only hold the office by virtue of such appointment until the next general election, that is, the general election to be held in the year 1912, and that a successor should be elected at such general election and should qualify and would be entitled to the office immediately upon his election and qualification, and that the right of the appointee to hold such office would be thereby and at that time terminated.

With reference to your second question I will say that in my judgment there are three legal methods of placing in nomination candidates for the office of judge to fill the vacancy in question and they are,

First, By petition in accordance with the provisions of code section 1100;

Second, By a bar association, or convention of attorneys of the district as authorized by code supplement section 1106, and

Third, By conventions held by the respective political parties independently of the primary law and in accordance with practices of the respective parties prior to the enactment of the primary law.

It should probably be stated in this connection that if the second method above pointed out is followed the nomination would be nonpartisan, and the name of the candidate so nominated could not appear, by virtue of such nomination alone, upon the ticket of either of the regular political parties.

However, if county conventions should be held in the several counties of the district, composed of the delegates selected at the primary election in 1912, and delegates to a judicial convention selected at such county conventions, and a judicial convention then held, composed of such delegates so selected and a nomination made for such office, if such conventions are held and such nomination made in accordance with a previous call of the judicial committee and such nomination is acquiesced in, nothing herein should be construed as holding an election of a candidate so nominated to be illegal.

Respectfully submitted,

GEORGE COSSON,
Attorney General.

August 19, 1912.

HONORABLE B. F. CARROLL,
Governor of the State of Iowa.

INEBRIATE HOSPITALS—BRICK PLANT—SECTION 14, CHAPTER 179, ACTS OF THE THIRTY-FIRST GENERAL ASSEMBLY CONSTRUED—THE WORDS "SHOP BUILDING" CONSTRUED—SUPPORT FUND.—The five thousand dollar appropriation made by section 14, chapter 179, acts of the thirty-first general assembly for shop building and machinery for the inebriate hospital at Knoxville may be used for the construction of a brick plant. The support fund provided for by code supplement section 2310-a16 may be used for the same purpose if the ultimate purpose of the construction of said plant is the maintenance and support of the patients in said hospital.

SIRS: In yours of the 21st ult. you call attention to the desire of your board to establish a brick-making plant at the state hospital for inebriates at Knoxville in order to furnish employment for the

patients, which plant would consist of a building or shop costing approximately $1,000.00 and the remainder of the cost would be for machinery. You also call attention to the $5,000.00 appropriation "for a shop building and machinery" made by section 14 of chapter 179 of the acts of the thirty-first general assembly, and then state, "We desire to know whether this sum may be used lawfully for installing the industry stated."

> "We also wish to know if a part of the support fund of the institution may be used properly for the purpose of installation, either to defray the entire cost or part of it."

Your first question requires the determination of the meaning of the words "shop building" as used in the section making the appropriation.

Webster defines the word "shop" as follows:

> 1st. "A building in which goods, wares, drugs, etc., are sold at retail."
>
> 2d. "A building in which mechanics work, and where they keep their manufactures for sale."
>
> *State vs. O'Connell*, 26 Ind., 266.

In England the word "shop" is understood to be a structure or room in which goods are kept and sold at retail. In this country, however, such a building is usually called a store, and universally so in the western and Pacific Coast cities where a shop is understood to be a building in which an artisan carries on his business, or laborers, workmen, or mechanics, by the use of tools or machinery manufacture, alter or repair articles of trade. The sale of goods so manufactured is not necessarily an ingredient in determining what constitutes a shop.

State vs. Hanlon, 48 Pac., 353; 32 Oreg., 95.

Commonly the word "shop" means a building inside of which a mechanic carries on his work.

C., R. I. & P. R. Co. vs. D. & R. G. Co., 45 Fed., 304.

It includes *any* building or room used for carrying on any trade or business adapted to be carried on in a building or room. It is a word of various significance and store and work-shop are both included in it.

Boston Loan Co. vs. City of Boston, 137 Mass., 332.

The fact that a part of the appropriation is for machinery and the further fact that it is for the benefit of a state institution which is not engaged generally in the sale of merchandise would tend strongly to show that the shop building provided for in the appropriation is to be a workshop rather than a store. In section 2 of chapter 179 it is further provided,

> "Any balance remaining of any appropriation after the object for which it was made has been accomplished may be expended in the discretion of the board of control of state institutions for any purpose connected with the institution for which the appropriation was made, except appropriations for land, which shall not be used for any other purpose."

In view of the authorities cited and of the language of the appropriation and the provisions of section 2, above quoted, I am inclined to think that your first question should be answered in the affirmative.

With reference to your second question I understand the support fund referred to therein to be the fund provided for by code supplement section 2310-a16, which provides:

> "The board of control of state institutions shall fix the per capita monthly allowance which may be charged by said hospital for the care, treatment and maintenance of each patient therein, which shall not exceed the sum of twenty dollars per capita per month * * * provided, however, that so much of the monthly sum as exceeds fifteen dollars shall be paid by the state from any money in the state treasury not otherwise appropriated, and shall not be charged to any county or person, provided that until the average number of patients in said hospital shall exceed 200 per month it shall be credited by the auditor of state and the treasurer of state with not to exceed the sum of four thousand dollars per month, which shall be drawn as above provided."

In view of the fact that the erection and equipment of buildings and shops, if the products are to be sold and the proceeds go into this fund, would tend to reduce the expense of the care, treatment and maintenance of patients, and the money so invested in such buildings and equipment would be, at least indirectly expended in such maintenance, there would seem to be no legal objection to using a portion of said fund for such purpose provided there is a

surplus in such fund not required in the support and maintenance of patients of said hospital. If, however, the proceeds of the shop and building will not be used to defray the expense of the care, treatment and maintenance of the patients, then I am of the opinion that no part of said fund may be used for the erection of the buildings and shops in question.

The question, therefore, resolves itself into a question of fact as to whether or not the ultimate purpose of the expenditure of the money is the care, maintenance and support of the patients in said hospital. If so, as before stated, the same may be used if there is sufficient remaining to meet all current expenses; but, if not, no part of the same should be used for this purpose.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

September 3, 1912.
HONORABLE BOARD OF CONTROL
of State Institutions.

PROVIDENTIAL CONTINGENT FUND.—Unavoidable cause defined. Code section 170 applied.

SIR: Responding to your oral request for an opinion as to whether or not section 170 of the code furnishes authority for the executive council to use any portion of its contingent fund with which to pay the expenses of restoring or repairing a pump or other machinery used in connection with a deep well located on the ground of one of the state institutions, when such pump or other machinery is out of repair or detached and lost in said well thereby rendering the same useless, will say that section 170 of the code to which you refer provides:

> "The executive council is authorized to draw warrants upon any contingent fund set apart for its use * * * for repairing, rebuilding or restoring any state property injured or destroyed by fire, storm, theft or unavoidable cause, and for no other purpose whatever."

An unavoidable accident is one which occurs without any apparent cause; at least without fault attributable to any one.

Clyde vs. Richmond, 59 Fed., 394.

By common acceptation "unavoidable accident" means a casualty which happens when all the means which common prudence suggests have been used to prevent it.

Hodgson vs. Dexter, 12 Fed. Cas., 283.

Where a lease of factory property contained a provision that in case the buildings or any part thereof should be destroyed or damaged by "unavoidable casualty" so that the same shall be rendered unfit for use and occupation, then the rent should be abated, etc., the giving away of two steam boilers on the premises while in use on low pressure and with moderate fire, so that they had to be replaced by others, which caused a closing down of the factory should be construed to be an "unavoidable casualty" within the meaning of such words as used in the condition in the lease.

Phillips vs. Sun Dyeing Co., 10 R. I., 458, at 461.

Hence it would seem that the question which you propound is largely one of fact and if the pump or machinery was injured, destroyed or lost by unavoidable cause then it would seem to be reasonably clear that this section would furnish authority for the payment of the expenses of such repairs from the contingent fund.

The purpose of this section was to furnish means for making such repairs in order that the state might not be deprived of the use of the property during the time intervening between its injury and a session of the legislature when an appropriation might be made for its repair. With this thought in mind, and in view of the authorities herein cited, I am inclined to think that the words "unavoidable cause" should receive a liberal construction and should not be confined to such causes as are usually designated as acts of God or *vis major,* and that if by reasonable care, prudence and foresight the injury could not have been avoided, it would be by unavoidable cause within the meaning of this section, and that the expense of making such repair might under this section be paid from the contingent fund.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

September 14, 1912.

HON. B. F. CARROLL,
Governor of Iowa.

ELEVATORS—APPROPRIATION FOR IN STATE HOUSE.—Chapter 192, acts of the thirty-fourth general assembly making appropriation for the installation of electric elevators in the north and south wings of the capitol construed and held to authorize the installation of such elevators where the present hydraulic elevators are located.

GENTLEMEN: I am in receipt of your communication of the 16th instant requesting an opinion as to whether or not the executive council may use the appropriation found in section 38, chapter 192, acts of the thirty-fourth general assembly, for the purpose of installing electric elevators in the north and south wings of the capitol at the present location of the hydraulic elevators.

The paragraph in question found in section 38 of chapter 192, acts of the thirty-fourth general assembly, provides that there is hereby appropriated the sum of $5,000 for "installing electric elevators in the north and south wings of the capitol, connecting the second and third floors, making rooms in the third story as easy of access as those in the second story."

In order that the money may be lawfully used by the executive council, the electric elevators should be installed in the north and south wings of the capitol. These elevators should connect the second and third floors of the capitol so as to make the third story as easily accessible as the second story. The present hydraulic elevators are located respectively in the north and south wings; they connect the second and third floors making the third floor easily accessible.

If I am correct in stating the facts, this appropriation may be used for the purpose of installing electric elevators to replace the present hydraulic elevators.

Yours very truly,

GEORGE COSSON,

Attorney General of Iowa.

November 23, 1912.

HONORABLE EXECUTIVE COUNCIL,

Statehouse.

SCHEDULE H.

SALOON KEEPER'S LICENSE—REVOCATION—RENEWAL.—The town council by a majority vote may revoke the license of a saloon keeper under code supplement section 2451. Under section 2, chapter 142, acts of the thirty-third general assembly the council would have a right to renew the license to assignee or grantee of party holding the same.

January 4, 1911.

MR. JNO. HEATER,
Coon Rapids, Iowa.

DEAR SIR: In reply to yours of December 16th will say that under the authority of section 2451 code supplement, your town council by a majority vote could direct the revocation of the saloon keeper's license to which you refer whether he sold out the business to a new party or otherwise.

Under section 2 of chapter 142 of the acts of the thirty-third general assembly the council, however, would have the right to renew the license to the new party, he being an assignee or grantee of the party holding the license.

While there might be some reason why the license should not be revoked where the business is purchased in good faith, yet the council would incur no liability in revoking it as one of your councilmen seems to think, and the question of whether the license should or should not be revoked is one for the determination of the council in the absence of a cause for revocation.

Yours very truly,

C. A. ROBBINS,
Special Counsel.

SALOON CONSENT PETITION—PUBLISHING OF NAMES THEREON—CANVASS OF PETITION.—There is no legal objection to the publishing of names appearing on a consent petition. Upon filing of same it becomes a public record subject to inspection by all. A newspaper cannot be required to publish such names. Ten days' notice by publishing is required before the board can canvass the names on such petition.

January 4, 1911.

MR. FRED A. SMITH,
Oxford, Iowa.

DEAR SIR: This will acknowledge receipt of your favor of the 7th ultimo submitting certain questions in relation to consent petition. The same has not received attention on account of the press of business.

The attorney general is not authorized to give an official opinion in this matter, but in an unofficial way I may say that from such investigation of the law bearing on the question as I have had an opportunity to make, there is no legal objection to the publishing of the names appearing upon a consent petition duly filed with the proper officer and you would incur no liability in so doing. Upon the filing of such a petition it becomes a public record subject to inspection by all persons for proper purposes.

I do not believe that a newspaper can be compelled to publish the names appearing upon a consent petition such as you mention, whether offered as advertising matter and at the usual rates charged and received by the paper or otherwise.

As stated above, upon the filing of the consent petition with the county auditor it becomes a public record and subject to inspection by those who desire to oppose it. The law further requires that at least ten days' notice be given by publishing the same in newspapers before the board can commence the canvassing of the petition, and you would have at least this time in which to secure withdrawals.

Yours very truly,

N. J. LEE,
Special Counsel.

PUBLIC FUNDS—INTEREST ON.—County funds may be deposited in certain banks at 2 per cent interest when authorized and required by the board of supervisors. Towns may deposit their funds in the same manner but are not required to do so.

January 4, 1911.

MR. BLINN N. SMITH,
Coon Rapids, Iowa.

DEAR SIR: Replying to yours of the 31st ultimo will say that the only statute authorizing the loan of public funds is contained

in chapter 91 of the acts of the thirty-third general assembly, but this only authorizes the county treasurer, with the approval of the board of supervisors, to deposit the funds in certain banks at the rate of at least two per cent interest on ninety per cent of the daily balances. As this provision does not apply to towns, there would be no way by which you could compel the banks to allow interest; however, where the interest is collected for the benefit of the town, there would be no legal objection to the town receiving such interest as the bank might be willing to pay within the legal rate.

Yours very truly,

C. A. ROBBINS,
Special Counsel.

PATENT MEDICINES—SALE OF.—One may sell patent medicines from his fixed place of business without being required to pay an itinerant vendor's license.

January 4, 1911.

MR. M. F. MCDERMOTT,
Wilton, Iowa.

DEAR SIR: Replying to your inquiry will say that if the patent medicines are sold only from your fixed place of business, you would not be required to pay an itinerant vendor's license, even though you deliver the medicines in connection with other commodities after the same had been purchased at your fixed place of business.

Yours truly,

C. A. ROBBINS,
Special Counsel.

DRAINAGE WARRANTS—INTEREST.—Under code supplement section 483 interest may be paid on drainage warrants.

January 5, 1911.

HON. HERBERT E. HADLEY,
Nevada, Iowa.

DEAR SIR: I beg to acknowledge receipt of your favor of the 3d instant referring again to your request of the 6th ultimo for an opinion from this office as to the right of the county treasurer to

pay interest on drainage warrants presented to him and by him stamped unpaid for want of money, the board of supervisors having prior to the issuance of such warrants directed the county treasurer to pay interest thereon at the rate of six per centum per annum.

From such investigaton of the law bearing upon the question submitted as I have had the opportunity to make, I will say that the county treasurer under the circumstances recited would be authorized to allow interest on such warrants at the rate of five per centum per annum. I do not think the resolution of the board of supervisors is any authority for the treasurer to pay interest on drainage warrants. But under section 483, supplement to the code, 1907, he would be authorized to pay interest on warrants properly drawn at the rate mentioned.

Where drainage improvement certificates or drainage bonds are issued in connection with the establishment and construction of the drainage district, the board of supervisors is authorized to fix the rate of interest upon such securities at a rate not exceeding six per cent per annum, but this does not extend to drainage warrants, and if the holder of such a warrant as you describe is entitled to interest at all thereon, it is by virtue of the section of the supplement to the code cited. That section being general in its terms and the county treasurer being the custodian of all drainage funds and which are paid out by him upon warrants issued by the county auditor, and drainage taxes being collected in the same manner as ordinary county taxes, it would seem to follow that no different rule would apply to such warrants in respect to the payment of interest than applies to other warrants drawn upon the county treasurer.

Yours very truly,

N. J. LEE,
Special Counsel.

DRUGGISTS—SALE OF PROPRIETARY MEDICINES.—A druggist without a permit to sell intoxicating liquors may sell proprietary preparations containing alcohol where they are not sold as a beverage and not capable of use as such.

January 5, 1911.

RETAIL DRUGGISTS' ASSOCIATION,
Burlington, Iowa.

GENTLEMEN: Upon Mr. Byers' retirement from the attorney general's office, I find your letter addressed to him of date November 8th apparently unanswered. While it would be impossible to give detailed information pertaining to the matters about which you inquire, yet the personal views of the writer are as follows:

A druggist holding no permit would have the right to sell the proprietary preparations referred to so long as they were not sold for use as a beverage and provided that they are not capable of such use. While many of these preparations have a legitimate use and may be legally sold for medical purposes, yet it often occurs that the sales to certain individuals are of such frequency that the seller knows, or would be held in law to know, that the purchaser was making use of them for the purpose of a beverage. In cases of this kind, the courts have held that the parties making such sales would be guilty of violating the prohibitory liquor laws of the state, and that when the article is sold or used as a beverage it matters not how slight the percentage of alcohol contained therein. In view of this situation and in view of the further fact that the attorney general ought not to be called upon to give advice in matters where it may hereafter be his duty to appear, I would suggest that your association should consult an attorney of its own selection and be guided by his advice.

Yours truly,

C. A. ROBBINS,
Special Counsel.

SALOON CONSENT PETITION—SIGNATURE BY MARK INVALID.—Where the signature on a saloon consent petition is by mark and no witness, same shall not be counted.

January 6, 1911.

MR. FRANK H. WEBSTER,
Maquoketa, Iowa.

MY DEAR SIR: Referring again to your letter of the 22d ultimo in which you inquire if a signature upon a saloon petition made by the elector making his mark, and his name written and witnessed

by the solicitor or canvasser for names on such petition, is a compliance with the law.

The attorney general is not authorized to render an official opinion in such a matter, but the question involving as it does a matter of public concern I may say in an unofficial and personal way that this precise question has never been passed upon by our supreme court, but in the case of *Scott v. Naacke,* 122 N. W. R., 824, the supreme court used the following language:

> "Where the signature is by mark we think it should be witnessed and unless so witnessed should not be counted."

It does not appear from the reading of the whole section that this identical question was in the case, but the language quoted is an indication of the attitude of the court. This question is being raised in connection with the canvassing of saloon petitions in various counties of the state, and undoubtedly will be presented to the court before long, and for that reason a more unqualified opinion will not be rendered by this department.

Yours very truly,

N. J. LEE,
Special Counsel.

SALOON CONSENT PETITION—CANVASS AT REGULAR MEETING—AFTER TEN CLEAR DAYS' NOTICE—ADJOURNMENT OF BOARD.—Code section 2450 requires all statements of general consent filed with the county auditor to be published and canvassed by the board of supervisors at a regular meeting after at least ten clear days' notice of the intention to canvass has been published by the county auditor in official papers of the county. Board of supervisors may adjourn the time for hearing if they are not ready to canvass names at the time fixed in the notice.

January 6, 1911.

MR. C. C. WATKINS,
Cedar Rapids, Iowa.

MY DEAR WATKINS: Your request for an opinion came while I was out of the city and after I returned I have been compelled to argue a case in federal court at Red Oak and one in the district court at Storm Lake, and hence it was impossible for me to sooner reply to your inquiry.

You request to be advised as to whether it is necessary for the auditor to consult with the board of supervisors with respect to fixing the date for the canvassing of the petition of general consent to sell intoxicating liquors.

Section 2450 reads in part that "All statements of general consent, filed with the county auditor as provided in the two preceding sections, shall be publicly canvassed by the board of supervisors, at a regular meeting, at least ten clear days' notice of such intended canvass having been previously published by the county auditor in the official newspapers of the county," etc.

I think it is customary for the auditor to consult with the board of supervisors before fixing the date for the canvassing but if he neglects to do this and gives the ten clear days' notice of such intended canvass, I am inclined to think that the notice would be legal even though he gave the shortest notice possible in order to embarrass the temperance people. There is no reason why the board of supervisors could not adjourn the time for hearing if they did not care to commence the canvass at the time fixed in the notice. If this is true then the notice given by the auditor would not control the action of the board, nor do I now see where it would prejudice any of the parties concerned.

Yours very truly,

GEORGE COSSON,

Attorney General of Iowa.

SALOON CONSENT PETITIONS.—The names on a saloon consent petition should correspond to the names on the poll books and may not be compared with the registration books.

January 7, 1911.

MR. FRANK HOLLINGSWORTH,
Boone, Iowa.

DEAR SIR: I am in receipt of your communication of the 4th instant enclosing copy of statement of consent used in the circulation of the consent petition in your county, and requesting to be advised as to whether the same is sufficient.

Second. May persons who sign the general consent petition and thereafter remove from the county or die prior to the canvassing of the same, be counted by the board of supervisors.

Third. As to whether or not a name should be counted if it corresponds with the name on the poll books regardless of the name which appears on the registration books.

It has been the custom of the department to decline to give definite answers to questions which are unusually close for the reason that it might tend to foreclose the question being determined in court, and therefore without passing definitely upon your first question, I wish to suggest to you the fact that it is doubtful whether or not it is legal to circulate a petition of consent which is to take effect at some future date. If the saloon people may circulate a consent petition which is to take effect more than six months from the time the same is circulated, and nearly six months from the time the canvass is made, why may they not circulate a consent petition once each year until they have the authority to sell intoxicating liquors for the next twenty or twenty-five years? I am of the opinion that a consent petition becomes effective from the date it is canvassed; that however could not be true in the instant case because the petition itself expressly states that it shall not become effective until the first of July, 1911.

With reference to your second question, there is very strong argument in support of the position that a man must be in the position of consenting to the sale of liquors at the time his name is canvassed by the board of supervisors, hence I am of the opinion that death operates to cancel his consent.

Third. The statute provides that the name must correspond with the name on the poll book and I think this is the controlling factor. In the event however that a fraudulent registration has been made or in case fraud was shown, in any event a different rule would prevail, but in the absence of fraud I think the controlling question is whether the name corresponds with the name as shown on the books.

Yours very truly,

GEORGE COSSON,
Attorney General of Iowa.

COLLATERAL INHERITANCE TAX.—Property passing by will to a brother-in-law is subject to the collateral inheritance tax.

January 9, 1911.

LIBBEY & STRUTHERS,
55 Cedar Street, New York.

GENTLEMEN: This will acknowledge receipt of your favor of the 5th instant referring again to your inquiry of the 29th ultimo as to the application of the collateral inheritance law of this state in a case you suppose.

Replying further to your inquiry I beg to advise you that all property within the jurisdiction of this state, and any interest therein, whether belonging to the inhabitants of this state or not, and whether tangible or intangible, which shall pass by will or by the statutes of inheritance of this or any other state, or by deed, grant, sale, or gift made or intended to take effect in possession or in enjoyment after the death of the grantor or donor, to any person in trust or otherwise, other than to or for the use of the father, mother, husband, wife, lineal descendant, adopted child, the lineal descendant of an adopted child of a decedent, step-child, or the lineal descendant of a step-child of a decedent, or to or for certain charitable and other institutions and societies, excepted from the operation of the law, within this state, is subject to a tax of five per centum of its value, above the sum of one thousand dollars, after the payment of all debts, for the use of the state.

In the case you suppose, if half of the property in this state were to go to the brother-in-law of the decedent the whole of such portion would be subject to the tax mentioned, and I understand from your last letter that the portion going to the brother-in-law would be twenty-five thousand dollars, and the tax would be computed upon that amount unless the brother-in-law was one of the excepted persons mentioned above.

I think you are in error in your conclusion that only $6,250.00 would be subject to the tax.

Yours very truly,

N. J. LEE,
Special Counsel.

FREE RAILWAY PASSES.—The law prohibits the giving of free transportation to the families of the general officers of any common carrier unless it is the chief and principal occupation of such officers to render services to such common carriers.

January 9, 1911.

MR. J. O. SCHULZE,
Pres. and G. M., Iowa City Electric Ry. Co.,
Iowa City, Iowa.

DEAR SIR: Referring again to your letter of the 13th ultimo asking if free transportation or free passes may be issued by a street car company to the families of its general officers, the rendering of service to such common carriers not being the chief and principal occupation of such officers, I beg to advise you that the attorney general is not authorized by law to render an official opinion in a case of this kind, but in an unofficial way I may say that from such investigation of the law as I have had the opportunity to make, I would construe the anti pass law to prohibit the giving of free transportation in any form to the families of the general officers of any common carrier of persons unless it is the chief and principal occupation of such officers to render service to such common carriers.

Yours very truly,
N. J. LEE,
Special Counsel.

HUNTER'S LICENSE—EXHIBIT FOR INSPECTION—WHO SIGNS—EVIDENCE OF GUILT.—A hunter's license shall be signed by the licensee in ink and he must exhibit the license to any person for inspection on demand. A failure to display license when demanded is prima facie evidence of a violation of chapter 154 of the acts of the thirty-third general assembly. A hunter having a license should carry the same with him but mere neglect or oversight to carry the same is proper to be shown in mitigation of the punishment.

January 10, 1911.

MR. JOHN P. HERTERT,
County Attorney,
Harlan, Iowa.

DEAR SIR: I am in receipt of your communication of the 7th instant advising that four persons were arrested under the game law

in your county for not having licenses as by law required; that three of these persons pleaded guilty and were duly fined; that the fourth had a license at home but did not have the same on his person when arrested and when demand was made that the same be exhibited to the game warden. You say that the matter has been suspended, pending my construction of the law.

Section 9 of chapter 154, acts of the thirty-third general assembly, provides in part that "The license shall be signed by the licensee in ink, and shall entitle the person to whom issued to hunt, * * * but it shall not entitle the person to whom issued, to hunt, pursue or kill wild animals, birds or game in this state *without being prepared at the time of so doing to exhibit it for inspection and permitting it, on demand, to be examined by any person.*"

Section 11 provides in part that "a failure to display a license when it is demanded by any person, shall be, except in the case of the owner or tenant, prima facie evidence of a violation of the provisions of this act."

In view of these provisions I think it is clearly the intention of the general assembly to require persons hunting to carry with them the license so that the same may be exhibited to the game warden at any time. If, however, the owner had the license and it was a mere neglect or oversight to carry the same on his person, I am of the opinion that this should be considered in mitigation or in fixing the punishment, and that the person offending should receive the minimum fine.

As to whether or not the justice of the peace should suspend sentence is a question which I think should be determined by the justice himself from all the circumstances. In other words, I do not feel that I ought to say just what punishment should be fixed, but I do recommend that the oversight should be taken into consideration in fixing the punishment, and that if a fine is given, that the minimum fine be imposed.

Yours very truly,

GEORGE COSSON,

Attorney General of Iowa.

HIGHWAYS—TRAVELERS PASSING EACH OTHER THEREON.—One traveling upon the public highway is not required to give any portion of the road to another traveler going in the same direction who desires to pass.

January 10, 1911.

MR. WALTER W. KITSON,
Manning, Iowa.

DEAR SIR: I am in receipt of your communication of the 6th instant requesting to be advised as to the duty of a person to give the right of way in case another is coming from behind.

The attorney general is not authorized to give official opinions to private parties. As a personal courtesy to you however I may in an unofficial way call your attention to the case of *Elenz v. Conrad,* 123 Iowa, 522. The doctrine of this case is that one is not required to give half the road to another coming in the same direction. It is the custom however for the team ahead to give half the road in the event that there is not room for the rear team to pass. This is done as a matter of common courtesy.

You also ask what is meant by the initiative and referendum. In certain states of the Union the law provides that before certain matters of general interest may become a law, it must first be referred to the people at the general election and if a majority vote for the same it will then become a law.

Yours very truly,
GEORGE COSSON,
Attorney General of Iowa.

SCHOOLS—TUITION.—The fact that a bank has to pay taxes upon the shares of stock owned by a father does not entitle him to a deduction from the amount of tuition he would otherwise be required to pay to an independent district where his child attended school and of which district he was not a resident.

January 10, 1911.

MR. WALTER P. JENSEN,
Pocahontas, Iowa.

DEAR SIR: Your letter of the 30th of November last has not received attention before now on account of the large volume of business in the office requiring attention. You submit the following proposition and request the opinion of the attorney general thereon:

"In the case in mind a father has been sending his children to school in an independent district of which he is not a resident. He does, however, own stock in the First National Bank located in that district. The question in issue is this, can he claim a deduction in tuition because of taxes paid by the banking corporation of which he is a member and in which he owns stock?"

This office is not authorized by law to render an official opinion in a case of this kind, but in an unofficial and personal way I may say that it is my opinion that the father in the case you cite would be entitled to a deduction in tuition equal to the amount of school taxes paid by him in the independent district. Shares of stock in national banks in this state are assessed directly to the stockholders at the place where the bank is located, but are usually paid by the corporation, and there would seem to be no distinction between school taxes based on this class of property and other property. I think this is a proper interpretation for the section of the code governing the matter, viz., section 2804.

Yours very truly,

N. J. LEE,
Special Counsel.

INSTRUMENTS AFFECTING REAL ESTATE—MORTGAGES RECORDED.—Instruments affecting real estate to be valid against subsequent purchasers for valuable consideration without notice must be recorded in the office of the recorder of the county in which the real estate lies. (Code section 2925.) A mortgagee is such a purchaser.

January 10, 1911.

FARMERS' TRUST COMPANY,
10 East Market Street,
Indianapolis, Indiana.

GENTLEMEN: This will acknowledge receipt of your favor of the 18th of November last submitting the following question and requesting opinion thereon:

"Do mortgages in your state take priority according to day, hour and minute of filing as against all other mortgages where the first mortgagee has no knowledge of any other outstanding mortgage, and where the first mortgage itself does not stipulate that it is to be junior to any other mortgage."

A reply to your letter has been delayed thus long on account of the unusual amount of business to be taken care of in this office. The attorney general is not authorized to render official opinions in matters of this kind, but in an unofficial way I may say that we have the following law governing the filing of instruments affecting real estate:

> "No instrument affecting real estate is of any validity against subsequent purchasers for a valuable consideration, without notice, unless recorded in the office of the recorder of the county in which the same lies, as hereinafter provided."

Other sections of the code define the manner of acknowledging the instrument, and the manner of filing and recording the same. The section quoted is 2925 of the code of 1897.

A mortgagee of real property is a purchaser within the meaning of the provisions of the section quoted, and any such instrument which is duly recorded takes priority over an unrecorded deed, mortgage or other instrument creating a lien unless the grantee, mortgagee or person in whose favor the lien is created has actual knowledge or notice of an unrecorded deed, mortgage, etc., but under the construction our court has given this section an unrecorded deed or mortgage takes priority over an attaching creditor or purchaser at judicial sale, unless done in fraud of such creditors, when other principles would govern. Of course, if the instrument itself contains a stipulation as to the matter of priority it would be binding upon the parties thereto.

Trusting that the foregoing covers the matter to your satisfaction, I beg to remain,

Yours very truly,

N. J. LEE,
Special Counsel.

WHIST CLUBS.—The giving of a prize to the winner by the members of a whist club does not constitute gambling unless there is a compact between the members to the effect that each one in turn shall entertain the club and offer a prize for which the several members are to play.

January 11, 1911.

REV. EMIL HANSEN,
Forest City, Iowa.

DEAR SIR: Referring again to your letter of the 14th ultimo in which you submit the following questions, to-wit:

"First. Does a whist club which offers a prize to a winner at its parties violate the law?

"Second. Admitting that no person has a right to 'play at any game for any sum of money or other property of any value' does the club in question violate the law also then, when that member of the club whose turn it is to entertain said club provides the prize?

"Third. Does not such a club make itself guilty of gambling in the sense of the law even if the host or hostess provides the prize, inasmuch as all the members of said club in turn entertain the club."

The mere offering of a prize to the successful contestant is not gambling within the meaning of the statute prohibiting the same. In order that any game of chance or skill shall constitute gambling the parties participating must pay a consideration or have something at stake.

The courts have frequently passed upon the identical principle, the cases arising because of horse racing at state and county fairs where the fastest horse receives the prize. The courts have held that this is not unlawful. The offering of a premium is not a bet or wager. In a wager or bet there must be two parties, and it is known before the chance or uncertain event upon which it is laid is accomplished who are the parties who must lose or win. In a premium or award there is but one party until the act, thing or purpose for which it has been offered has been accomplished. A premium is a reward or recompense for some act to be done; a wager is a stake upon an uncertain event.

I do not believe our statute will bear a construction which will prohibit the social diversions in which the hostess offers prizes for the most successful player at cards or other games. In such cases the players get nothing; they lose nothing, if unsuccessful; and pay nothing for the chance of winning. While the motive may be different, in a legal sense there is no difference in offering a prize at a horse race or to the most skillful player at a whist club than there is in offering a prize for the best essay written by high school pupils. And the mere fact that different members of the club entertain in succession would not alter the case.

But if the members of a club enter into a compact or agreement with each other pursuant to which each one in turn should enter-

tain the club and offer a prize for which the several members would play, then it probably would constitute gambling within the meaning of our statute prohibiting gaming and betting.

Yours very truly,

N. J. LEE,
Special Counsel.

POLICEMEN'S PENSION LAW—REWARDS ACCOUNTED FOR.—Under the policemen's pension law, chapter 62, acts of the thirty-third general assembly, one claiming benefits thereof must account for all rewards, moneys, fees, gifts, or emoluments of any kind or nature including rewards offered by the president of the United States or governor of this state.

January 11, 1911.

MR. C. F. KIMBALL,
City Solicitor,
Council Bluffs, Iowa.

DEAR SIR: Upon the retirement of Mr. Byers from the office of attorney general among other unanswered communications, we find a letter from your chief of police, also your letter asking for a construction of the police pension law with reference to certain rewards. You say: "I am in something of a quandary to know whether it includes rewards not offered by the city and whether the city would have the right to take and put into this fund private rewards or rewards offered by the United States government or by the state, and whether the board of trustees of the fund have the right to determine what rewards shall be allowed to go or not to go into the fund."

The answer to your question must be found in section 4 of chapter 62 acts of the thirty-third general assembly which provides:

> "All rewards in money, fees, gifts or emoluments of every kind or nature that may be paid or given to any police department or to any member thereof, except when allowed to be retained or given to endow a medal or other permanent or competitive reward on account of extraordinary services rendered by said police department or any member thereof" etc.

It will be seen from this that no exception is made in favor of any officer who might be entitled to a reward from some other

source than that offered by the city, and while the United States government or any person offering a reward might offer same in such a way as that it would not be payable to the officer as such, but as an individual merely, yet it seems to me that a police officer accepting a position with this law in force would in effect contract and agree to surrender and turn into this fund all such rewards that might be earned by him, except such as the section refers to as being excepted, and that consequently the effect would be that all rewards from whatever source should be turned into this fund. The trustees have no discretion as to what shall and what shall not go into the fund, and I doubt if the members of the police force could by agreement obviate the effect of this rule.

C. A. ROBBINS,
Special Counsel.

CITIES AND TOWNS—POWER TO ENACT ORDINANCES CONCERNING MEAT MARKETS AND DAIRIES.—Cities and towns are without power to enact ordinances governing meat markets, dairies, etc., where such matters are already fully covered by the state law.

January 11, 1911.

COUNTY ATTORNEY FREDERICK FISCHER,
Clarinda, Iowa.

DEAR SIR: Upon the retirement of Mr. Byers from the office of attorney general, I find among others your letter to him in which you ask for an opinion as to the right of a city in Iowa to enact and enforce the provisions of an ordinance with reference to meat markets and dairies, which matters are already covered by the state law.

In reply thereto will say that in the case of *Foster vs. Brown,* 55 Iowa, 686, the city passed an ordinance prohibiting the sale of intoxicating liquors. At that time the state law forbade the sale of whisky and the supreme court held the city without power to pass the ordinance, and in the course of the opinion made use of the following language:

> "We cannot presume that the state is not fully competent to enforce its criminal laws. If so, it does not need the aid of municipal ordinances. On the other hand, the attempt of the

city to take jurisdiction of criminal offenses, and punish by different penalties from those adopted by the state, might easily have the effect to impair the administration of criminal justice."

In the case of *Iowa City vs. McInnerny,* 114 Iowa, page 586, the city had enacted an ordinance requiring the closing of saloons on election day and a penalty of fifty dollars fine for a violation of the ordinance was imposed, and the supreme court in holding this ordinance invalid for want of power of the city to enact the same, said:

"We find that the statute itself requires the closing of saloons on election days, so that an ordinance requiring the same thing would not be a further regulation. Moreover, for breach of the conditions imposed by statute the offender became liable to all the penalties of the prohibitory liquor law; that is to say, he could be prosecuted either civilly or criminally for keeping a nuisance, could be prosecuted for unlawful sales or could have his liquors confiscated. Under the ordinance for doing the same thing he would be punished by fine alone, and this could not exceed fifty dollars. * * * Surely, then, an ordinance covering a subject already fully covered by an act of the legislature is in conflict therewith. * * * Our conclusion is that the ordinance is * * * in conflict with the provisions of the chapter known as the 'Mulct Law,' and cannot be sustained."

I also call your attention to the recent case of *Bear vs. Cedar Rapids,* 126 N. W., 324, where an ordinance intended to regulate the sale of milk and other dairy products very similar to the ordinance mentioned by you in your letter was, after an exhaustive consideration of the question by the supreme court, held to be void for the reason that the city had no power to enact the same, and for the reason that the subject was already covered by our state legislation.

In view of these decisions it is the opinion of this office that the ordinance, from which you quote sections, is inoperative and void.

Yours truly,

C. A. ROBBINS,
Special Counsel.

POLL TAXES—WHO LIABLE.—In order to be liable for the 50c poll tax the party seized to be charged must have been at least 21 years of age at the time the assessment was made, and one reaching that age after the assessment is completed and the books returned is not liable. One reaching the age of 21 years during the period within which labor upon the road is to be performed as road poll tax, that is between the first day of April and the first day of October, is liable for such tax. (Code supplement section 1550.)

January 11, 1911.

MR. R. A. LAWHEAD,
Mt. Ayr, Iowa.

DEAR SIR: Replying to yours of December 29th with reference to the liability for poll tax of a person reaching the age of twenty-one years after January 1st of any year, will say that in my opinion in order to be liable for the fifty-cent cash poll tax, the party taxed must have been of the age of twenty-one years at the time the assessment is made by the assessor for this tax is levied on the returns made by him, and that a party who reaches the age of twenty-one years after the assessment is completed and the books returned, would not be liable for that tax. A different rule, however, would apply to the road poll tax provided for in section 1550 of the code supplement. There the provision is that all able bodied male residents of his district between the ages of twenty-one and forty-five shall be required to perform two days' labor upon the roads between the first days of April and October of each year, and it is my opinion that if the party reaches the age of twenty-one years at any time during this period that he may be required to perform the labor or pay the penalty provided in section 1552.

The exemption provided by section 2209 of the code in favor of officers and soldiers, and also the exemption in favor of members of the fire company would apply in each instance.

Yours truly,
C. A. ROBBINS,
Special Counsel.

SCHOOL BONDS—EXEMPTION FROM TAXATION.—School bonds issued after the passage and before the taking effect of chapter 81, acts of the thirty-third general assembly, are not exempt from taxation.

January 11, 1911.

MR. R. S. GALER,
Mount Pleasant, Iowa.

DEAR SIR: A reply to your letter of October 25th last has been delayed until this time on account of the large volume of official business that required attention.

You inquire if school bonds issued after April 18th and before July 1, 1910, are exempt from taxation under chapter 81, laws of the thirty-third general assembly.

I do not think the bonds you mentioned are entitled to be exempt from taxation where issued before the taking effect of the statute. I think this would be so regardless of the opinion rendered by Mr. Byers in relation to the so-called "Moon law." There is, moreover, a distinction in the two cases. Code section No. 54 furnishes a rule of construction of the terms "heretofore" and "hereafter" as used in the code, and there would seem to be no reason why the supreme court would adopt a different rule of interpretation for subsequent acts of the general assembly.

Yours very truly,
N. J. LEE,
Special Counsel.

BOARD OF SUPERVISORS—CONTRACT FOR BRIDGES—NOT REQUIRED TO ADVERTISE FOR BIDS—WHEN REQUIRED TO BE SUBMITTED TO VOTE.—Code section 423 prohibits the board of supervisors from ordering the erection of a court house, jail, county home or other building or bridge when the probable cost will exceed $5,000 until the proposition therefor shall have first been submitted to the voters of the county and voted for by a majority of all persons voting. Code section 429 requires work done in the improvement of highways to be let to the lowest responsible bidder after having advertised for proposals.

January 13, 1911.

MR. F. E. BEERS,
Gilmore City, Iowa.

DEAR SIR: I am in receipt of your communication of recent date advising that the board of supervisors of your county let about

eighteen thousand dollars worth of steel bridges last year without advertising for competing bids. You request to be advised as to whether or not this is legal.

The attorney general is not authorized to give official opinions except to the various departments of state, but as a courtesy to you I direct your attention in an unofficial way to section 423 of the code which provides that the board of supervisors shall not order the erection of a court house, jail, county home or other building or bridge except as provided in section 424 of the code, when the probable cost will exceed five thousand dollars, nor the purchase of real estate for county purposes exceeding two thousand dollars in value, until a proposition therefor shall have first been submitted to the legal voters of the county, and voted for by a majority of all persons voting, notice of the same being given for thirty days previously, in a newspaper.

Also section 429 which provides:

> "Whenever any county in the state is free from debt, and has a surplus in its bridge fund, after providing for the necessary repairs of bridges in said county, the board of supervisors may, out of such surplus, make improvements upon the highways, upon the petition of one-third of the resident freeholders of any township in said county; but in no case shall they be authorized to run the county in debt for such improvement of the highways; and whenever they shall make such improvements, they shall let the work by contract to the lowest responsible bidder, after having advertised for proposals, in some newspaper printed in the county, for not less than fourteen days previous to the letting of said contract."

Except as above provided there is nothing in the law which requires the board to advertise the letting of contracts for bridges. Boards of supervisors, however, quite generally over the state, do advertise before letting contracts of any considerable size.

Yours very truly,

GEORGE COSSON,

Attorney General of Iowa.

CRIMES—COMMITTED NEAR BOUNDARY LINE OF A COUNTY—JURISDICTION.—When a public offense is committed on the boundary line of two or more counties, or within 500 yards thereof, the jurisdiction is in either county.

January 13, 1911.

MR. GEORGE A. LINCOLN,
State Fish and Game Warden,
Cedar Rapids, Iowa.

DEAR SIR: Replying to yours of November 21st in which you quote section 2559 of the code and inquire whether "under this section prosecution can be commenced in another county or parties arrested while committing an unlawful act and taken to another county for trial when the justice of the peace is nearer than in the county the crime is committed in;" and also, "can an officer take a warrant from one county and arrest a man in another county for unlawful acts, and try him in the county from which the warrant is issued," will say that this section must be construed in connection with section 5158 of the code which reads as follows:

> "When any public offense is committed on the boundary of two or more counties or within five hundred yards thereof. the jurisdiction is in either county, except as otherwise provided by law."

Considering the two sections together, both of your interrogatories must be answered in the negative, provided, however, that if the crime is committed within five hundred yards of the boundary line between two or more counties, or if the defendant has or has had in his possession the fish, bird or animals in question within five hundred yards of such boundary line, then the prosecution might be instituted in either county. The fact that the justice lives nearer the place where the crime was committed in the other county, does not give jurisdiction in that county.

Yours very truly,
C. A. ROBBINS,
Special Counsel.

LEGAL HOLIDAYS.—December 25th is a legal holiday but where that day falls on Sunday and the 26th is observed instead, it is not a holiday in the sense that would require the closing of mulct saloons.

January 13, 1911.

MR. A. BUFFHAM,
Anamosa, Iowa.

DEAR SIR: I am in receipt of your letter of the 31st ultimo requesting to be advised as to whether the 26th day of December was a legal holiday.

Christmas, the 25th of December, is a legal holiday and the fact that in a great many instances the 26th was observed does not make it a holiday in the sense that the mulct saloons would not have the right to operate.

Yours very truly,
JOHN FLETCHER,
Assistant Attorney General.

GRAND JURY—ONE MEMBER ILL—HIS PLACE SHOULD BE FILLED.—Where a member of a grand jury becomes ill and unable to assume his duties his place should be filled by calling in and drawing from the remaining five members of the panel a substitute for the sick juror.

January 13, 1911.

COUNTY ATTORNEY C. N. JEPSON,
Sioux City, Iowa.

DEAR SIR: I am in receipt of your communication of the 10th instant advising that your grand jury was impaneled January 3d; that after having been in session several days, but before indictments were returned, one of the members became ill and probably will not be able to resume his duties. You request to be advised in the premises.

In my opinion this question is governed by the provisions of section 5246 supplement to the code, 1907. Said section provides in part:

> "If a challenge to the panel is allowed, or if by reason of challenge to individual grand jurors being allowed, *or if for any cause at any time, the grand jury is reduced to a less number*

than seven, a new grand jury shall be impaneled to inquire into the charge against the defendant in whose behalf the challenge to the panel has been allowed, or the panel of the jury so reduced below the number required by law shall be filled as the case may be * * * . If such grand jury has been reduced to a less number than seven by reason of challenges to individual jurors being allowed, *or from any other cause,* the additional jurors required to fill the panel shall be summoned, first, from such of the twelve jurors originally summoned which were not drawn on the grand jury as first impaneled, or excused, and if they are exhausted, the additional number required shall be drawn from the grand jury list, and the court shall, when necessary, issue a venire to secure the attendance of such additional jurors."

It is clear from this section that it is only necessary to impanel an entire new jury when the challenge is allowed to the panel. The word "panel" may be used either with reference to the jury list from which the members of the grand jury are selected, or it may refer to the seven men drawn by lot.

State vs. Gurlach, 76 Iowa, 141-143.

Only one of the seven here being disqualified to serve, I think you should call in the remaining five of the original twelve jurors, and if one competent to serve can be selected from the remaining five that he be so selected. In the event that there is objection to all of the remaining five of the original twelve, the additional number required should be drawn from the grand jury list.

As further bearing on the question, see

State vs. Wheeler, 129 Iowa, 100;

Bussey vs. Barr, 132 Iowa, 463;

State vs. Heft, 127 N. W., 830.

Yours very truly,

GEORGE COSSON,

Attorney General of Iowa.

CITIES AND TOWNS—PROCEEDINGS TO BE PUBLISHED.—The proceedings of the city or town council are to be published in newspapers or by posting in public places when so ordered by the council.

January 14, 1911.

GOSSARD PUBLISHING COMPANY,
Onawa, Iowa.

GENTLEMEN: I am in receipt of your communication of the 13th instant requesting to be advised as to whether a city or town council can be compelled to publish or post the proceedings of the council.

It is my opinion that it was the intention of the legislature in the enactment of chapter 42 acts of the thirty-third general assembly to require the proceedings of city and town councils to be either published in a newspaper or posted in one or more public places, but the wording of the section is to say the least unfortunate, and because of this fact I would not recommend a prosecution in the event of refusal or neglect on the part of the council to act. Said section reads as follows:

> "Immediately following a regular or special meeting of the city or town council, the clerk shall, when so ordered by said council, prepare a condensed statement of the proceedings of said council, including the list of claims allowed, and from what funds appropriated and cause the same to be published in one or more newspapers of general circulation, published in said city or town, or by posting in one or more public places, as directed by said council."

You will observe that in no place is there a direct and positive statement that the proceedings must be published, but the section provides that the clerk shall prepare the statement *"when so ordered by said council."*

Yours very truly,
GEORGE COSSON,
Attorney General of Iowa.

SENTENCE—COMPUTATION OF TIME OF SERVICE.—Where sentence of imprisonment is imposed as punishment for crime the computation of time should begin not upon the date of the judgment but on the date when the defendant was taken into custody under execution for purposes of satisfying the judgment.

January 16, 1911.

MR. J. C. SANDERS, WARDEN,
Ft. Madison, Iowa.

DEAR SIR: In reply to yours of the 9th instant with reference to Novak, No. 9325, in which you say: "Now the question naturally arises should his time be computed from December 4th (the date of the sentence) or from the later date i. e., the day he was received at Anamosa," will say that the weight of authority seems to be to the effect that the time when a term of imprisonment under a given sentence is to be served out or suffered by the defendant, unless specifically made a part of the judgment, is not a part thereof, and that the time when the computation of the service should begin will therefore not be the date of the judgment itself, but rather the date on which the defendant was taken in custody under the execution for the purpose of satisfying the judgment. See *Miller vs. Evans,* 115 Iowa, 105.

The law contemplates however that the execution should be promptly served by the sheriff and that prompt return be made by him thereof. See code sections 5443 and 5444.

In my judgment the time of the defendant's imprisonment should not be lengthened without his consent by any unnecessary delay of the sheriff in taking the prisoner to the penitentiary after he was taken in custody under the copy of the judgment which takes the place of and operates as an execution, and that without any further showing that the delay was occasioned by some act of the defendant, the time should be counted from the date of his arrest under the execution.

The return of the sheriff endorsed on the execution ought to show when the defendant was taken in custody thereunder. Whether this return is also endorsed on the certified copy of the execution, which section 5444 requires to have been delivered to the warden along with the body of the defendant, I do not know, but it occurs to me it should be endorsed and should operate as a guide to the warden in determining when to release the prisoner. If this

copy in the hands of the warden does not show when the defendant was arrested thereunder, the true date could be obtained from the return filed with the clerk of the district court.

The foregoing is said upon the theory that the sentence is for twenty-five years from December 4, 1897, though the terms of the governor's order whereby the life sentence was reduced to twenty-five years, might have something to do with the question as to when the defendant in this case would be entitled to his discharge. If by its terms it provides that it shall be twenty-five years from the date of the sentence, then that date should govern. On the other hand, if it reads twenty-five years from the date of his arrival at the penitentiary, then that date should govern, and whenever the true date of the commencement of the term according to the foregoing instructions is ascertained, then under section 5703 of the code, the time of the defendant to be served would be thirteen years and nine months from that date.

Yours very truly,

C. A. ROBBINS,
Special Counsel.

PUBLIC LIBRARIES—BEQUESTS—FOR THE BENEFIT OF.—Where bequest is made for the benefit of a library fund it would become a part of such fund and should be paid over to the state treasurer, yet a bequest might be made in such a way as not to become a part of this fund and in such case might be handled by the board of library trustees or someone selected by the board for the purpose of handling such benefits.

January 18, 1911.

MISS ALICE S. TYLER,
Des Moines, Iowa.

DEAR MADAM: Replying to yours of the 12th instant in which you desire an opinion as to the powers of library trustees in handling bequests of money, will state that in my opinion "the moneys set apart for the maintenance of the library" referred to in section 730 of the code to which you call attention, are the moneys derived from the levy of the tax for the maintenance of such library as provided in section 732 of the code. While bequests might be made in such terms as that it would become a part of the fund for the

maintenance of the library and should be paid over to the city treasurer, yet a bequest might equally be made in such terms as that it would not necessarily become a part of this fund or be required to be paid to the city treasurer, but might be paid to any proper officer of the board of library trustees that might be selected by that body for the purpose of handling such bequests.

I call your attention however to section 729 found in the code supplement which supersedes and takes the place of section 729 of the code to which you call attention, and you will observe that the terms of this latter section give the board additional control, the additional language being "and of the expenditure of all moneys available by gift or otherwise."

In the same connection I also call your attention to section 740 of the code supplement and to the amendment thereto found in chapter 47 acts of the thirty-third general assembly, and in my judgment the effect of these new statutes, to which I call your attention, is to give the city power to take property by gift or bequest as well as to give the board of library trustees that power, so that the question as to where a particular bequest should go, whether to the library trustees to be handled individually aside from any control by the city, or whether it is to be controlled by the city independently of the board of trustees, would depend upon the terms of each particular bequest, but that in any given case the bequest might be made either to the one or to the other as the intention of the donor might be, and in the future it would be well to guard with care the expressions and terms of the bequests where they are intended for the purpose of purchasing books rather than for the maintenance of the library, and it could be made plain in the instrument donating the property.

Hoping that the foregoing will be sufficient for your purpose, I remain,

Yours truly,

C. A. ROBBINS,
Special Counsel.

LINSEED OIL—SALE OF—UNLAWFUL WHEN BLENDED OR COMPOUNDED.—Code supplement section 2510-f requires the barrel or cask containing linseed oil to be offered for sale to be labeled "Pure Linseed Oil Raw" or "Pure Linseed Oil Boiled." The sale of oil, blended linseed oil is in violation of law.

January 19, 1911.

MANHATTAN OIL COMPANY,
Des Moines, Iowa.

GENTLEMEN: I am in receipt of your letter of the 17th instant requesting me to advise you if it would be lawful for you to sell "compounded linseed oil" or "paint oil."

It would undoubtedly be a violation of section 2510-f of the supplement to the code 1907, to sell a product branded "compounded linseed oil," as this section requires the barrel or cask containing linseed oil that is offered for sale to be labeled "pure linseed oil-raw" or "pure linseed oil-boiled," as the case may be.

Practically the identical question was recently decided by Judge Howe of the district court of Polk county in the case of *American Linseed Oil Company vs. W. B. Barney,* state food and dairy commissioner, where the plaintiff sought to enjoin the defendant as state food and dairy commissioner from interfering with a sale of a product which it was selling under the label "blended linseed oil, not intended for food or medicinal purposes." In this case the court held that the sale of a product under such a label was a violation of the statute, and that defendant was within his rights and duties in prosecuting persons who were making sales of a product so labeled.

I do not believe, however, that it would be unlawful to sell a product labeled "paint oil" where no representation is made that such product is being offered for sale as linseed oil.

Yours very truly,
JOHN FLETCHER,
Assistant Attorney General.

COUNTY ATTORNEY—EXPENSES WHILE ATTENDING COURT AT THE COUNTY SEAT WHEN NOT HIS RESIDENCE.—Under code supplement section 308 the county attorney is entitled to actual expenses while attending to his official duties at places other than the county seat and other than his place of residence, but is not entitled to such expenses while attending court at the county seat when that is not his residence.

January 20, 1911.

COUNTY ATTORNEY CHAS. W. SCHOLZ,
Guttenberg, Iowa.

DEAR SIR: Yours of January 14th asking for a construction of section 308 of the code supplement, 1907, and especially as to whether or not said section authorizes a county attorney to be reimbursed for his actual expenses while attending to his official duties at the county seat when the county seat is not his place of residence, has been duly received.

The statute is not very clear and I have been unable to find any decision that will throw any light upon the question pronounced; however, an examination of the original statute section 11 of chapter 73 of the acts of the twenty-first general assembly reveals the fact that the provision was therein worded somewhat differently, the language being: "shall be entitled to his necessary and actual expenses incurred attending the discharge of his duty at a place other than his place of residence and the county seat, which shall be audited," etc. The change of the present form was made at the time of the revision of the code, that part of the section being rewritten and shown on page 67 of the Black Code, but while the language was rewritten, there was no intention to change the compensation of the county attorney as is indicated by the language shown at page 5 of the code commissioners' report, wherein they used the following language: "No changes in * * * compensation of county officers have been recommended though in a few instances there are changes as to fees to be charged and such fees are to be accounted for by the officer receiving them."

So that on the whole I am of the opinion that the statute as it now reads should be construed as though it read "at a place other than his residence and other than the county seat" and it necessarily follows that if this is the correct construction that the county attorney would not be entitled to expenses while attending his of-

ficial duties either at the place of his residence or at the county seat.

You will understand that it is not the duty of this office to render official opinions except to certain state officers, but out of courtesy to you I have given my personal views on the matter.

Yours very truly,
C. A. ROBBINS,
Special Counsel.

CITIES—UNDER COMMISSION FORM OF GOVERNMENT—ASSESSOR.—A city council under the commission form of government has the right to select the assessor under code supplement section 1056-a26, and to terminate the offices in force prior to their election to council under code supplement section 1056-a20; and where this has been done the assessor thus chosen rather than the assessor of the township in which the city is located is the lawful assessor for the city.

January 23, 1911.

MR. THEODORE A. CRAIG,
Keokuk, Iowa.

DEAR SIR: Yours of the 19th calling my attention to your former letter of the 2d instant duly received, and will state that your former letter was received at a time when the office was changing hands and had been overlooked until receiving your second letter.

In your first letter you state that John A. Dimond was elected as assessor in Jackson township inside the city of Keokuk which is a township having the same boundary as the city, and that subsequent to the election the city council (Keokuk being under the commission form of government) elected S. H. Johnson as city assessor. The question now arises whether the city assessor in the city of Keokuk should also act as township assessor and whether his selection by the city council entitles him to act, the substance of your inquiry being as to which of the two parties so chosen is rightfully entitled to the office of assessor.

Assuming that prior to the election in November, 1910, the boundaries of Keokuk coincided with the boundaries of Jackson township, I am at a loss to know why a township assessor was

elected, as the law only contemplates the election of a city assessor in such cases. See code sections 647 and 648; also section 650 which provides that the term of office of the assessor shall commence on the first day of January next ensuing his election.

It is only in townships where the boundary lines thereof include territory other and in addition to that included within the corporate limits of the city or town, that a township assessor is also to be elected. Code section 565 as now amended by chapter 37, acts of the thirty-third general assembly. So that it occurs to me that the assessor which you say was chosen by Jackson township at the election in November, 1910, was in all probability an assessor elected by the city of Keokuk rather than by Jackson township, but be that as it may, the city having adopted the commission form of government, its council had the right to select the assessor under code supplement section 1056-a26, and also had the right to terminate the offices in force prior to their election to the council under code section 1056-a20. Assuming that they have so done, the assessor of their selection would be entitled to and should perform the duties of the office.

Yours very truly,
C. A. ROBBINS,
Special Counsel.

INSURANCE POLICIES.—Policies of insurance containing the 80% clause are prohibited in Iowa.

January 23, 1911.

COATES & ROBINSON,
Dubuque, Iowa.

DEAR SIRS: I am in receipt of yours of the 6th instant addressed to Attorney General Byers.

It has been the holding of the state auditor that policies containing what you designate as the eighty per cent clause are prohibited by our law, sections 1746 and 1758 of the code. Under the latter section the policy holder could not maintain an action in the courts of this state, and while it might not invalidate his insurance to such an extent as to prevent his recovery in the state where the company is located, he would be effectually barred from an action on the policy in this state.

I also call your attention to the case of *Gurnett vs. Atlas Mutual Insurance Company,* 124 Iowa, 547, in which it is held that where the insurance company issues a policy that contains provisions contrary to law, such as to render the policy void, that by the acceptance of premiums thereafter, they are estopped from setting up the invalidity of the policy on account of the prohibited provision and but for the other provision of the statute depriving the policy holder of the remedy in the courts of this state, the policy might be enforced by the insured.

Yours very truly,
C. A. ROBBINS,
Special Counsel.

VETERINARY SURGEONS.—A veterinary surgeon of good moral character who had practiced for four years prior to July 4, 1902, may continue to practice without taking out a certificate such as is required by code section 2538, and the other sections relating thereto. So held by our supreme court in the case of *State vs. McCoy,* 128 N. W., 846.

January 24, 1911.

MR. F. W. LOOMIS,
Shannon City, Iowa.

DEAR SIR: Yours of the 21st instant addressed to the attorney general has been referred to me for reply.

Our supreme court recently determined that a person of good moral character who had practiced veterinary surgery for five years prior to July 4, 1902, the time of the taking effect of code supplement section 2538 and other sections relating thereto, violated no provision of the act by continuing to practice without taking out a certificate. The opinion was filed December 15, 1910, and the case is *State vs. McCoy,* 128 N. W. Rep., 846, which you can doubtless find in the office of any attorney in your city, and thus have the benefit of the opinion in full.

Yours very truly,
C. A. ROBBINS,
Special Counsel.

MAYOR—SALARY—FEES.—Under code section 670 a city has the right to provide by ordinance for the salary of the mayor and that the same shall be in lieu of fees, and where this is done the mayor is not entitled to fee voted. Under code section 676 the city would have the right to provide a salary for the mayor not in lieu of but in addition to fees and in such cases the mayor is entitled to the fees in addition to the salary. In state cases the mayor is entitled to the same fees as are provided for justices of the peace under code sections 671 and 4597.

January 24, 1911.

MR. J. F. SCHARLES,
Le Mars, Iowa.

DEAR SIR: Yours of the 20th instant addressed to the attorney general has been referred to me for reply.

Your question is whether or not you are entitled to fees in addition to the three hundred dollar salary which you are receiving as mayor, and whether or not you are entitled to the fees whether collected from the defendant or not.

It will be impossible to give you a definite answer without knowing the provisions of the ordinances of your city; however, the matter can be stated in such a way as that you can determine from an examination of the ordinances what you are entitled to.

Under section 670 of the code your city would have the right to provide for you by ordinance a salary *in lieu of fees* and if it has so provided, then you would not be entitled to the fees in addition to the salary provided by ordinance. See also code section 675; however, under code section 676, the city would have a right to provide by ordinance for a mayor's salary not in lieu of but *in addition to fees,* and if your city has passed such an ordinance, then you would be entitled to the fees in addition to the salary provided by the ordinance.

The last part of your question will also be determined by the reading of the ordinance. If it only allows you the fees that are collected from the defendant then you cannot recover the fees from the city or state; if on the other hand, it allows you the fees in all cases, you would be entitled to them whether collected from the defendant or not. You speak of the fees being three dollars in each case, and I assume that this is the fee allowed by the ordinance in city cases. In state cases you would be

entitled to the fees provided for justices of the peace. See code section 671; also section 4597 of the code.

Yours very truly,
C. A. ROBBINS,
Special Counsel.

JUSTICES OF THE PEACE—FEES FOR MARRIAGE CEREMONY.—While a justice of the peace who performs a marriage ceremony is not required to charge the $2.00 fee allowed by law therefor, yet if he does make this charge it is on account of the service rendered in his official capacity and he should account for same under provision of code supplement section 4680.

January 25, 1911.

MR. CHAS. J. HAAS,
Marion, Iowa.

DEAR SIR: Yours of December 28th addressed to the attorney general has been handed to me for reply, and while as you are aware that it is not the duty of this office to render official opinions except to certain state officers, will say that I have given the matter some little attention and made some examination of the authorities, and while I have been unable to find any decisions of our own supreme court, I call your attention to the case of *Austin vs. Johns,* 62 Texas, 182, where by an ordinance it was provided that an attorney was to have ten per cent of all moneys collected by him, and also certain fees for actions brought by him, and it was held that he was entitled to the ten per cent of the moneys collected in addition to the fee provided in civil as well as criminal cases; also the case of *Calloway vs. Henderson,* 24 S. W., 437, where under a statute providing that the county clerk should render to the county court a statement of fees received and salaries paid deputies and assistants, and that the aggregate amount any clerk should retain for his services for any one year was eighteen hundred dollars, it was held that such settlement of the clerk must include "all fees for all services of whatever character done in his official capacity" and that he could not retain an additional four hundred dollars received in connection with his duties in keeping accounts between the treasurer and the county.

See also *Board of Commissioners of Hennepin Co. vs. Dickey,* 90 N. W., 775, where it was held that the clerk's salary fixed should be in full for all services rendered in his official capacity, and that where he had during office hours furnished reports with reference to judgments and other liens entered in his office to abstract companies and commercial agencies, which reports were not authenticated, it was held that he was required to account for moneys received from the abstract companies and commercial agencies for these reports even though he could not have been required to furnish the information except by furnishing an authentic copy of the record, so that on the whole I am inclined to the opinion suggested by you, that while the justice of the peace who performs the marriage ceremony is not required by statute to charge and collect the two-dollar fee, the statute reading "any person authorized to solemnize marriages may charge two dollars in each case for officiating and making returns," yet if he does make this charge it is on account of services rendered in his official capacity and he should account for the same under the provisions of section 4680 of the code supplement.

Yours truly,

C. A. ROBBINS,
Special Counsel.

PEDDLERS—HUCKSTERS—FRUIT AND VEGETABLES.—A peddler includes transient merchants and itinerant vendors selling by sample or taking orders for future or immediate delivery. Code Supplement section 1347-a. To constitute an itinerant vendor it is not necessary that the person should travel all the time and have no fixed place of sale. Huckstering is carried on by persons who go from house to house buying from the farmer and selling either to customers or dealers at wholesale or retail. Timothy seed thus purchased and sold is a fruit as well as a vegetable and hence comes within the exception and one engaged in buying and selling the same is not required to have a license.

January 27, 1911.

MR. H. J. MANTZ,
County Attorney,
Audubon, Iowa.

DEAR SIR: Yours of the 24th instant addressed to the attorney general has been referred to me for reply, and your question briefly

stated is whether or not a farmer residing in your county who is a part of the time engaged in handling, buying and selling grass seed at public sales and other public gatherings by taking orders for future as well as immediate delivery, the seed being bought in large quantities and retailed to customers at various places, he having no regular place of business where the seeds are stored or kept for sale or displayed, is a peddler within the purview of section 1347-a code supplement.

It will be seen by an examination of this section that the term "peddler" shall be held to include and apply to all transient merchants and itinerant vendors selling by sample or by taking orders whether for immediate or future delivery.

Our supreme court has said:

> "We do not understand that the term 'transient merchant' has reference to the residence of the individual. It more properly relates to the character of the business carried on by him."
>
> *Ottumwa v. Zekind,* 95 Iowa, 624.

The defendant in that case being a non-resident of the plaintiff city, so that it would seem that the farmer in the case supposed by you would be a transient merchant within the meaning of this section.

Our court has also said:

> "To constitute an itinerant vendor it is not necessary that the person should travel all the time and have no fixed place of sale. He may have a place of business where he sells his goods during a part of the time and he may travel for the sale of his medicines at other times."
>
> *Snyder v. Closson,* 84 Iowa, 186.

So that it would seem that the party you have in mind would also be an itinerant vendor within the meaning of the law, and if he is either a transient merchant or an itinerant vendor, he would come within the statutory definition of the word "peddler" as defined in this section; however, it remains to be seen whether or not he would come within any of the exceptions provided for in the latter part of the section.

While you say nothing in your letter about his making use of a wagon to transport the seed from the place of purchase to

the place of sale or delivery, yet I presume that this must of necessity be the method of transportation employed, and if so, the question would arise whether or not he would be running a huckster wagon within the meaning of the section. The term "huckster" signifies a petty dealer and a retailer of small articles of provisions, etc. Webster's Dictionary.

> "Huckstering is defined to be a business carried on by persons who go from house to house buying from the farmer and afterwards selling either to customers or to dealers at wholesale or retail."
>
> Cyc. Vol. 21, page 1116.

And it would seem that this definition would be broad enough to cover the business in which the farmer you mention is engaged. If he could be held to be selling or distributing fruit or vegetables he would come within the exception.

> "Fruit is the natural product of trees, bushes or other plants."
>
> Anderson's Law Dictionary.
>
> "Fruit is the produce of a tree or plant which contains the seed. This term in legal acceptation is not confined to the produce of trees which in popular language are called fruit trees."
>
> Bouvier's Law Dictionary.

The term "vegetable" has been held to apply to and cover beans in either dry or natural state even though they would also come within the definition of seeds.

> *Robertson v. Salamon,* 130 U. S., 412.

In view of these definitions and in view of the fact that it is doubtful whether or not the legislators intended to prohibit promiscuous dealings in farm products, it is my judgment that the court would hold that the party would come within one or more of the exceptions mentioned in the latter part of this section and would therefore not be required to take out a license.

Yours very truly,

C. A. ROBBINS,
Special Counsel.

JUSTICES AND CONSTABLES—TRIAL FEE IN DOUBTFUL CASES.—Neither the justice of the peace nor constable is entitled to a trial fee in a civil doubtful case as there would be no trial within the meaning of the law.

January 28, 1911.

MR. JAS. D. DUNLAVY,
Harlan, Iowa.

DEAR SIR: Yours of the 24th inst. addressed to the attorney general has been referred to me for reply.

Your first question is, "Are the justice and constable permitted to charge and collect a trial fee in civil default cases?" Your second question is, "Where a prisoner pleads guilty are they then allowed the one dollar trial fee as part of the costs?" Answering the first question, will say that neither the justice nor constable would be entitled to trial fee in civil default cases, as there would be no trial within the meaning of the law. Answering the second question, will say that section 4598, subdivision 14, allows the constable for attending each trial in a criminal case one dollar, and I am of the opinion that if in a criminal case the constable is notified to attend and does attend for the purpose of trial and the defendant at the time assigned for trial enters a plea of guilty, that the constable would still be entitled to the trial fee. However, I do not believe he would be entitled to this trial fee if the defendant when first arrested and arraigned enters the plea of guilty, and I think the same rule should apply in the case of a justice where the case is assigned for trial on a particular day and he attends for the purpose of that trial. The fact that the defendant may change his mind and enter a plea of guilty ought not to deprive the justice of the trial fee, provided for in paragraph 21 of section 4598, yet the justice would not be entitled to this fee if the defendant when first arraigned before him entered the plea of guilty, for then the fee would be governed by subdivision 7 of section 4597.

Your third question with reference to the taxation of fees for three game wardens and only one filed the information, I am unable to answer without having further facts before me than those stated in your letter. If the others were summoned as witnesses and attended for that purpose, it is possible they would be entitled to a fee also. However, I would suggest that you take the matter up with your county attorney and be governed

by his advice, as this department is not authorized to give opinions except to state officers and the foregoing are simply the personal views of the writer.

Yours truly,

C. A. ROBBINS,
Special Counsel.

CITIES AND TOWNS—ORDINANCES—DEFINING TRANSIENT MERCHANTS.—While the city is given the power to define by ordinances who shall be considered transient merchants, one who is by universal acceptance of the business world not such a transient merchant cannot be made such by such ordinance.

January 30, 1911.

MR. FRANK WISDOM,
Bedford, Iowa.

DEAR SIR: Yours of January 28th addressed to the attorney general has been referred to me for reply.

I return the newspaper clipping which you enclose, also a copy of the letter referred to therein, which was written from this office December 30, 1910. I think an examination of the letter will reveal the fact that the Sioux City people have not carefully examined the authorities to which they were cited. In the case of *Cedar Falls vs. Gentzer,* 123 Ia., 670, it was held that under code section 700 the city had authority to impose a license on a person who had orders for goods on his own account and filled the same by purchase from the wholesale house, which shipped to him for delivery, he paying for the goods at wholesale and collecting the retail price from his customers on the ground that he was in fact a merchant having title to the goods. On the other hand, it was held in the case of *State vs. Nelson,* 128 Ia., 740, that one who was employed as a traveling salesman to solicit orders for goods by means of samples from consumer, or to deliver same on behalf of another, is not a merchant and should not be required by the said ordinance to procure license for the purpose of engaging in such business. It would seem from this decision that while the section quoted gives to cities and towns the power to define by ordinance who shall be considered transient merchants, yet they must exercise this power with "Wisdom," and yet "declare those persons to be merchants who by universal acceptance in the business world are not such." To the same effect see *State vs. Bristow,* 131 Ia., 664.

While an attempt was made by sec. 1347-a of the code supplement to give to the word "peddler," as used under the provisions of this act and wherever found in the code, a more extended meaning so as to include persons selling by sample or by taking orders whether for immediate or future delivery, in order to meet the objection to the previous statute which was declared inoperative on account of a defective title in the Bristow case, yet, I am of the opinion that before a person would be liable under sec. 1347-a for selling by sample or by taking orders, he must be a transient merchant or an itinerant vendor, so that the objection cited by sec. 1347-a was not in fact attained.

Yours truly,

C. A. ROBBINS,
Special Counsel.

SHERIFF—AGENT OF THE STATE IN REQUISITION MATTERS—MAY RETAIN MILEAGE.—Since the enactment of chapter 35, acts of the thirty-third general assembly, a sheriff who acts as an agent of the state is not required to account for the mileage earned under section 5169 but may retain the same.

February 6, 1911.

MR. LEE N. DOWIS,
Centerville, Iowa.

DEAR SIR: Yours of the 1st instant addressed to the attorney general has been referred to me for reply.

Your question in brief is whether or not the sheriff as the agent of the state under section 5169 of the code is entitled to retain the mileage therein specified in addition to his salary, or must he account for the same?

It will be observed by an examination of this section that it is no part of the official duty of the sheriff to act thereunder; any other person may be the agent as well as the sheriff.

I also call your attention to chapter 35 of the acts of the thirty-third general assembly amending section 510-a of the code supplement, and in my judgment the effect of this last amendment is to relieve the sheriff from the duty of accounting for mileage either in civil or criminal cases.

My opinion is that in view of these statutes the sheriff is entitled to retain the mileage under section 5169, and is not required to account therefor.

Yours truly,

C. A. ROBBINS,
Special Counsel.

SALOON CONSENT PETITION—BY WHOM SIGNED.—The saloon consent petition may be signed by the voters who voted at the last preceding election whether it was a city election or general election in towns of over 5,000 inhabitants, or of less than 5,000 and over 2,500 inhabitants if also signed by 80 per cent of the voters. But in cities of less than 5,000 the same must be signed by the legal voters who voted at the last preceding *general* election.

February 6, 1911.

MR. CHARLES J. MCCALL,
Boone, Iowa.

DEAR SIR: This will acknowledge the receipt of your letter of the 4th instant to the attorney general inquiring if a general consent petition may be signed by those who voted at a city election, or if such a statement must be based wholly upon the last general election.

In a city of over 5,000 inhabitants a statement of general consent may be signed by the voters who voted at the last preceding election whether it was a city election or a general election.

The same would be true as to a city of less than 5,000 and over 2,500 inhabitants, providing it is signed by eighty per centum of the voters; but as to cities and towns of less than 5,000 inhabitants the statement of general consent may be signed by the legal voters who voted at the last preceding general election only, except as to cities of more than 2,500 inhabitants and less than 5,000 inhabitants when signed by eighty per centum of the voters.

I cite you to sections 2448 and 2449 of the code and supplement to the code of 1907.

Yours very truly,

N. J. LEE,
Special Counsel.

ROADS—BRUSH AND WEEDS GROWING UPON SAME—DUTY OF TRUSTEES TO DESTROY.—By chapter 96, acts of the thirty-third general assembly it is made the duty of the township trustees and other officers responsible for the care of the public highways to destroy all noxious weeds and unnecessary brush on the public highways in such manner as to prevent the maturity of seed.

February 8, 1911.

MR. E. A. WILMETH,
Township Clerk,
Salem, Iowa.

DEAR SIR: This will acknowledge the receipt of your letter of the 4th instant requesting an opinion from the attorney general as to whose duty it is to cut the brush, sprouts, etc., growing along the public highway.

The attorney general is not authorized by law to render an official opinion in a matter of this kind, but I have no objection to making brief reply in an unofficial and personal way.

By virtue of chapter 96, laws of the 33d general assembly it is made the duty of the township trustees or other officer responsible for the care of public highways to destroy or cause to be destroyed all noxious weeds, and all unnecessary brush on the highways in such a manner as to effectually prevent the production of their seeds or their propagation in any other manner, and to warn out labor or to employ labor for this purpose in the same manner as for repairs to the highways.

This act also defines what are noxious weeds and specifies what funds may be used for said purposes, and prescribes penalties for failure to perform the several duties prescribed by the act.

I would suggest that you get a copy of the session laws of the last general assembly at the county auditor's office. The act referred to is too long to copy, and you will readily understand its provisions from a reading of it.

Yours very truly,
N. J. LEE,
Special Counsel.

ROAD TAXES.—Where a property road tax of four mills is levied persons owning the same may work out two mills and pay two mills in cash.

February 8, 1911.

MR. W. A. GORDON,
Seymour, Iowa.

DEAR SIR: This will acknowledge the receipt of your letter of the 3d instant to the attorney general in which you state that the township of which you are the clerk was subdivided into road districts as provided by law at the April meeting in 1910, and that at the same time the township trustees levied four mills as property road tax, one-half of which the property owners were permitted to work out and the other half to be paid in cash, and that the levy so made was reported to the county auditor and by him entered on the tax as four mills to be paid in cash, and you request an opinion from this department as to whether or not the property owners will have to work out the two mills and also pay the four mills as entered on the tax list by the county auditor.

The attorney general is not authorized by law to render an official opinion in a matter of this kind, but from such investigation of the law as I have been able to make I may say in an unofficial and personal way that I do not believe that the property owners under the facts set forth in your letter would be required to pay more than the two mills in cash if they worked out the other two mills as permitted by the board of trustees. In case property owners are given the permission to work out a portion of the property road tax in accordance with the law relating thereto and failed to do so, then, of course, the whole amount is payable in cash as to those who so failed to work it out, and under section 5, chapter 98, laws of the thirty-third general assembly, the township clerk is required to make out a list of those who have worked out the road tax and certify same to the county auditor on or before the second Monday of November of each year, and it then becomes the duty of the county auditor to credit the amount of tax worked out upon the tax list before delivering the same to the county treasurer.

The law, I think, contemplates that the work is to be done in the same year in which it is assessed, and in order to get credit for it on the tax list that fact must be certified to the county auditor while the tax list is still in his possession. You will see that unless

the county auditor entered the full amount of the tax levied by the township trustees, both cash and that portion to be worked out, there would be no way to collect the tax from those who failed to work it out.

Yours very truly,

N. J. LEE,
Special Counsel.

NATIONAL BANKS—LOAN AND TRUST COMPANIES—ASSESSMENT OF.—Real estate belonging to national banks should be assessed at its real value the same as other real estate. The capital stock in such banks should be assessed at its real value rather than its par value.

February 10, 1911.

MR. J. SID ANDERSON,
Waterloo, Iowa.

DEAR SIR: Yours of the 7th inst. addressed to the attorney general has been referred to me for reply. I cannot however comply with your request to compute the amount to be assessed to national banks, the loan and trust companies and the state savings banks in the instances which you cite for these reasons:

First. I take it that you have listed the capital stock at its par value, rather than at its real value.

Second. The time required to compute the tax in each instance would be such a draft upon the time of this office that we could not undertake it in any given case.

However, I will say that the real estate in each instance should be assessed the same as other real estate. The surplus and undivided earnings the same as other property of the kind. The capital stock should be assessed at its real value, in other words, if a share of $100.00 par value was worth 150 cents on the dollar, it should be assessed at its real value rather than its par value, and from the capital stock in each instance should be deducted the amount of capital invested in government bonds, if any.

I note your position that no act of the present legislature will have any effect on the present assessment of bank stocks. Some courts have held that the legislature has power to pass a law and make it applicable to an assessment then being taken, and will say

for your information that there are bills now pending in the present legislature, designed to furnish an immediate remedy, whether they will pass or not of course cannot now be determined, but I would suggest that the assessment of all bank stock and loan and trust companies be deferred, if possible, until it is ascertained whether or not these laws pass, and whether they will afford any immediate relief.

You will understand that this department is not authorized to give official opinions except to state officials and that the foregoing is simply the personal opinion of the undersigned.

Yours very truly,
C. A. ROBBINS,
Assistant Attorney General.

IOWA NATIONAL GUARD—MEMBERS EXEMPT FROM POLL TAX.—Members of a national guard are exempt from payment of poll tax only during their term of service.

February 11, 1911.

MR. WILLIAM SEALS,
Creston, Iowa.

DEAR SIR: Yours of February 5th addressed to the attorney general has been referred to me for reply.

Inasmuch as you state in your letter that you have been discharged from the Iowa national guard, the fact that you were once a member of the guard, will not exempt you from the payment of poll tax.

Code section 2209 exempts members of the guard from such tax only and during their term of service. Code section 891, however, requires only able bodied men to work or pay poll tax, and provides that a party may obtain exemption by filing his affidavit setting forth his disability, and if the sunstroke of which you speak has disabled you, the filing of such affidavit would doubtless secure your exemption.

You will understand that it is not the duty of this department to give official opinions to private persons and that what has been said is only the personal view of the undersigned.

I return herewith the governor's letters as requested.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

SKIMMED MILK DEFINED.

February 23, 1911.

MR. WIRT P. HOXIE,
County Attorney,
Waterloo, Iowa.

DEAR SIR: Your letter of the 22d instant addressed to Hon. W. B. Barney, State Food and Dairy Commissioner, with respect to the interpretation of section 4990 of the supplement to the code has been handed to me with the request that I make reply.

You particularly desire to know what construction should be placed upon the word "regarded" as used in this section.

The words "shall be regarded" are imperative in their nature and where the prescribed test shows milk to be below the fixed standard that test is conclusive proof and such milk must be regarded as skimmed or partially skimmed milk. It would be no defense to show, as you suggest the defendant contends, that the milk although it falls below the test is in the same condition as when it came from the cow, as the legislature evidently intended that milk of a test lower than that prescribed could not be considered milk as defined in this chapter.

The word "regarded" as here used means "declared to be," "taken as," "considered," "equivalent to," "the equal of," etc., so that no matter what proof might be submitted if the test actually showed less than the required amount of butter fat the classification of the product is fixed and determined.

Yours very truly,
JOHN FLETCHER,
Assistant Attorney General.

ELECTION CONTESTS—DUTY OF AUDITOR TO PRODUCE BALLOTS.—In an election contest involving the result of an election in a congressional district where a commissioner is appointed to take the testimony it is the duty of a county auditor, when subpoenaed by such commissioner, to produce the ballots on file in the office of such auditor for use in such contest.

February 23, 1911.

COUNTY ATTORNEY H. L. LOCKWOOD,
Charles City, Iowa.

DEAR SIR: I am in receipt of your recent communication advising that a congressional contest is pending in the 4th congressional district between Murphy and Haugen; that as a result thereof Judge Reed of the United States district court has appointed Mr. Steiner commissioner to take testimony in your county, and that such commissioner has subpoenaed your county auditor to appear at the court house and give testimony and produce the ballots of the November general election, 1910, in the county of Floyd.

You request to be advised as to the duty of the county auditor with reference to this matter.

The provisions relating to the taking of testimony in contested elections are found in sections 2770 to 2796 inclusive of Pierce's Code, the same being R. S. 105 to R. S. 130 inclusive; section 2788 Pierce's U. S. Code, the same being R. S. 123, provides that:

> "The officer (commissioner) shall have power to require the production of papers; and on the refusal or neglect of any person to produce and deliver up any paper or papers in his possession pertaining to the election, or to produce and deliver up certified or sworn copies of the same in case they may be official papers, such person shall be liable to all the penalties prescribed in section 116. All papers thus produced, and all certified or sworn copies of official papers, shall be transmitted by the officer, with the testimony of the witnesses, to the clerk of the house of representatives."

Pursuant to the provisions of this section and section 109 it was held by Judge Archibald of the United States district court of Pennsylvania in the case of *In Re Howell,* 119 Fed., 465, that a district judge has power and it is his duty on proper application to require the ballots cast at the election to be taken from the boxes and preserved, where it is shown that they are desired as evidence

by one of the parties to the contest, and that under the state law they would be destroyed before they could be used; and it was immaterial whether or not the issues to the contest have been made up so as to authorize the taking of testimony when such application is made.

My conclusion is therefore that if the commissioner was directed by Judge Reed of the federal court to require the opening of the ballots and the taking of the same for preservation and use in the contest, that your auditor should comply with this request of the commissioner. For further authority of the commissioner, see the provisions of sections relating to contested elections heretofore cited.

Yours very truly,

GEORGE COSSON,
Attorney General of Iowa.

FOREIGN CORPORATIONS—DOING INTERSTATE BUSINESS—FILING FEE. —In corporations like the Mississippi River Power Company, the purpose of which is to construct a dam across the Mississippi river at Keokuk for the production, supply and distribution of electricity to be sold in various parts of the states of Iowa, Illinois and Missouri, the filing fee due the state of Iowa should not exceed the amount of capital used or authorized to be used in the state in which the articles are filed.

February 24, 1911.

MR. JAMES C. DAVIS,
Des Moines, Iowa.

DEAR SIR: I am in receipt of your communication of the 20th ultimo advising that the Mississippi River Power Company, a corporation organized under the state of Maine, which company is successor to the Keokuk & Hamilton Water Power Company, will shortly desire to do business in the state of Iowa; that said company is now constructing and will maintain a large dam across the Mississippi river at Keokuk, Iowa, for the purpose of the production, supply and distribution of electricity, the same to be transmitted and sold in various parts of the states of Iowa, Illinois and Missouri.

You request to be advised as to what attitude this department will assume with reference to the payment of the filing fee under

the provisions of section 1637 of the code as amended by chapter 104, acts of the thirty-third general assembly.

I am thoroughly convinced that under the holding of the supreme court of the United States in the case of *Kansas v. Western Union Telegraph Company*, 216 U. S., 1, and later cases decided by said court, that the state of Iowa cannot exact a filing fee from foreign corporations doing an interstate business, which may hereafter desire to file their articles, in excess of the amount of capital used or authorized to be used within the state in which the articles are filed, and that will be the decision and position taken by this department pending further legislation by the general assembly, in the event that articles of foreign corporations doing an interstate business are offered for filing during said time.

Yours very truly,

GEORGE COSSON,

Attorney General of Iowa.

SCHOOL CORPORATIONS—LIABILITY FOR DAMAGE ON ACCOUNT OF EXPLOSION OF STEAM BOILERS.—A school corporation is not liable for injury to life or limb occasioned by the explosion of a steam boiler connected with its heating plant.

February 25, 1911.

HON. A. M. DEYOE,
Superintendent Public Instruction.

DEAR SIR: Yours of the 6th instant addressed to the attorney general has been referred to me for investigation and reply.

You request from this department an official opinion upon the following question:

> "What is the liability of a school corporation for damage to life or limb on account of an explosion of the boiler in the heating plant?"

I am unable to find any decision of our supreme court passing upon the exact question. However our court has held that "A school district is not liable for personal injuries sustained on account of the negligent construction of the school-house or negligence in failing to keep in repair the lightning rods with which it was provided, by reason of which plaintiff was struck by lightning and injured."

Lane vs. District Twp. of Woodbury, 58 Iowa, 462.

The court in that case used the following language:

"A school district is a public corporation, or *quasi* corporation, created by statute for the purpose of executing the general laws and policy of the state, which require the education of all its youth. It is a branch of the state government, an instrument for the administration of the laws, and is, so far as the people are concerned, an involuntary organization. Code, section 1713. In these respects it is not different from a county, except that its functions and the purposes of its organization are more restricted, and not so numerous. The education of youth is the only purpose of the corporate school district. Its powers are restricted to the execution of this purpose. * * * *

"This court has held that a county is not liable for a personal injury inflicted by reason of the defective construction of a court-house, and negligence in failing to keep it properly lighted. *Kincaid vs. Hardin County,* 53 Iowa, 430. In that case the plaintiff was in attendance at night upon the court as a witness and received injuries by reason of defective stairs of the court-house, and insufficient light. We held that the law gave him no remedy against the county. We discover no difference as to the liability of the respective corporations, between that case and this, except such as exist from the fact that the school district is far more limited in its functions and powers than the county. These differences of course do not distinguish the cases, but bring this case within the rule of the other.

"We regard *Kincaid vs. Hardin County,* as decisive of this case. Following that decision we order the judgment of the district court to be reversed."

In the case of *Freel vs. School City of Crawfordsville,* 142 Ind. 27; 37 L. R. A., 301, where the plaintiff brought suit against the school corporation to recover for injuries sustained while employed as a laborer engaged in making repairs on the premises, the supreme court of Indiana in passing upon the question said:

"School corporations in this state are a part of the educational system of the state, established in compliance with article 8 of the Constitution (Rev. Stat. 1881, sections 182, 187; Rev.

Stat. 1894, sections 182, 187) which makes it the duty of the legislature 'to provide by law for a general and uniform system of common schools, where tuition shall be without charge and equally open to all.' They are involuntary corporations, organized, not for the purpose of profit or gain, but solely for the public benefit, and have only such limited powers as were deemed necessary for that purpose. Such corporations are but the agents of the state for the sole purpose of administering the state system of public education. It is the duty of the school trustees of a township, town, or city to take charge of the educational affairs of their respective localities, and, among other things, to build and keep in repair public school buildings. In performing the duties required of them, they exercise merely a public function and agency for the public good, for which they receive no private or corporate benefit. School corporations, therefore, are governed by the same law, in respect to their liability to individuals for the negligence of their officers or agents, as are counties and townships. It is well established that where subdivisions of the state are organized solely for a public purpose, by a general law, no action lies against them for an injury received by a person on account of the negligence of the officers of such subdivision, unless a right of action is expressly given by statute. Such subdivisions, then, as counties, townships, and school corporations, are instrumentalities of government, and exercise authority given by the state, and are no more liable for the acts or omissions of their officers than the state. * * * *

"Certainly, a public corporation is not liable to respond in damages, in any instance, for the negligence of its officers or agents, unless it has the authority to raise the money from the taxpayers to pay the same. The officer, agent, or other person whose negligence was the proximate cause of the injury may be liable, but the appellee is not. The decisions in other states fully sustain the views here expressed."

In the case of *Ernst vs. West Covington,* 63 L. R. A., 652, the supreme court of Kentucky held a city not liable for injuries sustained by a pupil being jostled by playmates and thrown violently over a stone wall adjacent to the premises by reason of the unsafe condition of premises furnished by the city for school purposes, and in passing upon the question said:

"The property was in the possession of and in the control of the common-school district in the city of West Covington. The injured child was attending the public school, and sustained the injury in the manner described in the petition. The question is, can the city of West Covington be held liable for the damages sustained?

"The state regards it as her duty to establish and maintain a system of public education. When sums have been collected for that purpose they cannot be diverted to any other use or purposes. If it could be done, the system would be injured and the public suffer incalculable injury. If some one is injured by the faulty construction of a public school building or the maintenance of the grounds, no action can be maintained against the district for such injury. The law provides no funds to meet such claims. * * * *

"This action is brought against the city of Newport by the plaintiff, a minor, suing by her next friend, to recover damages for injuries which she suffered by being scalded and burned in one of the public schools of the city, by the heating apparatus there used, which the declaration alleges was carelessly kept by the city in a defective, unsafe, and dangerous condition without sufficient guarding and protection. If we understand the case aright, the ground of exemption from liability is not that the duty or service is compulsory, but that it is public, and that a municipal corporation in performing it is acting for the state or public in a matter in which it has no private or corporate interest."

In the case of *Hill vs. Boston,* 122 Mass. 344, the city was held not liable where it permitted the railing about a winding staircase to be so low as to render it dangerous and plaintiff sustained serious injuries by falling over same while attending school in the third story of said building.

In the case of *Ford vs. School District of Kindall Borough,* 1 L. R. A., 607, where the plaintiff, a pupil in the school, was standing near the stove of the school room in which the janitor was attempting to build a fire and failing to produce the desired result, he left the room and soon returned with a dish of crude petroleum which he threw into the stove. The result was an explosion by which the plaintiff was severely burned and otherwise injured. The board of directors had been twice notified of this method of

kindling fires by the janitor, and warned of the danger of permitting the continuance; and although the matter seems to have been discussed by that body, no further attention was paid to it. The supreme court of Pennsylvania in passing upon the case said:

> "We thus assume that the injury to plaintiff, as well as the negligence of both the janitor and the school board, has been established and that her case should have been submitted to the jury if the defendant can be made liable for the default of its agents. The question then is, can a school district be held for such default?"

The learned judge who presided in the trial in the court below determined this question in the negative, and directed a non-suit, and as to the rectitude of this decision we have no doubt; the school districts are but agents of the commonwealth and are quasi corporations for the sole purpose of the administration of the commonwealth system of public education.

A case very similar to the one contemplated by your inquiry arose in *Wixon vs. Newport,* 13 R. I., 454; 43 Am. Rep., 35, in which the court used the language quoted on page 4 hereof.

In view of the foregoing authorities and in the absence of statute I am of the opinion that while individuals may by negligence render themselves liable in such a case as you mention, no liability exists in such case as against the school corporation.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

CLERK OF THE DISTRICT COURT—FEES IN NATURALIZATION MATTERS —MUST BE ACCOUNTED FOR.—Fees received by a clerk of the district court in connection with the performance of his duties in naturalization matters should be accounted for by him the same as other fees received for official duties performed.

February 28, 1911.

MR. FRANK L. MAY,
County Attorney,
Lansing, Iowa.

DEAR SIR: Your letter of the 10th inst., addressed to the attorney general, has been referred to me for investigation and reply.

You state the question upon which the opinion of this department is desired as follows:

> "Must the clerk report the fees collected from naturalization matters, to the board of supervisors and pay said fees to the county? Or, do the fees so obtained belong to the clerk as compensation from the federal government for his labors?"

The proper solution of this question requires the consideration of the statutes of the United States, as well as of this state, bearing upon the question, and to some extent their history.

Prior to the act of June 29, 1906, the statutes of the United States, bearing upon the naturalization of aliens, were contained in sections 2165-2174 inclusive of the revised statutes of the United States of 1878, which will be found printed at length on page 30 of the Iowa Code of 1897. It will be observed that no provision is made with reference to clerks' fees in either state or federal courts, and the only portions material to this investigation are:

> 1st. "He shall declare on oath before a circuit or district court of the United States, or a district or supreme court of the territories, or a *court of record of any* of the states having common law jurisdiction and a seal and a clerk * * * * his intention to become a citizen of the United States," etc. Sec. 2165.
>
> 2nd. "That the declaration of intention to become a citizen of the United States required by section 2165, may be made by an alien before the clerk of any of the courts named in said section." (Added by act of February 1, 1876.)

Section 13 of the act of June 29, 1906, to which you refer, provides:

> "That the clerk of each and every court exercising jurisdiction in naturalization cases shall charge, collect and account for the following fees in each proceeding:
>
> "For receiving and filing a declaration of intention and issuing a duplicate thereof, one dollar.
>
> "For making, filing and docketing the petition of an alien for admission as a citizen of the United States and for the final hearing thereon, two dollars; and for entering the final order and the issuance of the certificate of citizenship thereunder, if granted, two dollars.

"The clerk of any court collecting such fees is hereby authorized to retain one-half of the fees collected by him in such naturalization proceeding; the remaining one-half of the naturalization fees in each case collected by such clerks, respectively, shall be accounted for in their quarterly accounts, which they are hereby required to render the Bureau of Immigration and Naturalization, and paid over to such bureau within thirty days from the close of each quarter in each and every fiscal year. * * * *

"Provided, That the clerks of courts exercising jurisdiction in naturalization proceedings shall be permitted to retain one-half of the fees in any fiscal year up to the sum of three thousand dollars, and that all fees received by such clerks in naturalization proceedings in excess of such amount shall be accounted for and paid over to said bureau as in case of other fees to which the United States may be entitled under the provisions of this act. The clerks of the various courts exercising jurisdiction in naturalization proceedings shall pay all additional clerical force that may be required in performing the duties imposed by this act upon the clerks of courts from fees received by such clerks in naturalization proceedings."

The sections of our Code, to which you refer, have contained their present provisions since 1894 and provide as follows:

Section 297. "The clerks of the district courts shall receive as full annual compensation for all services the following:" (Amounts to be fixed by the board of supervisors, with a maximum limit graded according to population.)

Section 296 provides:

Par. 23. "For declaration of intention by an alien to become a citizen, twenty-five cents."

Par. 24. "For all services on naturalization of alien, including oaths and certificates, fifty cents."

Par. 30 (last line). "All of which fees shall be paid into the county treasury."

Consideration should also be made of section 299, which provides:

"The clerk of the district court shall report to the board of supervisors of his county at each regular session, a full

and complete statement of the amount of fees received by him, which shall be verified by his affidavit, and pay such fees into the county treasury as hereinbefore provided."

It will be observed that at the time of the enactment of paragraphs 23 and 24 above referred to, there was no United States law fixing the fees to be charged in such cases, either by clerks in the state courts or in the United States courts, and it had been held, notwithstanding the provision of the United States statute, section 833, which provides that every clerk of the district court shall on the first days of January and July in each year make to the attorney general a written return for the half year ending on said days, of *all the fees* and *emoluments* of his office of every name and character; that neither the clerk of the United States court nor his bondsmen were liable for moneys which he had received in naturalization matters, none of which were included in his returns above provided for. *United States vs. Hill*, 120 U. S., 169. See also *United States vs. McMillan*, 165 U. S., 504, which was decided in 1897, eleven years later and was to the same effect. In the first cited case it was shown by the agreed statement of facts, and referred to as significant by the court, "that the clerks of the courts of Massachusetts under a fee-bill much like ours, and a statute requiring them to make to the county treasurer yearly a return of all fees received by them for their official acts and services" were never required to include in their returns the fees received in naturalization cases. This was changed by the (Mass.) act of 1879, C300, which defined what the fees in such cases should be and directed the clerks to include them in their returns.

So it would seem that inasmuch as clerks were not under the old law required to account for these fees, that the provision of the new law permitting the clerk "*to retain one-half of the fees collected by him*" should be construed as meaning that he might retain the same in his individual capacity rather than in his capacity as clerk (where he is clerk of a state court). This provision, in my judgment, had the effect of abrogating paragraphs 23 and 24 of 296 of our code above referred to and leaves the amount of the fee as fixed by the federal statute.

It may be said, however, that the state would have the power to require its officer (clerk in this case), to account for the fees received by him even though for the performance of some duty

not imposed upon him by the state, but, as in this case, by the United States, and even though it were for some service outside of his official duties, and that hence the clerk should account to the county for the one-half of these fees which the United States law permits him to retain in view of the fact that his compensation is on a salary basis.

The courts have gone at great length along this line, our own supreme court holding that the clerk must account, under the general provision requiring such accounting, for fees earned by him as a member of the insane commission. *Moore vs. Mahaska Co.*, 61 Iowa, 177.

And by the supreme court of Missouri that the clerk should account for fees earned in keeping accounts between the county treasurer and the county.

Calloway vs. Henderson, 24 S. W., 437.

And by the supreme court of Minnesota, that the clerk should account for fees received for reports furnished abstractors and commercial agencies, although unauthenticated.

Hennepin Co. vs. Dickey, 90 N. W., 775.

And by the supreme court of California, that he must even account for illegal fees collected by him.

People vs. Hamilton Co., 37 Pac., 627.

And by the supreme court of Nebraska, that he must account for fees earned in taking acknowledgments, etc., when he was also a notary public and acted as such.

State ex rel Frontier Co. vs. Kelley, 46 N. W., 714.

And in cases more nearly like the one under consideration, the supreme court of Oklahoma held that a probate judge should account for fees earned by him in townsite matters, even though in these matters he derived his powers from an act of congress.

Finley vs. Femtory, 73 Pac., 273.

In this case the court says:

> "The contention of plaintiff in error that the probate judge, while acting in town-site matters, is a separate and distinct office, is not well founded. The authority conferred in town-site matters by congress was an additional power and jurisdiction delegated to the probate courts of this territory. Con-

gress conferred this power upon the office, and not on the individual, and congress did not thereby create a separate and distinct office. Can it be said that when the probate court exercises the powers and jurisdiction of a justice of the peace he is, while performing such duties, a justice of the peace? Or can it be said that when he exercises the jurisdiction of a district court in the trial of certain civil causes he is a district judge? Or can it be said that when he is acting in townsite matters he is a judge of the United States court, or an officer of the United States? These questions must be answered in the negative. * * * *

"The legislature of this territory has the undoubted power to fix the fees and salaries of the probate judges, and to require them to report and account for all fees received by them. And this is what our legislature has done. * * * *

"He shall at the time of making such report, pay into the county treasury all moneys received as fees during the three months immediately preceding the date of filing of said report in excess of one-fourth of the amount allowed by law as the annual salary of the probate judge; provided, that should the amount of fees received by the probate judge during any quarter be less than the amount allowed to him as his salary for said quarter under the provisions of this act, such deficiency may be made up out of the excess of his receipts from fees over the amount of his salary during any quarter of his term or terms of office."

Section 15 of said act provides:

"Any probate judge who shall fail to make a quarterly report under oath as herein required, shall forfeit to the county twenty-five dollars for each day he shall wilfully fail so to do, to be recovered from his bondsmen, as in other cases. * * * *

"In the light of these various statutory provisions, it clearly appears that the office of probate judge is purely a fee office, that he is required to keep a strict and accurate account of all fees received and charged by him, and that he is entitled to retain from such fees the maximum salary allowed by law, and the excess, if any, he is required to pay into the county treasury.

"There is no question in this case as to the schedule of fees to be charged by the probate judge, or whether the amounts collected by him are the fees authorized to be charged by law, and there is no question as to whether the fees collected by him were legal or illegal. The law authorizes the probate judge to charge a specific fee for every official act he performs by virtue of his official position; and where specific fees are not fixed by law, then he shall be entitled to receive therefor the same fee as may be by law allowed to district clerks for like services, and, when received or charged, such fees must be entered in the book required for that purpose, and this without regard to the purpose for which the act was performed. * * * *

"But it is contended that the statutes make no provision for charging a fee in town-site matters, and since no fee is provided for by law, that the probate judges are not required to report and account for any compensation that they may have received for performing such extra services. This contention we think is untenable. * * * *

"But it is contended that the term 'fees' does not include compensation or charges received for services while acting in town-site matters. We do not think so. We think the word 'fees' as used in our statutes, clearly includes all compensation or charges received by the probate judge by virtue of his office. And this view of ours is sustained by the authorities. * * * *

"The statute fixing the compensation for probate judges embraces every possible fee, compensation or emolument accruing to the probate judge by virtue of his office, and does not permit him to withhold any of them. The test is, whatever is done by such probate judge that could not be done by him as a private individual, and when not exercising the powers and duties of his office, is clearly within the purview of the statute requiring him to report and account for all fees and emoluments received by him. * * * *

"But it is argued by counsel for plaintiff in error that the duties devolving upon the probate judge in respect to town-site matters necessarily involve a vast amount of labor, and that it is not contemplated that he should bear the burden, worry and expense of so onerous a duty without receiving just

compensation for such additional labors. We think this question should be addressed to the legislative branch of our government, and is not a matter for judicial interpretation."

In view of these authorities I am of the opinion that even though our present state statute no longer fixes the fees of the clerk in naturalization matters, yet under the general provision requiring the clerk to account he is required to account to the county for the one-half of fees in such matters which the federal laws permit him to retain.

Respectfully submitted,

C. A. ROBBINS,
Assistant Attorney General.

COUNTY RECORDER—COMPENSATION OF—NO RIGHT TO RETAIN OUTSIDE COMPENSATION.—A county recorder must account to his county for compensation received from abstract companies and others to whom he furnishes material for their daily reports.

March 1, 1911.

MR. WILLIAM DENNIS,
Marion, Iowa.

DEAR SIR: Your letter of February 23rd addressed to the attorney general has been referred to me for investigation and reply.

Your inquiry in brief is, as to whether or not the county recorder would have a right to retain compensation received by him from abstract companies and others to whom he furnished material for their daily reports.

A question very similar to the one propounded arose in the case of *Hennepin Co. vs. Dickey*, 90 N. W., 775.

The supreme court of Minnesota in stating this case, which was an action by the commissioners against the county clerk, used the following language:

"Respondent has been the incumbent of the clerk's office since January 1, 1891. After he took possession he continued a practice previously in vogue, to furnish daily reports to abstract companies and commercial agencies located at Minneapolis. These reports were made upon printed blanks prepared for that purpose. They contained the title of suits commenced, amounts involved, as well as judgments entered

> and docketed, derived from an examination of the files and records and comprised the knowledge useful in furnishing abstracts of title and commercial reports. They were given out at stated times each day but without authentication."

What the clerk did was not done secretly. For this work the clerk received during the six years previous to the commencement of the action, a compensation agreed upon between him and those to whom the statements were furnished, aggregating several thousand dollars, which he has retained upon the claim that he had the legal right to the same.

The existing fee schedule provides the measure of compensation for clerks' duties provided therein. The fees were to be collected and paid into the county treasury. From these sources the county derived a revenue taken from the clerk, but in lieu thereof he was to be paid a fixed salary.

While the statute fixes no fee for such information as was given out, yet a fee was designated for copies and exemplifications of records and pleadings, and under the law in this state the recorder would have a right to charge a statutory fee for such copies.

The court in that case, after an exhaustive consideration of the subject, concludes its opinion as follows:

> "While respondent may not, perhaps, be criticised for furnishing the statements in the form and manner given to the agencies and abstract companies, yet he could not by a short cut or business arrangement of his own pursue a course that would dispense with copies or certificates, when such useful means might be an essential prerequisite to securing the knowledge desired by persons seeking the same.
>
> "If copies, certificates, or searches where no copies were made would within any fair intention or expectation provide a means by which services of a clerk would be given to secure legitimate ends, it ought not to be evaded by any plan that would deprive the county of its revenues.
>
> "We are therefore required to adopt the conclusion that a proper legal view of the clerk's duty to deal with the money thus received from the statements furnished to the abstract men and agencies, must be determined against his asserted rights to appropriate the same to his own use, upon the consideration that the statements were furnished in his official capacity and

it was likewise the interest and the clear right of the county to have the compensation received therefor turned into its treasury; and it is of no significance that the specified fees provided for in the schedule were not in terms exacted, or even that more than legal fees had been received by the clerk; for, such services being official in character and having been voluntarily paid, whatever was so paid became a resource of the county and not a perquisite of the clerk."

And it has been held by the supreme court of California that where fees were collected by a clerk without legal authority but under cover of his office, that the fees belonged to the state and not to the officer.

People vs. Hamilton Co., 37 Pac., 627, and

People vs. Van Ness, 21 Pac., 554.

The reasoning made use of by the court in these cases applies with equal force to the case presented by you and I am therefore of the opinion that it is the duty of the recorder to account to the county for whatever compensation he has received from the abstract companies.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

TELEPHONES—WHEN FIXTURES.

March 2, 1911.

MISS MARGARET A. HENSLEIGH,
College Springs, Iowa.

DEAR MADAM: Yours of February 27th, addressed to the attorney general, has been referred to me for reply.

The question which you present has never been determined by the supreme court of Iowa and it has been determined differently in different states, so that the question would be a close one in this state in case of a contest.

Where the telephone is put in by a tenant, or other person not owning the building, then they clearly have the right to remove it, but when the owner of the building equips it with a telephone and then sells the building without making any reservation, the rule is different, and as I have said has been determined differently

in different courts, and if brought to a test in this case the outcome would be doubtful.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

PRIMARY ELECTION—PERCENTAGE OF VOTES REQUIRED—TOWNSHIP OFFICERS.—The provision of the primary law requiring 35% of the votes cast for that office in order to nominate applies only to the offices to be filled by voters of a county and not to offices to be filled by voters of a subdivision of a county. Does not apply to township officers.

March 2, 1911.

MR. F. E. PLUMLEY,
Ralston, Iowa.

DEAR SIR: Yours of February 22nd addressed to the attorney general has been referred to me for reply.

You state your question as follows:

> "There are three trustees to be elected but four are voted for in the primary election, two of which are Democrats and two Republicans. Now as regards the two Democrats, one received one vote and the other received two, there being but three votes cast for the office on the Democratic primary ticket, which according to our understanding would not give the man with the one vote the right to appear on the general election ticket.
>
> "Now where our voters would like your ruling is in regard to how the Democrat that received but one vote had the lawful per cent in order to get his name printed on the official ballot at the general election."

I assume that the percentage to which you refer does not have reference to the two per cent of the total vote cast at the general election in order to entitle the political party (Democrat in this case) to have its ticket appear on the ballot, as required by section 1087-a3 of the code supplement, but that the percentage you refer to is the thirty-five per cent of all the votes cast by the party for such office as mentioned in section 1087-a19, code supplement.

A careful examination of this section will disclose the fact that this provision requiring the thirty-five per cent only applies to

offices to be filled by the voters of the county and not to offices to be filled by the voters of a subdivision of the county. The provision with reference to townships does not require any per cent of the total vote and reads as follows:

> "And the candidate or candidates of each political party for each office to be filled by the voters of any subdivision of a county, having received the highest number of votes, shall be duly and legally nominated as the candidate of his party for such office," whereas, in county offices there is added the further provision: "and not less than thirty-five per cent of all the votes cast by the party for such office."

So it will be seen that no percentage of the total vote whatever is required to nominate in the case of township officers. Furthermore, in the case supposed by you, each of the parties received the entire vote cast for that office. It is true that one received two votes and the other only received one vote, yet they were not candidates for the same office, but each was a candidate for one of the three places to be filled and each received the entire vote cast by his party for that office, and as the entire vote equals one hundred per cent, he had the thirty-five per cent and more, and was lawfully nominated and entitled to have his name printed on the ballot at the general election.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

INTOXICATING LIQUORS—SALES OF.—Persons are prohibited from soliciting or accepting orders for the sale of intoxicating liquors.

March 8, 1911.

MR. A. S. TRAGETHON, MAYOR,
Kensett, Iowa.

DEAR SIR: I am in receipt of your communication of the 3rd instant requesting to be advised (first) as to whether a person may lawfully solicit orders for the purchase, sale, shipment or delivery of liquor within this state; (second) as to whether a person who is on the black list on account of being a drunkard may purchase liquor in an adjoining town from a pharmacist.

1st. Section 2382 of the supplement to the code provides in part that:

> "No one, by himself, clerk, servant, employe or agent, shall, for himself or any person else, directly or indirectly, or upon any pretense, * * * * solicit, take, or accept any order for the purchase, sale, shipment, or delivery of any such liquor (intoxicating), or aid in the delivery and distribution of any intoxicating liquor so ordered or shipped," etc.

This provision has been held legal and valid by the supreme court of Iowa and the supreme court of the United States.

2nd. No registered pharmacist, with or without a permit, is permitted to sell intoxicating liquors to any minor, or to any one who habitually uses intoxicating liquors as a beverage, and a permit holder before he sells liquor is bound to know personally at his peril that the person to whom he sells is not a minor, intoxicated person, or one in the habit of using intoxicating liquors as a beverage, hence it follows that if the man is a drunkard, no druggist may lawfully sell him liquor regardless of the fact as to whether he is or is not on a black list.

Yours very truly,

GEORGE COSSON,
Attorney General of Iowa.

TOWNSHIP TRUSTEES—COMPENSATION.—The compensation of trustees for attending meetings called by the board of supervisors for the purpose of instruction in road building and weed destruction under chapter 96 of the acts of the thirty-third general assembly should be paid from the general township fund.

March 9, 1911.

MR. G. M. CHAFFEE,
Atlantic, Iowa.

DEAR SIR: Your letter of the 3rd inst. addressed to the attorney general has been referred to me for reply.

Your question is as to what fund the township trustees are to receive their compensation from for attendance at the meeting called by the board of supervisors for the purpose of instruction in road building and weed destruction, whether from the county fund or the township fund.

Section 6 of chapter 96 of the acts of the thirty-third general assembly, which provides for this school of instruction is not very clearly written. The provision controlling the matter is as follows:

> "For such attendance the same compensation shall be allowed to trustees and road supervisors and the county supervisors as is allowed by law for other services, to be paid as other expenses; the expense of experts herein provided for may be paid from the county road fund."

It is certainly not meant by this section to provide that the services of the trustees, road supervisors and county supervisors, as well as the expenses of the experts, should be paid from the county road fund; if so it would have included in the latter provision, which expressly provides that the expense of experts may be paid from this fund.

While the term "to be paid as other expenses" undertakes to specify the manner of payment, yet it will be observed that it does not indicate or fix the fund from which the payment is to be made and as no other fund is provided, it would seem to follow that the compensation of the trustees would come from the township fund.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

ROAD TAX—COLLECTION OF.—Where the road taxes are ordered paid in money it is the duty of the county treasurer to collect same along with the other taxes.

March 11, 1911.

MR. JOHN F. DALTON,
Manson, Iowa.

DEAR SIR: Yours of March 7th addressed to the attorney general has been referred to me for reply.

1st Q. "Under the township road district plan, the road superintendent is appointed by the trustees. Can he collect any road tax in money if residents do not work out said taxes?"

A. It is the duty of the county treasurer to collect road tax when the trustees order the same to be paid in money instead of labor. See code section 1533, but where this order is not made and the party fails to work out his road tax, the superintendent may

recover the statutory penalty of $3.00 per day, provided by section 1552, but this he would recover as a penalty and not by way of collection of the tax.

2nd Q. "Is there any fixed compensation for work with team, or rather for the work of the team, per day on the roads?"

A. No.

3rd Q. "What is the difference between the compensation for a man with a team and a man without a team, per day?"

A. There is no difference. Where a man is working out poll tax and works with or without a team he is required to work the two days fixed by section 1550, and section 1535 requires eight hours work for a man, or man and team, to constitute one of the day's work required by section 1550. This should not be construed to apply to cases where the superintendent or other road authorities employ men with teams, but only to cases where the party is working out his taxes.

4th Q. "What is the fixed compensation for road superintendent with team? Without?"

A. There is no fixed compensation for road superintendent with or without team, but the superintendent's compensation is to be fixed by the trustees, and section 1533 code supplement requires it to be fixed not to exceed $3.00 per day, and no mention is made of superintendent having a team, so this compensation would be his compensation without team unless otherwise specified.

5th Q. "If enforcement of the weed cutting law more than uses up the levy for that purpose, may said law be enforced and penalties inflicted?"

A. Yes.

6th Q. "The law gives compensation of township trustees at $2.00 per day. Can the board of supervisors cut bill for their services when only $2.00 per day is asked for all time rendered, that is, and do so legally?"

A. No.

7th Q. "Has the board of supervisors set any fixed compensation for the work of assessors and have they legal right to do so?"

A. As to whether your board or any other board has fixed compensation for work of assessor, I do not know, but chapter 41 of the acts of the thirty-third general assembly provides:

"Each township assessor shall receive in full for all services rendered of him by law, a sum to be paid out of the county treasury, and fixed annually by the board of supervisors at their January session; said compensation shall be for the succeeding year, and shall not exceed the sum of two and one-half dollars ($2.50) for each day of eight hours which said board determines may necessarily be required in the discharge of all official duties of such assessors, except in townships having a population of thirty thousand (30,000) or over, and situated entirely within the limits of a city acting under special charter, such compensation shall be four dollars ($4.00) per day."

and this would not only give them the legal right but make it their duty to fix the compensation.

8th Q. "Can promissory notes for the rent of land be legally classed as moneys and credits?"

A. Yes.

9th Q. "If taxable may they be offset by debts?"

A. Yes.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

TAXATION—ASSESSMENT—MORTGAGE IN OTHER STATE.—A note held by a resident of this state should be assessed to him at his place of residence even though the same is secured by mortgage on land in another state where such mortgage is also taxed.

March 15, 1911.

MR. LEVE TALHELM,
Hampton, Iowa.

DEAR SIR: Your letter of the 14th inst. addressed to the attorney general has been referred to me for reply, and while this department is not authorized to furnish opinions to persons other than state officers, I will say for your information that our supreme court has held in the case of *Snakenberg vs. Stein,* 126 Iowa, 650, that where moneys and credits had been assessed in the wrong county, they might also be assessed in the proper county, which was the county in which the owner of the note and mortgage re-

sided, and for this reason, I am of the opinion that the court would hold that the note secured by mortgage would, under the section to which you refer (sec. 1313 of the code), be assessable to the party in this state at the place where he resides, even though he had been required to pay some tax on the mortgage where recorded in the other state.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

SCHOOL HOUSE TAX—STATUTE FIXING TIME OF LEVY DIRECTORY.—Where the levy of a tax is authorized in manner provided by law but through negligence or mistake the levy is not made at the proper time a levy made a year later is valid.

March 15, 1911.

MR. DALE HUNTER,
Westfield, Iowa.

DEAR SIR: Your letter of the 14th inst., addressed to the attorney general, has been referred to me for reply.

Your question in brief is: How to procure the levy of a school house tax, which was voted in March, 1910, and certified as required by law, but through oversight the levy was not made by the county board of supervisors.

There are two ways to remedy this matter, one way would be to have the board meet at this time, or before the legislature adjourns, make the levy and then have the legalizing act passed, curing the levy as against the defect of its being made after the time prescribed by law, as was done in the case of *C., R. I. & P. Railway Company vs. Independent District of Avoca,* 68 N. W. (Iowa), 881.

However, it would hardly be possible to have the tax thus levied spread upon the books and collected in such a way as to be available this year, hence, I am inclined to think that the best remedy would be to follow the rule announced in the case of *Perrin vs. Benson,* 49 Iowa, 325, wherein it is held:

> "If the levy of a tax, which has been authorized in the manner provided by law, is not made at the proper time, through negligence or mistake, it may be made at the time fixed by law for making the succeeding tax levy. This section of the code

prescribing the time and manner in which a school tax shall be levied is directory merely, and a failure of the board of supervisors to levy the tax in the time prescribed is not fatal thereto, and a levy made a year later is valid."

So that it would seem that all that is required would be to see that the levy is not overlooked, but is made by the board at its September meeting.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

DELINQUENT TAX COLLECTOR—COMPENSATION OF.—The 5% compensation for delinquent tax collector provided by code supplement section 1407 should be collected from the delinquent and not from the county treasury.

March 16, 1911.

MR. HOWARD E. KITTELL,
Audubon, Iowa.

DEAR SIR: Your letter of the 15th inst., addressed to the attorney general, has been referred to me for investigation and reply. You call for the opinion of this department as to the proper construction of code supplement section 1407, and say:

> "Our delinquent tax collector has been charging the 5% commission on all delinquent taxes that he has collected, but one of the resident attorneys holds that he has no right to do that only in cases where he has to make a levy on property to get the tax."

I think the proper construction of the section authorizes the collection, by the collector, of the 5% from the delinquent in all cases where he makes the collection and pays over the proceeds. I do not believe the collector has authority to make distress and sale, but that when necessary to collect by distress and sale, the statute provides that the treasurer shall place the same in the hands of the sheriff or constable, who shall proceed to collect the same, and either shall be entitled to receive in addition to the 5% the same compensation as constables are entitled to receive for the sale of property, or execution, and in such cases the collector would not be entitled to the 5%, but this 5% would go to the sheriff or constable making the collection by distress and sale. It therefore follows that your

view is the correct one and that the view of the local attorney, as expressed by you, is erroneous.

You will understand that this department is not authorized to give official opinions, except to certain state officers, and that the foregoing is simply the personal view of the undersigned.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

CITY COUNCIL—MEMBERS OF—MAY NOT CONTRACT WITH CITY—POSTMASTERS MAY NOT HOLD MUNICIPAL OFFICES.—A member of the city council is prohibited from contracting with his city. The office of postmaster is incompatible with that of city office.

March 17, 1911.

MR. CLARENCE DUNN,
Van Meter, Iowa.

DEAR SIR: Your letter of the 13th inst. addressed to the attorney general has been referred to me for reply. While this department is not authorized to furnish official opinions except to certain state officers, yet the writer hereof is willing to give you his personal views upon the several questions propounded by you, which are as follows:

1st. "Is the town under obligations to construct culverts or other modes of safe passage, over gutters and ditches along the sides of graded streets?"

2nd. "Are fourth class postmasters prohibited in any manner from holding municipal offices in small towns where such office does not interfere with their duties in the post office?"

3rd. "Is there any provision in code of Iowa forbidding a councilman, or other town officer, working on streets by day labor, at the compensation established and paid to all laborers performing such labor?"

Bearing upon your first inquiry, I call your attention to code section 785, which provides that when a city or town shall have established the grade of any street or alley and any person shall have made improvements thereon, or lots abutting thereon, according to the established grade thereof, when such grade shall thereafter be

altered in such a manner as to damage, injure or diminish the value of such property or improvements, said city or town shall pay to the owner of such property the amount of such damage or injury.

Under this statute our supreme court has held that, where a street is cut down or graded before any grade has been established, in such a way as to make the abutting property more difficult of access, the property owner is entitled to recover damages.

Richardson vs. Webster City, 111 Iowa, 427;

Trustees vs. Anamosa, 76 Iowa, 539;

Blanden vs. Fort Dodge, 102 Iowa, 441.

And in a later case the supreme court said:

> "The situation comes down to this: the city is liable, in damages, if it shall injuriously grade in the absence of an ordinance, and it is liable in damages if it shall injuriously make a change in grades. And the damage to the abutting owner cannot be any different in extent or character in the one case from what it is in the other.

Code section 1556, relating to the working of public highways, provides that the supervisors shall not destroy or injure the ingress or egress to any property, and this provision is held applicable in the case where the supervisor cuts a ditch along the side of a street in an unincorporated village and the property owner sought to enjoin the cutting of the ditch. The supreme court, in passing upon the matter, said:

> "The inconvenience which can be caused by a ditch six inches in depth, furnished with proper approaches or coverings, is too insignificant to justify a court of equity in interfering. We cannot presume that the defendant will not use due care in providing a proper crossing, and, if such a crossing is made, the purpose of the law will be accomplished and the plaintiff will have no cause for complaint."

Randall vs. Christiansen, 76 Iowa, 171.

So that, while there is no provision requiring the town to construct the culvert, yet, where it cuts a ditch two feet deep, as stated by you, it would seem that in order to avoid liability for damage to the property owner, such culvert or crossing should be constructed. Of course if the city prefers to lay itself liable for a suit for damages by cutting of the ditch, rather than to construct

the culvert, this course would be open to it. Of course where a grade has once been legally established by ordinance, and then a subsequent grade is established, the statutes provide that damages shall be assessed and paid, and in such case, the damage so assessed and paid would be the extent of the city's liability, and in such case it would be the duty of the property owner to construct his own culvert or crossing, but I assume that this latter situation is not what you have in mind but only a case where the ordinary side ditch for drainage purposes is constructed.

Replying to your second inquiry, would say that there is no statute of this state which prohibits postmasters from holding municipal offices, however, it is a fundamental proposition, sustained by common law, that no person can hold two offices, if the duties of the same are to any extent incompatible and authorities state the rule as follows:

> "It is a general rule that a federal office holder may not, at the same time, hold a state office. Under this rule the following offices have been held to be incompatible: postmaster and judge of a county court, or justice of the peace, or county commissioner, or township collector, or township trustee."
>
> *23rd American and English Encyclopedia of Law*, p. 335.

And I am unable to see why this rule would not equally apply to and exclude the postmaster from holding any municipal office, even though he might find time to perform the duties of both.

Replying to your third inquiry, I call your attention to subdivision 14 of code section 668, which provides:

> "No member of any council shall, during the time for which he has been elected, be appointed to any municipal office which shall be created, or the emoluments of which shall be increased, during the time for which he shall have been elected; nor shall he be interested, directly or indirectly, in any contract or job for work, or the profits thereof, or services to be performed for the corporation."

Our supreme court has even gone farther than the terms of this section, and held that, even though this section does not apply, that a contract for the sale of lumber used by the city for the construction of sidewalks and crossings, even where the town received the benefit of the contract, and even though the councilman who furnished the lumber did not vote upon the proposition of making

the contract, that such contract was void as being against public policy and that the city should be enjoined from paying him for the lumber.

Bay vs. Davidson, 133 Iowa, 688.

In the last cited case the court said:

> "Now, by general law contracts of sale as here shown cannot be upheld because they are not only violative of the fundamental law of agency, but are contrary to public policy. The defendant Binning was an officer and agent of the town, and the duty and obligation which the law cast upon him in such relation forbade him from acting in any transaction for himself as an individual on the one part, and as an officer and agent of the town on the other part. And it can make no difference that in the particular transaction he refrained from voting for the purchase of goods as made. It was his duty to vote, and he could not reap an advantage by avoiding that duty."

So it would seem that subdivision 14 above referred to would prevent a councilman from rendering service as an employe of the city, and whether or not this section would apply, he could not lawfully be paid for any services he might render, even though he work at the same wages which were paid other laborers. It is not a question of whether or not in either or both instances the city is paying more than it should pay, because the party to whom it is paid for services rendered or material furnished is a member of the council, but it is because of the fact that opportunity is afforded for the councilman as such and as a representative of the city, to make with himself as an individual, a contract that would not be advantageous to the city, that the law steps in and says that no such contract shall be valid.

Hoping that the foregoing views upon the questions submitted are sufficiently sustained by authority to meet your approval, I remain,

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

TELEPHONE COMPANIES--INCORPORATION OF—MUST BE FOR PECUNIARY PROFIT.—Telephone companies do not fall within any of the classes of corporations which may be organized under the chapter providing for incorporation not for pecuniary profit.

March 18, 1911.

MR. J. P. STEELE,
Winterset, Iowa.

DEAR SIR: Your letter of the 17th inst. addressed to the attorney general has been referred to me for reply. After reciting that certain telephone companies desire to merge and incorporate a mutual telephone company, not intending to derive any profit therefrom other than the individual service of the telephone, and that it is proposed to issue stock in the new company and in payment therefor accept the proposed stock of the merging company, you propound the following inquiries:

"1st. Would they be required to pay the $25.00 fee provided for under section 1610 of the code?"

"2nd. What will be the probable cost of having a valuation placed upon the several telephone lines as provided in chapter 71 of the 32nd general assembly?"

"3rd. Will these appraisers appointed by the executive council to make the investigation be men sent out from Des Moines, or will they be persons living in the county selected by the council?"

It will readily be seen that the answer to your first inquiry will depend upon whether the proposed corporation falls under chapter 1, title IX of the code covering corporations for pecuniary profit and, if so, whether it comes within the class of such corporations exempt from the payment of the filing fee, or whether it falls under chapter 2 of title IX, relating to corporations not for pecuniary profit.

Corporations not for pecuniary profit, are only organized for the following purposes enumerated under code section 1642: "for the establishment of churches, colleges, seminaries, lyceums, libraries, fraternal lodges or societies, temperance societies, trades' unions or other labor organizations, agricultural societies, farmers' granges, or organizations of a benevolent, charitable, scientific, political, athletic, military or religious character".

In 1909 some parties sought to incorporate a telephone company under this section, and claimed to this department that it could be done under the clause, "farmers' granges". This department then rendered an opinion as follows: (quoting from opinion of Mr. Wilcox) "I very much doubt whether the clause concerning farmers' granges in section 1642 of the code could be so liberally construed as to include an organization of farmers in the construction and operation of a mutual telephone company."

On February 11 of the present year an inquiry was submitted to this department and referred to me, as to whether or not a telephone company could be incorporated under this section 1642, and at that time I replied as follows:

> "While this office is not authorized to give opinions to private concerns, yet I may say in a personal way that corporations not for pecuniary profit are limited to the purposes named in section 1642 of the code, which do not include telephones. According to a previous holding of this office, a telephone company could not be brought under the provisions of this section providing for farmers' granges, and I concur in this view and am unable to imagine any other matter enumerated in section 1642 that could be construed to cover telephone companies, and am therefore of the opinion that a telephone company could not be incorporated under this chapter."

So you will see that this department is committed to the view above expressed, and nothing has occurred since to cause a departure therefrom, hence, if your concern is to be incorporated, it must fall under chapter 1 of title IX of the code, relating to corporations for pecuniary profit, and unless exempted by the provisions of that law, the filing fee would have to be paid.

Code section 1610, to which you refer, provides:

> "Farmers' mutual co-operative creamery associations shall be exempt from the payment of the incorporation fee provided herein."

This section has been repealed, and the substitute therefor now appears in chapter 104 of the acts of the 33rd general assembly. The clause exempting certain concerns from the payment of the incorporation filing fee reads as follows:

> "Farmers' mutual co-operative creamery associations whose articles of incorporation provide that the business of the as-

sociation be conducted on a purely mutual and co-operative plan, without capital stock, and whose patrons shall share equally in expense and profits, incorporations organized for the manufacture of sugar from beets grown in the state of Iowa, shall be exempt from the payment of the incorporation filing fee provided herein."

This is the only provision that I have been able to find which provides exemption to any concern incorporated for pecuniary profit from the payment of the incorporation filing fee, and I am sure that you would not contend that this provision could be so construed as to exempt your proposed company. It therefore follows that your first interrogatory must be answered in the affirmative.

I can see no greater reason, however, for exempting mutual creamery companies and beet sugar factories from the payment of this fee than for exempting mutual telephone companies, and if called to the attention of the legislature it might see fit to enlarge the exemption clause above quoted, so as to include concerns similar to the one proposed by you.

With reference to your second and third inquiries, will say that I have just called on the secretary of the executive council and he informs me that the proposed concern in each instance selects its own appraisers and pays them, and that the report showing the appraisement be submitted with their application to the executive council, so that the matter of the cost of the appraisement would be substantially within your own control.

I enclose a circular letter handed me by the secretary of the executive council, which contains further directions as to the showing to be made to the executive council as a basis for its finding, fixing the value at which the corporation may receive the appraised property in payment for capital stock issued in the new concern, as provided in chapter 71 of the acts of the thirty-third general assembly.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

AUTOMOBILES—DEALER'S NUMBERS.—Where a dealer has a place of business in two or more distinct places he should have a dealer's number and permit for each such place of business.

March 18, 1911.

MR. ORVILLE A. HAMMOND,
Spencer, Iowa.

DEAR SIR: Your letter of March 16th, addressed to the attorney general, has been referred to me for reply. Your questions are:

"1. Has the purchaser of an automobile a right to run his machine by using the dealer's number, or has he a right to run his machine after he has sent for a number, but before his number has been assigned to him?"

"2. If a man or firm have automobile sales rooms or liveries in two different towns, have they the right to use the same number in each town?"

The answer to both interrogatories will be found in chapter 103 of the acts of the thirty-third general assembly. Section 4 provides, that "no person shall operate a motor vehicle on the public street or highway without a number displayed as above provided, nor with any other number than that assigned to said vehicle by the secretary of state and registered in the name of the owner thereof." The number of the automobile dealer would be registered in his own name, and hence would not be a protection to the subsequent owner of the machine, so that your first interrogatory will have to be answered in the negative.

Section 3 of the same chapter provides, that "where a dealer has an established place of business in more than one city or town, he shall procure a separate and distinct dealer's number and permit for each such place of business," so that your second interrogatory will also have to be answered in the negative.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

POLL TAXES.—Where the poll taxes are payable in labor upon the highways persons liable therefor are entitled to three days' notice of the time and place they are required to work before they can be required to pay the same in money.

March 23, 1911.

WALLACES' FARMER,
Des Moines, Iowa.

GENTLEMEN: Yours of the 20th inst., addressed to the attorney general, has been referred to me for reply.

Your first question is:

"Is the township road supervisor supposed to call out the farmer in his district to work his poll tax? Suppose he does not call on him, the farmer having time to work out the tax, can he be made to pay in cash? Can the road boss do as he pleases in this matter by neglecting to notify the farmer and then charge him $3.00 in cash?", and the answer thereto will be found in code supplement, section 1551 and Code section 1552, which provides as follows:

> "The road supervisor shall give at least *three days' notice* of the day or days and place to work the roads to all persons subject to work thereon, or who are charged with a road tax within his district, and all persons so notified must meet him at such time and place, with such tools, implements and teams as he may direct, and labor diligently under his direction for eight hours each day; and for such two days' labor the supervisor shall give to him a certificate, which shall be evidence that he has performed such labor on the public roads, and exempt him from performing labor in payment of road poll tax in that or any other road district for the same year.
>
> "Each person liable to perform labor on the roads as poll tax, who fails to attend, either in person or by satisfactory substitute, at the time and place directed, with the tools, implements or teams required, having had *three days' notice* thereof, or, appearing, shall spend his time in idleness, or disobey the road supervisor, or fail to furnish him, within five days thereafter, some satisfactory excuse for not attending, shall forfeit and pay him the sum of three dollars for each day's delinquency; and in case of failure to pay such forfeit within ten days, he shall recover the same by action in his name as supervisor, and no property or wages belonging to such person shall be exempt from execution therefor. Such

action shall be before any justice of the peace in the proper township. The money, when collected, shall be expended on the public roads."

Your second question is:

"Is there any law to compel the farmer to drag the road without pay?" The answer to this will be found in chapter 101 of the acts of the thirty-third general assembly, which provides as follows:

"The township trustees shall have all the main traveled roads, including mail routes, in their townships dragged at such time as in their judgment is most beneficial, and they shall contract at their April meeting to have a given piece of road dragged at a rate not to exceed fifty cents per mile for each mile traveled in dragging. In choice of persons to do the work or in making contracts to do such work, preference shall be given, other things being equal, to the occupants of the land abutting the road or adjacent thereto at the point where the work is to be done, but if more than one occupant, the trustees shall decide to which preference shall be given. * * * * No compensation shall be paid to any person for dragging roads *unless the same be authorized by the township trustees* and in the manner directed by them."

It follows that both your questions should be answered in the negative.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

PRACTICE OF MEDICINE AND SURGERY.—A chiropractor is a physician and must have a license before he can lawfully practice.

March 24, 1911.

WALKER & MCBETH, *Attorneys,*
Keosauqua, Iowa.

GENTLEMEN: Your letter of the 22d inst., addressed to Attorney General Cosson, making inquiry regarding regulations relating to the practice of chiropractic physicians in this state, has been handed to me for reply.

Any person who practices medicine or surgery must first procure a license and file the same for record in the office of the recorder

of the county in which he intends to engage in practice, as provided in section 2579 of the code.

Section 2579 of the code provides that any person shall be considered as practicing medicine, surgery, etc., "who shall publicly profess to cure or heal." The supreme court in the case of *State vs. Miller,* 124 N. W., 167, held that a chiropractor was a person engaged in the practice of medicine within the meaning of section 2579, and that it would be necessary for such person to pass an examination as provided in section 2582 of the code, before he could legally engage in the practice of his profession.

Yours truly,

JOHN FLETCHER,
Assistant Attorney General.

INCOMPATIBLE OFFICES.—The same person may not hold the office of justice of the peace and that of police judge.

March 24, 1911.

MR. WILL S. JOHNSTON,
Ft. Dodge, Iowa.

DEAR SIR: This will acknowledge receipt of your favor of the 18th inst. addressed to myself, in which you request an opinion by the attorney general as to whether the offices of justice of the peace and police judge are incompatible.

It is my opinion that the same person may not hold the office of justice of the peace and that of police judge. Under our statute a police judge is a magistrate before whom preliminary examinations may be held. Also, as you suggest in your letter, change of venue in certain cases may be taken from a police judge to a justice of the peace. Where the same person holds the two offices, this would amount to a denial of the right to take such change of venue, because the two offices being held by the same person has the effect of consolidating the same and reducing the number of courts having jurisdiction of the particular case. Also, because such a consolidation and reduction in number of such courts would diminish the number of examining magistrates in that jurisdiction. I think these are the grounds upon which incompatibility in these two offices must be placed.

In support of the views expressed, I cite you to the case of *State vs. Jones* reported in the eighth volume of Lawyers Reports An-

notated, new series, at page 1107. That is a Wisconsin case and holds that the offices of justice of the peace and county judge are incompatible, and from a reading of the opinion it would appear that the powers and jurisdiction of justice of the peace and county judge in that state are similar in many respects to those exercised by justice of the peace and police judge in this state.

The case of *State vs. Jones* is based upon another case in the same state referred to therein, entitled *State ex rel Knox vs. Hadley,* 7 Wis., page 700. In the case last cited the relator in a contest by quo warranto for the office of police judge of a certain city was held to have no right to that office, because, at the time, he was holding the office of justice of the peace in the same jurisdiction. The decision in that case was based upon the same principle as in the case of *State vs. Jones.*

Trusting this may be of some assistance to you, I beg to remain,

Yours very truly,

N. J. LEE,
Special Counsel,

DOMESTIC CORPORATIONS—ASSESSMENT OF CAPITAL STOCK.—In the assessment of the capital stock of a domestic corporation the amount of its bonded indebtedness should not be added to its capital for the purpose of ascertaining the value of its property or the capital stock therein.

March 25, 1911.

HON. BEN MCCOY,
Oskaloosa, Iowa.

DEAR SIR: Your letter of the 11th inst. addressed to the attorney general has been referred to me for reply. The extraordinary demand made upon this department by the members of the legislature now in session, has made it impossible for me to give the matter attention until now, and while this department is not authorized to furnish an official opinion upon such a matter, yet I am perfectly willing to give you the benefit of my personal views.

You state the matter, as to which there is a dispute between yourself and the taxing officers, as follows:

> "I have one thought about the matter and the taxing officers have another. Let me illustrate by the round numbers given. I seek to collect taxes on a domestic corporation

capitalized at $250,000.00 paid in, invested in real estate and personal property not situated in Iowa. The corporation is bonded for $250,000.00, invested in the same way. It has a real estate assessment of $150,000.00. Under sections 1323 and 1324, my thought is that the bonded indebtedness should be added to the capital, making $500,000.00, from which should be deducted the real estate assessed at $150,000.00, which would leave net assessment of $350,000.00. * * * * The auditor and treasurer insist under the language of section 1323 that the shares of stock of any corporation shall be assessed to the owners thereof at the place where its principal business is transacted, the assessment to be on the value of such shares on the first day of January in each year, and insist that the following is a correct method of arriving at the shares of stock for assessment. Taking a $250,000.00 capital corporation fully paid, with a bonded debt of $250,000.00 and an assessment on real estate of $150,000.00, with property tangible and intangible, including real estate of $500,000.00. They deduct the bonded debt from the amount of assets leaving $250,000.00 and deduct from that the assessed value of the real estate leaving $100,000.00 for assessment on the shares of stock to the individual stock holder under section 1323 of the code. You will readily note that the assessment is $250,000.00 short of what we contend is the correct valuation for the purpose of assessment."

On first blush it would appear to be a strange proposition that would require the indebtedness of a corporation to be added to its assets for the purpose of determining the value of its property and incidentally the value of shares of stock in such corporation. When we undertake to determine whether or not an individual is solvent, we ascertain the property which he has and deduct therefrom his liability for the purpose of determining the net value of his property over and above liability, and I see no reason why this same rule should not apply in determining the value of a corporation, and the value of a share of stock in a corporation is of course equal to its proportionate share of the property of such corporation.

I have examined the Coggin case to which you refer, and while it announces the rule as contended for by you, yet I am inclined to think that the decision is based upon a misapprehension of the Illinois statute. The Illinois statute requires among other things

that the corporation shall state under oath "the total amount of indebtedness except the indebtedness for current expenses." This statement and the other required by the statute are for the purpose of enabling the assessing officer to determine the value of the shares of stock in such corporation, and the court in that case, as well as other cases in that state, held that this required the indebtedness to be added to the corporation stock, the very thing which I have stated would be an unlawful thing to do. However, it occurs to me that, in so deciding, the court assumed that the property procured with the bonded indebtedness was equal to such indebtedness, and instead of inquiring into the value of the property purchased with the proceeds of the bonded indebtedness, assumed that property to be of a value equal to the bonded indebtedness, and hence added it to the value of the original property of the corporation, which would be approximately a correct method of ascertaining the value of its whole property, assuming that the property realized for the bonded indebtedness was worth what it cost and no more.

If this be true then there is nothing seriously wrong with the rule in the Coggin case, provided however, that the bonded indebtedness should then be deducted from the whole property in order to ascertain the net value of the corporation over and above its indebtedness.

It will be observed that our statute 1323, while it requires many of the same matters to be stated as is required by the Illinois statute, yet does not require any statement as to the amount of indebtedness owed by the corporation. Yet in the very nature of things this is one of the matters that must be taken into account by the assessing officer in placing the value upon the property of the corporation or of shares of stock therein, and in the case of the Illinois statute I think it was the design of the legislature in requiring this statement of indebtedness to be made not for the purpose of having it added to the corporation stock, but for the purpose of enabling the assessing officer to know the amount of such indebtedness in order that he might deduct the same from the value of the share of stock as shown by the property aside from the indebtedness.

Assuming that the corporation which you mention in your question should, after the expiration of one year, earn enough money in the operation of its business, or by reason of increase in value

of some of its property, so that they would be enabled to entirely liquidate the bonded indebtedness, then the corporation would have on hands its original $250,000.00, also the $250,000.00 of property purchased with the bonded indebtedness, which would make a total of $500,000.00, from which you would deduct the real estate assessment of $150,000.00, which would leave $350,000.00 for assessment aside from the real estate. This is identical with what you have in your supposed case before there has been any earnings, and yet it would be absurd to say, that, after the company has earned $250,000.00 and paid off that amount of its indebtedness and still had on hands the same property which it had at the time it incurred the $250,000.00 indebtedness, it is not worth more than it was at the time the indebtedness was first incurred. And this it seems to me demonstrates the fallacy of your position.

On the other hand, if the plan contended for by the auditor and treasurer, as stated by you, was followed, the value of the stock would be increased by the $250,000.00 earned and applied to the payment of indebtedness.

Yours truly,

C. A. ROBBINS,

Assistant Attorney General.

FARM NAMES—REGISTRATION OF.—An instrument by which a farm is given a name is one affecting real estate and should be acknowledged before being recorded.

March 27, 1911.

MATT PARROTT & SONS,
Waterloo, Iowa.

GENTLEMEN: I am in receipt of your communication of the 25th instant directing attention to the recent act which passed the General Assembly providing for the recording of farms, a description thereof and the name of the farm described. You request to be advised as to whether the instrument should be acknowledged.

The bill itself is silent on this question but section 2925 of the code provides that no instrument affecting real estate is of any validity against subsequent purchasers for valuable consideration without notice, unless recorded in the office of the recorder of the county in which the same lies as hereinafter provided; and section 2926 of the code provides:

"It shall not be deemed lawfully recorded unless it has been previously acknowledged or proved in the manner hereinafter prescribed."

In my opinion the instrument should be acknowledged in view of these provisions of the law. The act however contained no publication clause and therefore the same will not become effective until the 4th day of July, 1911.

Yours very truly,

GEORGE COSSON,
Attorney General.

LICENSE FEES—POWER OF THE MAYOR TO DISREGARD AMOUNT FIXED BY ORDINANCE.—Where the ordinance of a city or town imposes a license fee against transient merchants, the mayor or other person authorized to issue the same has no power to do so except in strict compliance with the provisions of the ordinance, and the amount of the license fee exacted must be that fixed by the ordinance.

March 27, 1911.

MR. A. A. WHITMER,
Curlew, Iowa.

DEAR SIR: This will acknowledge the receipt of your favor of the 10th inst. in which you request the opinion of the attorney general on certain matters that you submit.

You first inquire if an election should be held this year in an incorporated town. An answer to this question is probably too late to serve any purpose. In any event the question cannot be answered satisfactorily without knowing more about the times of holding your elections in the past. Section 646 of the supplement to the code, 1907, will furnish information in this matter.

You also inquire, if a mayor of a town has the legal power to issue a license to a transient merchant for a less amount than the ordinance providing for such license fixes, and if the mayor does attempt to issue such license for less than the specified amount, is he liable to the town for the difference between the amount collected and the amount as fixed by the ordinance?

The mayor, or the person authorized to issue such licenses, has no power to do so except strictly in accordance with the terms of the ordinance providing for the same, and no one would acquire

any protection or rights under a license attempted to be issued in such a manner. In fact it would not be a license at all, it would be a mere nullity, and it follows from what I have said that the mayor would not be liable to the town for any discrepancy in the amount, because the amount that was collected was not in pursuance of any legal authority and did not properly become the property of the town.

You further inquire if, where a street commissioner of an incorporated town fails to notify the persons liable to perform work upon the streets as poll tax, the town having ordinance providing for the working of the poll tax in accordance with the statute, such poll tax can be collected from the person who would have been liable therefor.

I do not think any person can be compelled to work out poll tax, or be compelled to pay any money in lieu thereof, or to forfeit any money for failure to so work such poll tax, or pay money in lieu of such work, unless he was notified in writing by the proper officer at the proper time, of the time and place where such work is required of him, but as to your inquiry whether the street commissioner, the mayor or the council would be responsible to the town for any loss on account of such neglect on the part of the street commissioner to notify or warn out persons liable for poll tax, I cannot give you a satisfactory opinion without knowing more about the facts surrounding the appointment and qualification of such street commissioner. My notion is, without having investigated the question very fully, that it would depend upon whether a bond was given and the conditions of the bond.

Yours truly,

N. J. LEE,
Special Counsel.

POLL BOOKS.—The judges of election should deliver one of the duplicate poll books to the township clerk and the other to the county auditor in both general and town elections.

March 30, 1911.

F. B. WILEY, *City Clerk,*
Marshalltown, Iowa.

DEAR SIR: Your letter of the 29th inst. addressed to the attorney general has been referred to me for reply.

While this department is not authorized to give an official opinion to persons other than state officers, yet, in view of the situation as stated by you, I am glad to give you the benefit of my personal views with reference to the matter which is stated by you as follows:

> "I am handing you a copy of a written opinion of our city attorney, regarding my turning over the poll books to the county auditor. I am at a loss to know just what to do, on account of having advice from two sets of attorneys, and they disagree."

I also note the opinion of your city attorney, expressed by him as follows:

> "I would call your attention to section 9, chapter 3 of the revised ordinance which it seems to me is conclusive of this controversy. It reads as follows: Sec. 9. When the polls are closed the ballots shall be strung as counted, replaced in the ballot box and with all poll books, tally sheets, etc., delivered immediately to the city clerk who shall preserve them for six months, or until the determination of any contract then pending.
>
> "The section which was called in question (1145) pertains, I believe, to the general election law and the code (642) provides that city elections should be governed by the general election law so far as such law is applicable.
>
> "I can see no reason or necessity for any of the poll books being deposited with the county auditor. They did not originate in his office, and under any circumstances if there has been any neglect of duty it was in the judges of election failing to deliver the poll books to the county auditor, but where the ordinance is specific as in the case for them to be returned to you and kept and preserved by you I think that should determine your conduct."

The first section referred to by the city attorney, code section 1145, provides as follows:

> "One of the poll books containing such return, with the register of election attached thereto, shall be delivered by one of the judges of election, within two days, to the *county auditor*. In township precincts, the other of said poll books, with the register of election attached, shall be delivered by one of

the judges of election to the township clerk. In city precincts, the other of said poll books with register of election attached, shall be delivered by one of the judges of election to the city clerk. In *town* elections, *the other* of said poll books, *with register of election* attached, shall be delivered by one of the judges of election to the town clerk."

It will be observed that this section specifically applies to *town elections* and hence it does not "pertain to general elections" alone as claimed by the city attorney.

This section contemplates that one book shall be delivered to the auditor; this is clearly indicated by the language requiring "the other of said poll books" to be delivered "to the town clerk." No express provision is found elsewhere in the code requiring a like delivery to the auditor and city clerk in case of city elections and yet it will doubtless be conceded that there is no reason for requiring the poll book to be filed with the auditor in case of town elections that does not apply with equal force to city elections.

The question immediately arises, whether the words "town elections" and "town clerk," as used in section 1145, were used in the sense of referring to incorporated towns exclusive of cities, or as including cities as well as incorporated towns. The term town is a generic term, including every character of municipal government from a city to a village.

Words and Phrases, pages 7019-20.

This view is strengthened when we also take into account our own statute with reference to the construction of words and phrases, code section 48, subdivision 16, which reads as follows: "Town. The word 'town' means an incorporated town, and may include cities." And when we note the further language of section 1145, "with register of election attached" which must refer to the copy of registration list required by code section 1080 to be delivered to the judges of election before the opening of the polls, and to be by them returned with the vote from their precinct, and when we further consider that no registration is authorized or required in incorporated towns, but only "in cities having a population of thirty-five hundred or more," Code section 1076, there is no escape from the conclusion that the word "town" in each instance where used in section 1145, was used in the sense of city or incorporated town.

It therefore follows that only one of the poll books should have been delivered to you and the other should have been delivered by the judge of election to the county auditor.

The city ordinance referred to by the city attorney, if construed to require the return of all poll books to you and to prevent the return of the one to the auditor as required by statute, would be in conflict with the state law and void, and would hence afford you no protection.

Iowa City vs. McInnery, 114 Iowa, 586;

Code section 680.

You should either deliver one of the poll books to the auditor for the judge of election or deliver it to the judge of election that he may do so.

Respectfully submitted,

C. A. ROBBINS,

Assistant Attorney General.

ROAD DISTRICTS—ROAD TAX PAYABLE IN MONEY.—Where the one road tax plan is adopted it is the duty of the township trustees to order and direct the expenditure of the road funds and labor and to order that the township road tax be paid in money.

March 30, 1911.

WALLACES' FARMER,

Des Moines, Iowa.

GENTLEMEN: Replying to your letter of the 25th, will say that there is no authority in the law for an assessment of a cash tax against the farmer who fails to work out his poll tax. The only authority is to collect the $3.00 a day penalty when he fails to appear and work, after having had the three days' notice. In other words, it is a condition precedent to the collection of the $3.00 a day penalty that he should have had the opportunity to perform the two days' work required by the statute, and three days' notice of the time when it was desired that he should perform such work. I understand that in some localities the officials have construed section 1533 of the code supplement as requiring the trustees to order the poll tax paid in money and collected by the county treasurer. The provision is as follows: "Where the one road tax plan is adopted, the board of township trustees shall order and direct the expenditure of the road funds and labor belonging and

owing to the township, * * * * and shall order the *township* road tax for the succeeding year paid in money and collected by the county treasurer."

It is my opinion, however, that this provision has reference to the property road tax and that all persons liable for poll tax should have the right to work the same out as provided by the statute; in other words, the primary liability is for the two days' work as specified in the first section quoted in my former letter, and that they are only liable for the $3.00 a day after having failed or refused after proper notice to render such work. This liability for the $3.00 is not in the nature of a tax which they have authority to assess against the delinquent but is a statutory penalty for failure to perform the work and is to be collected by suit as provided in the second section quoted in my former letter and is not to be collected as other tax.

Yours very truly,

C. A. ROBBINS.
Assistant Attorney General.

SCHOOLS—FEEBLE MINDED PUPILS—POWER OF THE BOARD TO EXPEL.—The board of trustees, under code section 2782, may, by a majority vote, expel any pupil for immorality or for a violation of the regulations and rules established by the board, or when the presence of the pupil is detrimental to the best interests of the school, and this power is broad enough to permit them to expel a feeble minded pupil.

March 31, 1911.

MR. JOHN W. SMITH,
Coon Rapids, Iowa.

DEAR SIR: This will acknowledge the receipt of your letter of the 21st inst. addressed to the attorney general, in which you request his opinion as to the right and power of your school board to expel a pupil from the public schools who is feeble minded and who has attended school five or six years and makes no progress and cannot get through the primary grade, and who, his teacher says, is a detriment to the school.

The attorney general is not authorized by law to render an official opinion in a matter of this kind, but I am directed to make reply in a personal and unofficial way, as a courtesy to you.

Section 2782 of the code, among other things, provides that, "The school board may, by a majority vote, expel any scholar from school for immorality or for a violation of the regulations or rules established by the board, or when the presence of the scholar is detrimental to the best interests of the school." This provision of the code would seem to lodge sufficient discretion and power in the board of directors to expel the pupil in question under the facts which you set forth.

The public school is not the place for a feeble minded child. The law has made provision for such children and if, as you say, the presence of this pupil is a detriment to the best interests of the school, it is ample reason and ground for the exercise of the power to expel given the board.

I would suggest, however, that if the board determines to exercise this power in this case, that it might be advisable to make that fact known to the parents of the child, which might induce them to withdraw the pupil from school, and whatever publicity and odium that might attach from the expulsion by the board would be obviated.

I also call your attention to section 2823-a of the supplement to the code, 1907, which makes it the duty of any parents having control of any child of the age of seven years up to fourteen years, in proper physical and mental condition, to attend school, shall cause him to attend some public or private school, so you see that no person could be deemed guilty of violating the compulsory school law if he withheld a child in the mental condition of the child you mention in your letter, and while the statute does not specifically prohibit the attendance in school of persons not normal in mental capacity, yet, in any case where that condition makes his presence in school a detriment to the school, there can be no question as to the propriety of the board in exercising the power given, as above set forth.

Yours very truly,

N. J. LEE,
Special Counsel.

UNITED STATES SENATOR—APPOINTED TO FILL VACANCY—LENGTH OF TERM.—Where there is a vacancy in the office of United States senator such vacancy is filled by an appointment at the hands of the governor. Such appointee will hold the office only until the vacancy is filled by the succeeding general assembly, and in no event beyond the adjournment of such general assembly.

April 6, 1911.

MISS ANNA ALTMAN,
Russell, Iowa.

DEAR MADAM: This will acknowledge the receipt of your letter of the 4th inst. addressed to the attorney general in which you inquire if the term of Hon. Lafayette Young as senator in the congress has expired, and if not, when the same will expire.

Answering your question I beg to inform you that Senator Young's term has not yet expired. As you know, he was appointed by the governor upon the death of Senator Dolliver. In such a case the appointment holds until the vacancy is filled by the next succeeding general assembly and in no event beyond the adjournment of the general assembly which convenes after his appointment. The legislature now in session has thus far failed to elect a senator to fill the vacancy occasioned by the death of Senator Dolliver and if no election shall take place before the adjournment, Senator Young's tenure will end with the present session of the legislature and there would then be a vacancy in the office. The governor under such circumstances would not have the jurisdiction to make another appointment.

As you say, the constitution does not provide for all of these contingencies and we must look to the federal statutes and to the precedents established in the United States senate in such cases for the law upon the question.

Yours very truly,

N. J. LEE,
Special Counsel.

DEPUTY AUDITOR—APPOINTMENT OF—APPROVED BY BOARD OF SUPERVISORS.—It is not necessary that a county auditor have the approval of the board of the appointment of a particular person as his deputy, but he should have the consent of the board that one or more deputies be appointed.

April 6, 1911.

MR. C. A. BRYSON,
Iowa Falls, Iowa.

DEAR SIR: Your letter of March 31st addressed to the attorney general has been referred to me for reply. The questions on which you desire the opinion of this department, as stated by you, are as follows:

"1st. Has the board of supervisors the right, as defined by the code, to refuse to confirm the appointment of a deputy auditor, made by the auditor?

"2d. If for any cause no deputy auditor is appointed, is it within the province of the auditor, though he may have made one appointment, to refuse to make any further appointment?

"3d. In case no deputy has been appointed has the auditor the right, under the statute, to employ *continuously*, or *only temporarily*, a clerk to perform the duties of deputy auditor?

"4th. If only temporarily, what period of time does that embrace?"

In answer to your first inquiry, will say that code section 481 provides:

> "Each county auditor may, in writing, with the consent of the board of supervisors, appoint one or more deputies not holding a county office, for whose acts he shall be responsible and from whom he shall require a bond, which bond shall be approved by the officer who has the approval of the principal's bond, and such appointment may be revoked in writing, which appointment and revocation shall be filed and kept in the auditor's office."

I do not think that a proper construction of this section requires the board to confirm the appointment of a deputy, made by the auditor, but rather, in the first instance, requires the consent of the board that one or more deputies may be appointed, and if the board has given its consent that one or more deputies may be appointed then the appointment may be made by the auditor with-

out requiring the consent of the board to the selection of the particular individual chosen by the auditor as his deputy.

The answer to your second inquiry is to some extent covered by the answer to the first. If the board has given its consent that a deputy may be appointed, the appointment may be made by the auditor at any time, even though he has attempted to make a previous appointment.

Bearing upon your third inquiry, the same section of the statute provides:

> "In case no deputy shall be appointed, but on account of the pressure of business in his office the auditor is compelled temporarily to employ an assistant, he shall file the bill for such service at their next regular meeting, and the board of supervisors shall make a reasonable allowance therefor."

While the statute contemplates that the appointment in such a case should be temporary and hence could not be said to be continuous, yet I am inclined to think that the length of time during which such appointment might extend would depend upon the length of time that the "pressure of business in his office compelled the employment of such assistant," and if in any given case the pressure of business in the office compelled continuous employment, the board would be compelled to make a reasonable allowance therefor under the statute.

Your fourth inquiry is fully answered by what has been said in reply to the third.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

ILLEGAL VOTING—PENALTY FOR PROCURING—INTOXICATING LIQUORS—LAW ENFORCEMENT.—Any person advising another to give an illegal vote is guilty of an indictable misdemeanor under code section 4922. One casting an illegal vote knowingly is guilty of an indictable misdemeanor under code section 4919. It is the duty of the police officers, primarily, rather than that of the mayor, to enforce laws relating to the sale of intoxicating liquors.

April 6, 1911.

MR. WILL H. HAGENDORN,
Colfax, Iowa.

DEAR SIR: This will acknowledge the receipt of your letter of the 30th ult. addressed to the attorney general, in which you submit the following questions:

"1st. What is the penalty for one who procures or counsels another to vote at an election who is not qualified to vote?

"2d. What is the penalty for voting at an election when not qualified?

"3d. Is it the duty of the mayor or his police force to enforce the provisions of the law relating to the sale of intoxicating liquor?

"4th. If it is not the duty of such officer to enforce said law, whose duty is it?

"5th. If any such officer fails to do his duty in the premises, how may he be removed?"

Bearing on the first question, I quote you section 4922 of the code: "If any person procure, aid, assist, counsel or advise another to give his vote, knowing that such person is disqualified, he shall be fined not exceeding five hundred nor less than fifty dollars and be imprisoned in the county jail not exceeding one year."

With reference to the second question, I point to section 4919 of the code, which provides that: "If any person, knowing himself not to be qualified, vote at any election authorized by law, he shall be fined not exceeding two hundred dollars or be imprisoned in the county jail not exceeding six months."

Answering your third question, I have to say that it is not primarily the duty of the mayor to enforce the laws relating to the sale of intoxicating liquors, but it would be the duty of the

marshal and police officers. This would also be the duty of the sheriff and his deputies and of constables. City or town marshals, constables, sheriffs and their deputies and policemen of cities and towns are peace officers under the statutes, and the law provides that it is their duty to see to it that all the provisions of chapter 6, title XII of the code are faithfully executed within their respective jurisdiction, and when they are informed, or have reason to believe that the law has been violated, and that proof thereof can be had, they shall file an information to that effect against the offending person. Any peace officer failing to perform such duty must pay a fine of not less than ten nor more than fifty dollars and a conviction works a forfeiture of his office. The chapter that I mention relates to intoxicating liquors.

It is also the duty of the county attorney to diligently enforce, or cause to be enforced in his county, all laws relating to the sale of intoxicating liquor.

What I have said also answers the fourth question.

Answering your fifth question will say that the law provides that any county attorney, sheriff, mayor, police officer, marshal or constable, shall be removed from office by the district court or judge, upon charges made in writing and hearing thereunder for the following causes:

1st. For wilful or habitual neglect or refusal to perform the duties of his office.

2d. For wilful misconduct or maladministration in office.

3d. For corruption.

4th. For extortion.

5th. Upon conviction of a felony.

6th. For intoxication or upon conviction of being intoxicated.

This law is found in chapter 78, laws of the thirty-third general assembly, and the procedure for removing such officers for any of said causes is there fully set forth.

Yours very truly,

N. J. LEE,
Special Counsel.

BOARD OF HEALTH.—The mayor and city council in towns, and township trustees of the township constitute the local board of health.

April 7, 1911.

DR. GEORGE E. DECKER,
Davenport, Iowa.

DEAR SIR: I am in receipt of your communication of the 15th ultimo directing attention to the conflict between section 652 supplement to the code, 1907, which provides in part that the mayor of each city or town shall appoint a health physician; and section 2568 of the code, which provides that the mayor and city council, or the trustees of any township, shall constitute a local board of health within the limits of such towns, cities or township of which they are officers, which board shall appoint a competent physician as its health officer, who shall hold office during its pleasure.

I have been of the opinion that better results would generally follow if the board was authorized to appoint, and I doubt very much if it was the intention of the legislature to repeal the provisions of section 2568 of the code. I think the error crept into the law when the general assembly was reorganizing cities and towns without it being called to the attention of any one that there was a conflict. Section 2568 is more explicit than section 652 of the code supplement. I am sending a copy of this letter to Mr. Pope.

Yours very truly,
GEORGE COSSON,
Attorney General of Iowa.

BANKS—TAXATION OF.—General provisions concerning the taxation of banks discussed.

April 11, 1911.

MR. J. W. GRAY,
Sioux City, Iowa.

DEAR SIR: In accordance with my promise, I am writing you further with reference to the matters inquired about in your letter of March 31st, addressed to the attorney general. Your inquiries as stated by you are as follows:

> "1st. Is capital, surplus and undivided earnings to be considered the full value of stock of which 20% is to be taken as taxable value?

"2d. From said full value is *all* real estate owned by the bank to be deducted *or only that part on or in which the bank is located?* Of course I understand leasehold interests are considered as ownership, also the amount of capital invested in shares of stock of corporations owning only real estate. The point I wish instructions on is, is this intended to cover on *all* real estate or only that passed on or in which bank is located?

"3d. Are any deductions to be made for government or Panama bonds? I was told by several, who took considerable interest in this bill, that government bonds are not to be deducted in any case.

"4th. In making up assessments, would it not be proper to assess *under the head of the bank,* all the stockholders, listing to each the number of shares owned and the value thereof, however treating and listing same as corporation stocks?"

Your first interrogatory should be answered in the affirmative, but it should be borne in mind in fixing the value of any share of stock, in any given corporation that the par value of such share is not necessarily its real or true value. A share of stock in some corporations is worth 50 cents on the dollar and some 20 cents on the dollar.

In answer to your second question, will say that section 4 of the new law, provides, in arriving at the total value of the shares of stock of such corporations, the amount of their capital actually invested in real estate owned by them and any shares of stock of corporations owning only the real estate, on or in which the trust company is located, shall be deducted from the real value of such shares, and such real estate shall be assessed as other real estate, so that the rule should be to deduct not necessarily the real value of the real estate or its taxable value from the shares of stock, but rather as stated in the section quoted, THE AMOUNT OF THEIR CAPITAL ACTUALLY INVESTED IN REAL ESTATE, ETC.

In answer to your third inquiry, will say that there are no deductions to be made from the value of any share of corporate stock, as otherwise ascertained on account of the fact that the capital of such corporation, or any part thereof, may be invested in government securities of any kind. It is only where the corporation itself is sought to be taxed, rather than the shareholder, that these deductions are required to be made. The supreme court of the

United States in the case of the *Home Savings Bank vs. Des Moines*, 205 U. S., at p. 516, in passing upon this question used the following language:

> "Although the states may not in any form levy a tax upon United States securities, they may tax, as the property of their owners, the shares of banks and other corporations whose assets consist in whole or in part of such securities, and in valuing the shares for the purpose of taxation it is not necessary to deduct the value of the national securities held by the corporation whose shares are taxed. The right to tax the shares of national banks arises by congressional authority, but the right to tax shares of state banks exists independently of any such authority, for the state requires no leave to tax the holdings in its own corporations. The right of such taxation rests upon the theory that shares in corporations are property entirely distinct and independent from the property of the corporation."

Replying to your 4th inquiry, I can see no objection to having all bank shares and other corporation stock, held in any particular bank or trust company, listed in a place by itself for the purpose of convenience and for the purpose of enabling the books to be balanced as suggested by you, but care should be exercised, and the assessment made in such a way as to show beyond question that it is made against the individual stockholder and not against the bank, for if it could be construed as an assessment against the bank the tax would be illegal and unauthorized, unless the government securities were deducted as hereinbefore explained.

I would further suggest in reply to that phase of your letter which inquires, whether real estate deducted should be at its assessed value or at the value at which it is held and carried by the bank, that in any given case in which you are unable to determine the exact amount of capital invested in the real estate, that then the deduction should be made on the basis of the assessed value, as required by code section 1324. The law as finally amended was published in the Des Moines Capital of date April 8th, and also in the Register and Leader about the same time and you can doubtless secure a copy, in order to have the exact language before you.

Yours truly,

C. A. ROBBINS,

Assistant Attorney General.

QUARANTINE—HOW ESTABLISHED.—Notice must be served as provided by rule 2 of the state board of health in order to establish valid quarantine.

April 11, 1911.

MR. A. C. JOHNSTON,
Ida Grove, Iowa.

DEAR SIR: Yours of the 4th instant addressed to the attorney general has been referred to me for reply.

Your first question is:

> "Is the failure to serve the written notice provided by rule 2 of the state board of health, sufficient to invalidate a quarantine?"

This question seems to be answered in the affirmative by our supreme court in the case of *State of Iowa vs. Kirby,* 120 Iowa, 26, where it is held that a person by consenting to a quarantine without notice may waive the notice of an infectious disease required by statute, but where the notice is not given there can be no prosecution for disobeying the order establishing the quarantine.

Your second question, after referring to the facts stated and shown in the copy of the letter enclosed by you, is:

> "Was Mr. Todd guilty of knowingly subjecting other people to contagion?"

The statute, code section 2573, reads:

> "Any one so offending, or knowingly exposing another to infection from any contagious disease * * * * shall be liable for all damages resulting therefrom and guilty of a misdemeanor."

I take it from the copy of letter enclosed that at the time Mr. Todd left the premises in supposed violation of the quarantine, that you would be unable to show that the persons at the premises were in fact infected with the disease at that time, while you would be able to show that they were infected on the 16th day of March at the time when Dr. Houlihan visited the Todd home; yet they would be able to show by the other physician who visited the premises three days later and was unable to say whether the children had scarlet fever at that time, and furthermore, the defendant Todd, as you stated in your letter, was disinfected by Dr. Karterman, as were also the premises, and if he were in fact disinfected, it would be difficult to imagine how he could subject another person to contagion by going about the country.

In the case of *In re Wm. H. Smith, et al.*, 146 N. Y., 68; 28 L. R. A., 821, it was held that where a person was in a position and had the opportunity to become infected with small pox, that fact alone would not show that he had been exposed to that disease so as to justify his detention in quarantine where he refused to be vaccinated, the court saying in connection with the matter:

> "Like all enactments which may affect the liberty of the person, this one must be strictly construed; with the saving consideration, however, that, as the legislature contemplated an extraordinary and dangerous emergency for the exercise of the power conferred, some latitude of a reasonable discretion is to be allowed to the local authorities upon the facts of a case."

Even though the defendant may be technically guilty of a violation of this statute, yet it seems to me it would be difficult for you to find a jury that would convict where, as you say, you are unable to trace any case as having arisen by reason of coming in contact with the defendant while at large in violation of the supposed quarantine.

Yours very truly,
C. A. ROBBINS,
Assistant Attorney General.

VETERINARY SURGEON—DUTIES OF.—There is no statute requiring veterinary surgeons to report diseased animals to the state board of health.

April 12, 1911.

MR. JOHN W. CROW,
Minden, Iowa.

DEAR SIR: Your letter of April 5th addressed to the attorney general has been referred to me for reply. You make the following inquiries with reference to tubercular cattle:

> "1st. Is it optional with the veterinarian, who tests the animal and finds it diseased, to report it to the state board of health or does the statute compel the veterinary surgeon to do so?
>
> "2d. What are persons who have such animals required to do in the matter of disposing of them."

In reply to your first question, would say I know of no law requiring a veterinarian to make any such report. Code supplement section 2533 makes it the duty of local boards of health upon the appearance of any contagious or infectious disease among domestic animals to notify the state veterinary surgeon. Said section points out the duty of the state veterinary surgeon in such cases, but this does not apply to other veterinary surgeons.

Replying to your second inquiry, will say there is no statute requiring or preventing persons having such animals to make any particular disposition of them, except that it is provided by the following section 2534, that such stock may be destroyed under the opinion of the state veterinary surgeon where the public safety demands it.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

PARK BOARD.—A park board may establish a play ground and furnish music and pay for the same from the park funds.

April 13, 1911.

MR. HARRY E. HOPPER,
Indianola, Iowa.

DEAR SIR: Yours of the 5th inst. addressed to the attorney general has been referred to me for reply. The questions propounded by you are:

Is it legal for the park board to hire a band to play on the park grounds and to pay for same from the park funds?

Has the park board any authority to make and maintain a play ground on the park grounds or any other place in the city and use the park funds for same?

Has the park board any authority to park any other place in the city, such as the grounds adjoining the railway stations besides the grounds set aside for park purposes?

The powers of park commissions in cities of your class, are specified in section 861 of the code, which provides as follows:

> "They shall have exclusive control of the parks of the city or town, and shall manage, improve and supervise the same; they may use the 'park fund' for improving avenues there-

to; they may appoint one or more park policemen and pay them out of said fund, and may do all things necessary to preserve such parks. They shall keep, and make annually to the council, a full account of their disbursements, and all orders drawn on such fund shall be signed by at least two of their number."

These powers may be to some extent extended, especially with reference to the disbursement of the funds by section 862-b of the code supplement, which reads as follows:

"Said fund so appropriated shall be expended under the direction of a committee of three persons, consisting of the mayor, one member of the council appointed by the council, and one resident property owner of such city or town appointed by the council, which committee shall receive no compensation for their services."

Under the provisions quoted, I am inclined to the view that your first and second interrogatories should be answered in the affirmative and that the expenditure for such purposes with the approval of the council, would not be an unwarranted diversion of the funds.

Your third interrogatory presents a question of more serious doubt, and unless the other grounds sought to be parked by the board may be such as could fairly be held to be an avenue leading to the park, within the meaning of section 861, they would be unauthorized to expend the park fund in the improvement of such other grounds as you mention in your third interrogatory.

Very truly yours,

C. A. ROBBINS,
Assistant Attorney General.

FOREIGN CORPORATIONS—ANNUAL FEE.—A corporation for pecuniary profit, other than one organized for the purpose of carrying on a mercantile or manufacturing business as clearly defined and restricted by its articles of incorporation, must pay the annual fee provided for by chapter 105, acts of the thirty-third general assembly.

April 14, 1911.

BLYTHE, MARKLEY, RULE & SMITH,
Mason City, Iowa.

GENTLEMEN: Yours of the 11th inst. addressed to the attorney general has been referred to me for reply.

Your inquiry is as to whether a foreign corporation engaged in the manufacturing business is obliged to file annual report and pay annual fee as required by sections 1 and 3 of chapter 105 of the acts of the thirty-third general assembly.

Code section 1637 was, by chapter 104 of the acts of the thirty-third general assembly, amended so that it now reads:

> "Any corporation for pecuniary profit, other than for carrying on mercantile or manufacturing business as clearly defined and restricted by its articles of incorporation, authorized under the laws of another state * * * * shall file with the secretary of state a certified copy of its articles of incorporation, duly attested by the secretary of state in whose office the original articles were filed, * * * * and requiring the issuance to such corporation of a permit to transact business in this state."

I am inclined to think that sections 1 and 3 of chapter 105 of the acts of the thirty-third general assembly, to which you refer, and which provide for the annual report and the payment of an annual fee by corporations, only apply to such corporations as are required by section 1637 as now amended, to obtain the permit referred to in section 1637.

It will be seen, however, that corporations carrying on mercantile or manufacturing business, as clearly defined and restricted by its articles of incorporation, are exempt from the necessity of obtaining such permit and hence would be likewise exempt from making the annual report and from payment of the annual fee.

I understand, through a conversation had with the secretary of state, that the construction placed upon these statutes by his

department is in harmony with the views herein expressed, but that it is not a question of the kind of business that the particular corporation is engaged in that entitles it to the exemption from obtaining annual report and payment of annual fee; in other words, even though its business as carried on may be strictly that of manufacturing or of mercantile business, yet if the articles of incorporation would permit of its doing other business it would not be exempt, and in order to obtain the exemption, it must be restricted by its articles of incorporation to the class of business mentioned, viz., mercantile or manufacturing.

You will understand that this department is not at liberty to furnish official opinions except to state officers, and that what has been said in the foregoing is simply the personal views of the writer.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

CITIES AND TOWNS—POPULATION OF—HOW DETERMINED.—The population of a city or town is determined by the last preceding state or national census.

April 14, 1911.

MR. S. J. RICE,
Scotch Grove, Iowa,

DEAR SIR: I am in receipt of your communication of the 12th instant requesting to be advised (1st) as to whether a general consent petition to sell intoxicating liquors may be based upon the poll books of a special or municipal election; (2nd) as to whether prisoners at the reformatory may be counted as citizens in making up the twenty-five thousand population.

Replying to your first question I have to advise that wherever a city is an entity itself for the purpose of selling intoxicating liquors, the law says that the general consent petition shall be based upon the last preceding election, which would include a regular municipal election and possibly a special election, but upon this question the court has not expressed itself.

The answer to your second question is determined upon the population of the city of Anamosa as shown by the last preceding state or federal census. Upon application to the secretary

of state you may secure the population of your city as shown by the last federal census.

Very truly yours,

GEORGE COSSON,
Attorney General of Iowa.

INCOMPATIBLE OFFICES.—The office of library trustee and that of city councilman are incompatible and cannot be held by the same person at the same time.

April 15, 1911.

MR. W. P. PAYNE,
Nevada, Iowa.

DEAR SIR: This will acknowledge receipt of your letter of the 6th inst. addressed to the attorney general in which you request his opinion as to whether the same person may hold the office of city councilman and that of library trustee.

There is no express provision in the constitution or laws of this state forbidding the same person holding both of said offices, and it becomes a question then of whether the two offices you mention are incompatible under the rules of the common law. If they are incompatible, then they may not be held by the same person and an acceptance of the office of councilman in the case you mention would have the effect of creating a vacancy in the office of library trustee, as in the case you submit the person was holding the office of library trustee when he was elected to and accepted the office of councilman.

Without going into a lengthy discussion of the rules of law applicable to the question submitted, I am of the opinion that the offices of library trustee and city councilman are incompatible under the common law, and may not be held by the same person. Where there is no express provision, the true test is whether the two offices are incompatible in their natures, in the rights, duties or obligations connected with or flowing out of them. Offices are incompatible or inconsistent when they cannot be executed by the same person; or when they cannot be executed with care and ability; or when one is subordinate to or interferes with another; or where the office is under the control of another; or when the holder cannot, in every instance, discharge the duties of each. It has also been stated by the courts that the incompatibility which shall operate to vacate the first office exists where the na-

ture and duties of the two offices are such as to render it improper from considerations of public policy for one person to retain both. One writer has said that the test of incompatibility is the character and relation of the offices, as where one is subordinate to the other, and subject in some degree to its revisory power or where the functions of the two offices are inherently inconsistent or repugnant. It has been held that all officers who have the appointing power are disqualified for appointment to the offices to which they may appoint, and that the question of incompatibility is to be determined from the nature and duties of the two offices and not from a possibility or even a probability that the incumbent might duly perform the duties of both.

Applying these principles and rules to the case you submit, there can be no question but that the opinion already expressed is the law. I find from an examination of the law respecting the powers and duties of library trustees and that of town and city councilmen, that there would in many instances be a conflict in interest and duties. I shall not endeavor to mention all of them.

Section 727 of the supplement to the code, 1907, provides that cities and towns may receive, hold or dispose of any and all gifts, donations, devises and bequests that may be made to them for the purpose of establishing, increasing or improving free public libraries and that when the conditions of such gifts, donations, devises and bequests have once been accepted by the city or town council, the performance of such conditions may be enforced at the instance of the library trustees by mandamus or by other proper proceedings.

We can readily see from this that a city council, after having accepted the conditions upon which such a devise, gift or bequest has been made for said purpose, may refuse to perform the conditions and in order that the city might avail itself of the benefits of any such gift or bequest, it might be necessary for the library trustees by appropriate action to compel the performance of such conditions and we would then have the incongruous situation of a person while acting as library trustee maintaining an action against himself while acting as city councilman.

Another instance of conflicting interest results in the case of removal of library trustees. Under the law, the officers or board or body making the appointment has the power of removal, and library trustees being appointed by the mayor, by and with the

approval of the city council, a member of the city council might be called upon to pass upon the question of his own removal.

Very truly yours,

N. J. LEE,
Special Counsel.

HOG CHOLERA SERUM FUND—PAID TO SUCCESSOR.—Any fund on hands at the expiration of the term of office of the state veterinarian derived from sale of hog cholera serum should be turned over to his successor in office rather than into the state treasury.

April 17, 1911.

DR. PAUL O. KOTO,
City.

DEAR SIR: Your letter of the 14th addressed to the attorney general has been referred to me for investigation and reply.

You ask for an opinion as to the proper disposition to be made of the funds in your hands, arising from the sale of hog cholera serum, and whether it is your duty to turn the balance over to your successor, the executive council or the state treasurer.

The statute provides:

> "The receipts from the sale of serum and from salvage shall be used by the director of the laboratory to promote the work, and he shall file with the executive council a separate official and itemized statement of all such receipts and expenditures in lieu of turning such receipts into the state treasury, as provided in section one hundred and seventy-d (170-d) of the supplement to the code 1907. The director of the laboratory shall issue receipts for all money received by him and shall annually file with the executive council a complete statement of all moneys received by him or expended in the equipping and conducting of said business."

I am clearly of the opinion that it would be your duty under this statute to turn over to your successor any balance in your hands at the expiration of your term of office, take his receipt for such balance, and let the same, or duplicate thereof, accompany the statement required to be filed with the executive council.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

STATE AGENTS—EXPENSES OF WHILE ATTENDING CONFERENCES—HOW PAID.—Where the board of control under section 2692-b of the supplement to the code requires of state agents that they attend conferences of people engaged in similar work, their expenses while attending such conferences may be paid from chapter 134, acts of the thirty-fourth general assembly.

April 18, 1911.

BOARD OF CONTROL,
Building.

GENTLEMEN: Your letter of April 12th addressed to the attorney general has been referred to me for investigation and reply.

After quoting from senate file No. 293 of the acts of the thirty-fourth general assembly, you state the question on which you desire the opinion of this department as follows:

"We desire to know whether it will be legal for us to authorize the payment from this fund of $5,000.00, when the bill shall become a law, of the actual expenses of state agents to attend conferences of people engaged in their work or in similar work, as for example, the State Conference of Charities and Correction and the National Conference of Charities and Correction."

Section 2692-a of the supplement to the code provides for the appointment of state agents for the soldiers' orphans' home and for the industrial school.

Section 2692-b of the supplement to the code provides:

> "The duties of the agents shall be as prescribed by law *and by the board of control.*"

Without quoting further from this section, it is sufficient to say that it prescribes additional duties, but does not make it the duty of such agents to attend conferences such as you mention in your inquiry.

I think, however, that the board of control, under the authority given in that portion of the section above quoted, might prescribe it as the duty of such agents to attend such state conferences as are mentioned in your inquiry, and such other gatherings as might be helpful to them, and that if such an order were made prescribing it to be their duty to attend these conferences, then it would be legal for the board of control to authorize the pay-

ment of their actual expenses while attending such conferences, from the $5,000.00 appropriation referred to in your inquiry.

In the absence of an order of the board authorizing or requiring state agents to attend such conferences, the question presented would be one of some doubt and uncertainty, but this doubt and uncertainty would be readily avoided by making the order or requirement above suggested.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

OPTOMETRISTS—RIGHT TO PRACTICE.—One who has practiced optometry in Iowa continuously for five years and thereafter left the state and became a resident of Nebraska upon reestablishing his residence in this state is entitled to practice within this state.

April 19, 1911.

MR. G. S. DUNLAP,
Sioux City, Iowa.

DEAR SIR: In reply to yours of March 6th with reference to question stated by you as follows:

> "A man who has practiced optometry in Iowa ten years, then taking up his residence in Nebraska, residing there two years, securing the exemption from examination by making sworn affidavits that Nebraska is his residence, then after our optometry law was passed, but before it had gone into effect, he again returns to Iowa, claiming to be a bona fide resident of Iowa, making sworn affidavits and asking an exemption from examination here. What I want to know is this: Did this man lose his rights of residence in Iowa when he became a resident of Nebraska, and can a man become a bona fide resident of Iowa in three or four months and claim the privileges of same within the meaning of section 6 of the optometry law?"

will say that the latter part of the section referred to provides:

> "but any person who is a bona fide resident of Iowa, who shall have continuously engaged in the practice of optometry for more than five years in the state prior to the passage of this act, shall (upon submitting proof of same), be entitled

to receive from said board a license to practice and a certificate of exemption from examination.''

Now while it is true that the party would lose his residence by removing from Iowa to Nebraska, yet, if he in good faith returned intending to become a resident of Iowa, he would regain such residence in this state, and it will be observed that the statute does not require that the residence should have existed for any specified length of time. It is the five years' continuous practice in the state and not the five years' residence that gives the party the right to exemption, and the statute does not require the five years' practice to have been immediately prior to the passage of the act, hence it is my judgment that in the case stated by you, if the party was a bona fide resident at the time of making his application and had practiced within the state for five years continuously at any time prior to the passage of the act, that he would be entitled to the exemption provided by the act.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

HUNTING AND FISHING—ON OVERFLOWED LANDS.—No person would have the right to hunt or fish on lands of another without his consent even though overflowed lands, nor would he have a right to cut fences which may be erected across non-navigable streams.

April 20, 1911.

MR. J. M. ZIMMER, J. P.,
Centerville, Iowa.

DEAR SIR: Yours of April 19th, addressed to the attorney general, has been referred to me for reply.

In my judgment, no person would have a right to hunt or fish on the lands of another without his consent, even though such lands were overflowed lands, nor would any person have a right to cut fences which may be erected across non-navigable streams. If a fence were constructed in a way to hinder the free passageway of fish up or down, it might constitute a nuisance which any

person would have a right to abate, but there are not many fences constructed across streams that would have this effect.

Yours very truly,
C. A. ROBBINS,
Assistant Attorney General.

TEMPERANCE BEER.—Temperance beer is an intoxicating liquor if it contains alcohol.

April 21, 1911.

THE ROYAL BREWING COMPANY,
Kansas City, Mo.

GENTLEMEN: I am in receipt of your communication of the 17th instant requesting copy of the local option laws of Iowa.

We have no copies in pamphlet form. Relative to the sale of temperance beer, I have to advise that our supreme court has held that the sale of any liquor as a beverage which contains any per cent of alcohol whatsoever, regardless of whether the same is intoxicating, and regardless of whether it contains sufficient alcohol as to require federal stamp, is in violation of law.

See *State vs. Colvin,* 127 Iowa, 632;

Sawyer vs. Botti, 124 N. W., 787.

Yours very truly,
GEORGE COSSON,
Attorney General of Iowa.

SCHOOLS—TUITION.—Under chapter 146 of the acts of the thirty-fourth general assembly a district may offer a two year high school course and may recover from the home district of pupils taking said work tuition therefor.

April 22, 1911.

HON. A. M. DEYOE,
Building.

DEAR SIR: Complying with your request I have examined house file No. 101, and am inclined to the view that the state aid of $500.00 per annum provided for in section 4, should be limited to schools where the training provided for in section 2 of said act is had in the eleventh and twelfth grades of such schools and

that the statute is sufficiently elastic to permit of the introduction of the training in the post-graduate course or city training class mentioned in the letter of Mr. Harris to you.

If the training, however, were introduced in the eleventh and twelfth grades, there probably would be no objection to the post-graduates taking the training in such grades provided it was also open to the regular pupils of the eleventh and twelfth grades.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

REGISTERED NURSES—UNUSED FUNDS—HOW DISPOSED OF.—There is no provision requiring the balance on hand in the nurses' fund to be turned over to the state treasurer as is usually provided with reference to other funds, and until such provision is enacted, the funds should remain intact and be a continuous fund.

April 26, 1911.

DR. GUILFORD H. SUMNER,

Secretary State Board of Health.

DEAR SIR: Yours of the 20th inst. addressed to the attorney general has been referred to me for investigation and reply. You refer to chapter 16-D and state the question upon which you desire the opinion of this department as follows:

> "As this chapter which relates to registered nurses does not provide that unused moneys shall be turned into the state treasury on the 30th day of June of each year, and there being no general statute making this requirement, I believe the state auditor's office is in error when, on the 30th day of June, 1910, $1,350.96 were charged off, or in other words this amount was taken from the credit of the nurses' account and turned into the state treasury.
>
> "The secretary of the Iowa State Board of Health desires to know if this was legal and proper. The secretary believes that this amount should have remained to the credit of the nurses' account and been made available for legitimate expenses of the nurses' department."

Section 170-d provides:

"That all boards, commissions, departments and officers of state, elective or appointive, shall turn into the state treasury on or before the fifteenth day of each month all fees, commissions or moneys collected or received during the preceding calendar month, with an itemized statement of sources from which received; and shall also file with the auditor of state a duplicate of such statement."

Section 170-f of the code supplement provides:

"The treasurer of state and auditor of state shall each keep an account of the moneys paid in under the provisions of this act and where the law now provides, or may hereafter provide, that the amounts allowed for per diem and expenses shall be limited to or paid from fees collected, the auditor's warrant shall be drawn against the funds realized from such fees and shall not exceed the amount thereof."

These sections, however, would not authorize the transfer of moneys in one fund to another fund or to the state treasury generally. An examination of the statutes governing the matter of accounting for fees derived in a similar way might throw some light upon the question. Section 2575-a44 of the code supplement, after providing for the payment of the compensation of the members of the board of medical examiners, the secretary, expenses, etc., further provides:

"Any balance of said funds remaining shall be turned over to the state treasurer for the use of the state."

Section 2583 of the code supplement, after providing for like compensation and expenses, provides:

"Any balance of said funds remaining shall be turned over to the state treasurer for the use of the school fund."

Section 13 of chapter 167 of the acts of the thirty-third general assembly, relating to the practice of optometry, wherein the fees provided for are similar and paid out in a similar way, provides:

"All unappropriated funds arising under this act shall be accounted for and turned into the state treasury on June 30th, of each year."

The chapter to which you refer contains no similar provision and no provision whatever that specifically authorizes any unused portion of the nurses' fund to be transferred to the state

treasury, and while the same reasons for turning such surplus into the state treasury would exist in this case as exist in the other instances referred to where there is provision for the surplus being turned in and while it is doubtless an oversight on the part of the legislature, yet the fact remains that the legislature has failed to provide that any unused portion of said funds should be transferred to the general treasury, and until it does so provide the moneys properly going into this fund should remain therein, except as paid out on warrants properly drawn against the same, and if any erroneous transfer, such as you indicate, has been made, it would be proper to restore such money to the proper funds.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

ROAD FUNDS—TAX LEVY.—Under subdivision 1 of section 1528 of the supplement to the code, township trustees may, since the enactment of chapter 96, acts of the thirty-third general assembly, levy six mills. By section 1530 of the supplement to the code, as amended by chapter 97, acts of the thirty-third general assembly, it is mandatory for the board of supervisors to levy a tax of not more than one mill on the dollar for county road fund. Section 1 of chapter 97, in using the term "general township fund," has reference to the fund which the trustees are required by section 1529 to set apart for the purpose of purchasing tools, etc.

April 27, 1911.

MR. O. W. WITHAM,
Greenfield, Iowa.

DEAR SIR: Your letter of the 14th inst. addressed to the attorney general has been referred to me for investigation and reply, and I have delayed answering in order to have before me the new law with reference to dragging the public highway, known as house file No. 46, which I thought had some bearing on the question. I enclose you a copy of this new act, which is now in force, and by section 2 you will observe that it is provided that a one mill levy shall be made and the proceeds expended only for the purpose of dragging the road within the township. This levy is to be made by the township trustees.

In addition to this new matter, your question in brief is, what levy may lawfully be made under sections 1528 and 1530 of the supplement to the code as amended by chapters 96 and 97 of the acts of the thirty-third general assembly.

Subdivision 1 of section 1528 provides for a levy by the township trustees of not more than four mills on the dollar. By section 5 of chapter 96 of the acts of the thirty-third general assembly, the words "four mills" are changed to "six mills." Subdivision 2 of section 1528 remains unchanged and provides that the trustees may certify to the board of supervisors their desire for an additional road tax of not to exceed one mill to be levied in whole or in part by the board of supervisors as hereinafter provided. Section 1530, as amended by section 1 of chapter 97 of the acts of the thirty-third general assembly, makes it mandatory for the board of supervisors to levy a tax of not more than one mill on the dollar of the assessed value of the taxable properties in the county for the county road fund, and on written petition of the majority of the freehold electors of any township, the said board may levy an additional mill in said township to be expended by the board of supervisors on the roads in the township where levied. This same section does not require, but permits the board of supervisors to levy an additional tax of not more than one mill on the dollar, to be known as the county drainage fund. The latter part of this section provides that the board of supervisors shall levy such additional sum for the benefit of such township as shall have certified a desire for such additional levy, as provided for in section 1528, and while prior to the enactment of this clause, the board of supervisors under subdivision 2 of section 1528 might have levied one mill or less of the amount required, yet since the enactment of this clause I am inclined to believe that the board is required to levy the amount certified, not exceeding of course the one mill authorized to be so certified. All these provisions could be harmonized were it not for the last three lines of section 1 of chapter 97 above referred to. They provide: "The amount for the general township fund and the county road fund and the county drainage fund shall not exceed in any year six mills on the dollar." As we have already seen this same section provides for a county road fund of one mill, which must be levied the county over, also for a road fund which may be levied in certain townships when petitioned for, but it will be observed that this fund

is not designated as the county road fund, also that the board may levy a tax for the county drainage fund, which if levied would be levied the county over.

There can be no question as to the meaning of the term "county drainage fund" as used in the last lines of this section above quoted, it must refer to the drainage fund above provided for. The county road fund, as therein used, must have reference to the fund of one mill, which is to be levied the county over, and not to the one mill levied in certain townships when petitioned for. The meaning of the term "general township fund" as used in the last lines of this section above quoted is not very clear. If it refers to the tax provided for by subdivision one of section 1528, then manifestly, if a drainage fund of one mill had been levied and a county road fund of one mill had been levied, the six mill levy provided for by said section 1 as amended would necessarily be reduced to four mills.

By reference to section 1529 of the code you will observe that it is provided that the trustees shall set apart such portion of the tax provided in the preceding section as may be necessary for the purpose of purchasing the tools and machinery and paying for the guide boards mentioned therein, and the same shall constitute a *"general township fund."* I am inclined to think that this fund is what is referred to by the term "general township fund" found in the latter part of section 1 of chapter 97 of the acts of the thirty-third general assembly, and construing all these statutory provisions together I am inclined to the view that it is the duty of the trustees under section 1529 to set apart, not a certain specified amount of money which shall constitute the general township fund, but a "portion of the tax provided in the preceding section". This tax as we have seen was four mills but has been increased to six by section 5 of chapter 96, (the evident purpose being to allow an additional two mills in order to provide for the destruction of noxious weeds in the public highway). In other words they should set off a certain number of mills of the levy to constitute the general township fund. For example: If a given township should levy the six mills provided for by subdivision 1 of 1528, as amended, and set off four mills of this levy as a general township fund, and should the county supervisor order the additional mill known as county road fund for the entire county and the additional mill for county drainage fund, still the sum total of the levy for general township fund, county road fund and county drainage fund for

that township would only be six mills or the limit provided for in the last lines of section 1 of chapter 97 above quoted, and in this case the township could levy for the other purposes (aside from the general township fund) specified in subdivision 1 of section 1528, two mills and the board of supervisors should levy for them, when requested, under subdivision 2 of section 1528, an additional road tax, not to exceed one mill.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

PUBLICATION OF EXPENDITURES—DISCUSSION AS TO WHAT IS SUFFICIENT PUBLICATION.

May 2, 1911.

MR. P. T. GRIMES,
Bloomfield, Iowa.

DEAR SIR: This will acknowledge the receipt of your favor of the 29th ult., addressed to the attorney general, replying to the letter of the 17th ultimo, by Mr. Robbins of this department, and enclosing a copy of the semi-annual report of the county treasurer of Davis county, for the period from June 1, 1910, to January 1, 1911, as published in the official paper of said county, and requesting the opinion of the attorney general as to whether such publication of said report is in compliance with the law relating to such matters.

It is my opinion that the publication of the said report as shown by the copy enclosed, does not fully comply with the law. The law requires that the report of the county treasurer, including a schedule of the receipts and expenditures shall be published, etc. I do not think it would be necessary, in order to comply with this provision, to publish an itemized and detailed statement of all receipts by the treasurer. I think the aggregate amount collected for each separate fund required to be kept by him would be sufficient. It would be entirely out of the question to require the treasurer to publish a list of all the tax payers who contributed to the respective funds and the amount contributed to each fund.

Under the head of expenditures it would not be required to show to whom all the disbursements were made. Nothing would be accomplished by such statement, because in connection with the pub-

lication of the proceedings of the board of supervisors, the schedule of bills allowed is required to be set out.

Section 487 of the code requires the county treasurer to keep a separate account of the several taxes for said county, school, highway and all other funds created by law, and he must open an account between himself and each of such funds, charging himself with the amount of the tax and crediting himself with the amount paid on each, etc. I think the funds as designated in the copy you enclosed are too general in many instances. One fund shown is "electric light". It does not appear who is entitled to the tax in this fund. If it belongs to more than one municipality, that fact ought to be shown, and the amounts. The same remarks would apply to the fund designated in this report as "special water". Another fund is designated as "township road". It does not appear to what township or townships this fund belongs. It undoubtedly belongs in part to each of the tax districts in the county. One of the purposes of such publication of said notice is that it may tend to serve as a check against mistakes and against wrong doing. This purpose would not be subserved by the publication of the total amount of township road fund collected in the whole county, but if the amount collected for such fund in each of the taxing districts is shown, the tax payers of the respective townships are better enabled to detect errors. Merely giving the total amount of township road tax collected for the whole county would be of little value to the tax payers of any particular taxing district, and the only way they could get definite information as to such taxes in their own township or district would be to go to the county treasurer's office and ascertain from his books the facts, which it was the purpose of the law to furnish in the published report of the county treasurer.

Another fund shown in this report is "teacher's fund". It gives no information or hint as to the amount of teacher's fund collected for the respective school corporations in the county, and the remarks made as to township road fund applies equally to the last fund mentioned. The same remarks apply also to the funds shown in the report, designated as "contingent", "schoolhouse", "grading", "cemetery", "improvement" and "sewer".

In looking over the letter that Mr. Robbins wrote you, I find that he stated that there was no provision in the law requiring the reports of the township trustees to be published. He did not have time to make a very careful investigation of the law, and

neither have I in this respect, but in looking up these other matters I notice the following provision by section 1566-a of the supplement to the code, 1907:

> "The trustees of each township shall take and file with the board of supervisors, on or before the first Monday in each year, a full and itemized account, verified by the township clerk, showing each item of expenditures and receipt of all moneys received and disbursed during the preceding year, for road purposes in said township, which report shall remain on file with the county auditor, and, omitting certifications and verifications of township officers, a synopsis thereof showing the names of all persons to whom money has been paid and the amount paid to each, shall be published in the published report of the proceedings of the January session of the board of supervisors."

Yours truly,

N. J. LEE,
Special Counsel.

HAIL INSURANCE—BY WHAT COMPANIES WRITTEN.—Damage by hail to growing crops is such damage as would fall within the term "other casualty" as used in subdivision 1 of code section 1709 authorizing stock companies to write insurance against loss or damage by fire or other casualty.

May 2, 1911.

HON. JOHN L. BLEAKLY,
Auditor of State,
Des Moines, Iowa.

DEAR SIR: Your letter of February 23, 1911, addressed to the attorney general, has been referred to me for investigation and reply.

Your inquiry calls for a construction of subdivision 1 of section 1709 of the code, which reads as follows:

> "Any company organized under this chapter or authorized to do business in this state may:
>
> "1. Insure houses, buildings and all other kinds of property against loss or damage by fire or other casualty, and make all kinds of insurance on goods, merchandise or other property

in the course of transportation, whether on land or water, or any vessel or boat wherever the same may be."

You state the question upon which you desire the opinion of this department as follows:

> "Do the words 'other casualty' as used in subdivision 1 of section 1709 extend the jurisdiction of a company primarily licensed to write fire insurance risks under said subdivision section 1, as to enable them to cover *damages wrought by hail upon growing crops?* Or should the interpretation of the two words be construed only in connection with the main thought, fire insurance, and covering only casualty risks which are analogous to or directly allied therewith, such as the breaking of sky lights on the insured building, by hail; breaking of plate glass through heat; destruction of the insured building or property by tornado; direct loss by lightning where fire may not ensue," etc.?

A proper interpretation of this subdivision requires not only a construction of the words "other casualty", but also of the words "other kinds of property," used in said subdivision.

The meaning of the term "other property" was considered by the supreme court of Connecticut, where a statute of that state provided that a railroad company shall be liable for an injury done to "a building or other property" by a locomotive engine, and the court in that case held that the term "other property" was not limited to property like buildings but that it should be construed to "embrace fences, growing trees, and herbage".

> *Grissell vs. Housatonic R. R. Co.,* 54 Conn., 447; 9th Atl., 137.

> *See also Martin vs. N. Y.,* 62 Conn., 331; 25 Atl., 239.

Our own supreme court, in the case to which you refer, *Casualty Co. vs. Natl. Bank,* 131 Ia., on p. 463, states:

> "That the rule relied upon by appellee necessarily permits some latitude in the interpretation of statutes is well illustrated by reference to the first clause of the very provision we are here considering. The power there granted is 'to insure houses, buildings, *and all other kinds of property,*' etc. We feel very certain that counsel would not insist that the rule of ejusdem generis operates to restrict the corporation to insurance of structures similar in character to 'houses and

buildings'. Indeed, if the power thus granted is not broad enough to authorize the insurance of household goods, stocks of merchandise, grain in stack, and generally whatever comes fairly within the term 'property', and is liable to 'loss or damage by fire or other casualty', then the statute falls far short of the commonly accepted meaning as well as the effect which has always been given it in actual practice."

Section 3221 of the revised statutes of the United States, abating tax on distilled spirits destroyed while in a bonded warehouse by "fire or other casualty" was before the circuit court of the United States, and that court speaking of the statutes, said:

> "It means the accidental destruction by some cause of like character and operation as fire, such as lightning, floods, cyclones, storms, or some uncontrollable force which ordinary foresight and prudence could not guard against nor prevent."
>
> *Crystal Spring Distillery Co. vs. Cox*, 49 Fed. Rep., 555, at 559.

Our own supreme court, in the case to which you refer, *Casualty Co. vs. National Bank*, 131 Ia., 456, held the term "other casualty," to cover a case of damage by burglary, and in discussing the matter, said:

> "It is to be admitted that the insurance statutes which we have cited as being in force at the date of the organization of the appellant company contain no provision which expressly and in so many words authorized insurance against loss by burglary, and if such authority then existed, it must be drawn or inferred from the general terms and provisions embodied in those enactments. For the purpose of this case, we may also admit the entire correctness of the appellee's contention (1) that a corporation may lawfully exercise only such powers as are expressly or impliedly granted by statute; and (2) that as between a corporation and the public, any reasonable doubt as to the granting of a corporate power will be resolved in favor of the public, but these propositions being granted and given due weight in reaching our conclusion we have still to ask whether the power to carry on the business of burglary insurance is not fairly to be implied from the statute as it stood in the year 1896?
>
> *"It is to be observed that there is no express prohibition of such business. The title of the act is broad enough to cover*

insurance of any kind. The opening section (McClain's code, section 1685), which is the key note or introduction to the provisions which follow, prescribes how 'any number of persons' (may) 'associate themselves together for the purpose of forming an insurance company or for any other purpose than life insurance.' Section 1695, already quoted, undertakes to prescribe the five different classes or kinds of insurance in which such associations may engage. If this chapter is broad enough to permit burglary insurance, it must be found in subdivision 1 of this section when read in the light of the entire insurance statute of which it forms a part. The subdivision authorizes the insurance of houses, buildings, and all other kinds of property against loss by *fire* or other casualty. As will be noticed, the effect of the statute, as applied to this case, will be determined very largely on the scope of the meaning we may give to the words *'other casualty'*. *'Casualty'* and *'casualty insurance'* are words of quite frequent use, yet it cannot be said that their definition has been very accurately settled by the courts. Strictly and literally 'casualty' is perhaps to be limited to injuries which arise solely from accident without any element of conscious human design or intentional human agency; or as it is sometimes expressed, inevitable accident, something not to be foreseen or guarded against. Standard dictionary. But in ordinary usage, 'casualty' like 'accident' is quite commonly applied to losses and injuries which happen suddenly, unexpectedly, not in the usual course of events, and without any design on part of the person suffering from the injury. Nor does the fact that the conscious or intended act of some other person produces it take from such injury its character as an accident or casualty,''

and while it is true that much of this discussion was only by way of illustration and did not involve a decision of the question as to whether or not the term would cover damage by hail to growing crops, yet in view of the broad construction that they have already placed upon this subdivision, I am inclined to think that the supreme court would follow the dictum used by them in the case cited.

In another portion of the opinion, the court makes use of the following language:

"A casualty by which a loss of property is occasioned is not necessarily restricted to a conflagration by which the property is consumed, and we can see no reason why, in the absence of other restrictive provisions in the statute, it may not as well include lightning, tornado, flood, hail, or other force or violence by which such property is injured, destroyed or lost without the agency or design of the owner.

"To interpret the statute as if it read 'to insure property against loss or damage by fire or other loss or damage by fire' would be to perpetrate an absurdity. Indeed, unless we treat the general words 'or other casualty' as intended to include other risks than those already mentioned in the specific reference to 'loss or damage by fire' they then mean nothing and add nothing whatever to the idea which would be expressed by the sentence with these words entirely omitted."

It will also be observed that the only authority for stock companies to issue a hail policy is found in this subdivision of the section, and unless it authorizes stock companies in Iowa to issue hail policies, then it is impossible, under the laws of Iowa, for stock companies to insure against this casualty. This would tend to establish a monopoly of the hail insurance business in favor of the mutual insurance companies, and monopolies are not favored by the law.

I note your suggestion as to the difficulties that will be encountered by your department if this construction of the statute is to prevail, but relief from these difficulties should come by way of legislative enactment rather than by unwarranted judicial construction.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

SLOT MACHINES—GAMBLING DEVICES.—A slot machine used for the purpose of vending gum or other articles where the purchaser has a chance of getting an additional amount on same is a gambling device.

May 8, 1911.

MR. R. J. VAN ANTWERP,
Delhi, Iowa.

DEAR SIR: I am in receipt of your communication of the 4th instant advising that there are certain business places in your town

in which slot machines are being used, in which the operator places a nickle and receives chewing gum each time with a chance of getting two or more trading checks good for five cents in trade at any store.

You request to be advised as to whether the operation of such machines is gambling.

This question has been submitted to the department many times, in fact it was first submitted to former Attorney General Remley and he gave a very clear and exhausive opinion holding that all games of chance in which the person paid a consideration in order to operate the same, were gambling devices and the person keeping the same in a place or building was guilty of keeping a gambling house, and this has been the ruling of the department since that time. I do not regard the question as even doubtful or debatable.

Yours very truly,

GEORGE COSSON,
Attorney General of Iowa.

COUNTY BONDS—CONDITIONS INSERTED.—Under chapter 26, acts of the thirty-third general assembly, a county, in negotiating its bonds, may cause to be inserted therein a provision that they cannot be paid off within five years from date of issue.

May 9, 1911.

MR. MARSH W. BAILEY,
Washington, Iowa.

DEAR SIR: I am directed to make reply to your favor of the 6th inst. addressed to the attorney general, referring to your letter of the 3rd inst., requesting his interpretation as to certain provisions contained in chapter 26, laws of the thirty-third general assembly.

The precise question you submit is, would it be proper for the county in authorizing the issuance and negotiation of the bonds mentioned in section 6 of said chapter, to provide that the bonds, or some of them, may be paid or redeemed before the expiration of five years, it being the contention of some that such bonds cannot be paid off within five years of the date of their issue.

Without going into a lengthy discussion of this proposition and giving all of the reasons for the conclusion announced, I am of the opinion that the county is authorized to insert a provision in

such bonds, giving the county the privilege of payment at such times as it deems proper. Among other things, said section 6 provides that such bonds shall be payable at the pleasure of the county after five years, and that each of such bonds shall provide that it is subject to this condition. This provision, I take it, would give the county the right to redeem such bonds after the expiration of five years, regardless of any provision therein to the contrary. I think that is all this provision means. In other words, I think it was the intention of the legislature to prohibit counties from issuing such bonds that cannot be paid off after the expiration of five years and before their maturity. There is no provision in the whole act which in any way prohibits the county from making such bonds due and payable at any date before the expiration of five years. I take it that this would be a matter of agreement between the county and the persons who would purchase the bonds.

If you do not propose to issue any bonds to run for as long a period as five years, then I would feel that much more positive as to the correctness of the opinion expressed.

You will understand, of course, that this is not an official opinion, and the same is given largely as a matter of accommodation and courtesy to you as chairman of the hospital board.

Very truly yours,

N. J. LEE,
Special Counsel.

INCOMPATIBLE OFFICES.—The office of mayor of a city or town is incompatible with that of deputy sheriff of the county and cannot be held by one and the same party at the same time.

May 10, 1911.

HON. R. F. HICKMAN,
Sidney, Iowa.

DEAR SIR: I am directed to make reply to your letter of the 8th inst., addressed to the attorney general, in which you request his opinion as to whether Mr. F. C. Ginther, who was elected mayor of Sidney in the year 1910 and duly qualified and is now acting as such officer, and thereafter in the month of March, 1911, was appointed deputy sheriff of Fremont county, and duly accepted said office and qualified and is now acting as such officer, may legally hold both of said offices at the same time.

There is no express provision in our constitution or statutes prohibiting the same person from holding these two offices at the same time. It then becomes a question as to whether they are incompatible under the rules of the common law or are incompatible under the general provisions of the constitution of this state. From such investigation of the authorities as I have been enabled to make somewhat hurriedly, I have no hesitancy in expressing the opinion that the office of mayor and deputy sheriff are clearly incompatible at common law, and further, that the acceptance of the second office has the effect of at once creating a vacancy in the first. Section 691 of the code confers upon a mayor in criminal matters the jurisdiction of a justice of the peace, co-extensive with the county, and in civil cases the same jurisdiction within the city or town as a justice of the peace has within the township, except in cities having a police court. A mayor, therefore, in certain cases exercises judicial functions.

A deputy sheriff is an executive officer. Where there is no express provision, the true test is whether the two offices are incompatible in their natures, in the rights, duties or obligations connected with or flowing out of them. Offices are incompatible or inconsistent when they cannot be executed by the same person; or when they cannot be executed with care and ability; or when one is subordinate to or interferes with another; or where the office is under the control of another; or when the holder cannot, in every instance, discharge the duties of each. It has also been stated by the courts that the incompatibility which shall operate to vacate the first office, exists where the nature and duties of the two offices are such as to render it improper from considerations of public policy for one person to retain both. The question of incompatibility is to be determined from the natures and duties of the two offices and not from a possibility, or even a probability that the incumbent might duly perform the duties of both. Applying these principles and rules to the state of facts you submit, there can be no question but that the opinion already expressed is the law. We can readily imagine a great number of instances where the duties of these two offices might conflict.

But if there were any question that these two offices are incompatible at common law, such doubt would be removed, I think, in light of the provisions of our constitution found in section 1, article III, to wit:

"The powers of the government of Iowa shall be divided into three separate departments: The legislative, the executive and the judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall excercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted."

The foregoing views are based in part on the following cases:

Wilson vs. King, 3 Littell (Ky.) 457;

State Bank vs. Curnan, 10 Ark., 142;

Stubbs vs. Lee, 64 Me., 195;

Magie vs. Stoddard, 25 Conn., 565;

Commonwealth vs. Tate, 3 Leigh's (Va.), 802,

and other cases and various provisions of our statute which I need not point out.

You will understand, of course, that this is not strictly an official opinion, but is rendered largely as a courtesy to you with a desire to render such assistance to you in your official capacity as this department is enabled to do in the light of other matters that demand attention.

Yours very truly,

N. J. LEE,
Special Counsel.

SOLDIERS' EXEMPTION—WHEN INCREASED EXEMPTION AVAILABLE.—The $1,200.00 exemption provided for by chapter 62, acts of the thirty-fourth general assembly is not available on assessments made in the year 1911.

May 12, 1911.

MR. J. E. WILSON,
Knoxville, Iowa.

DEAR SIR: I am directed to make reply to your letter of the 11th inst., addressed to the attorney general, in which you inquire if all veterans of the civil war are entitled to the exemption from taxation in the sum of $1,200.00, provided for by an act of the last general assembly, and if such exemption applies to the assessment made this year.

The act to which you refer repeals subdivision 7 of section 1304 of the supplement to the code, 1907, and enacts a substitute for it and it provides that all honorably discharged soldiers or sailors of the Mexican war or of the war of the rebellion, and widows of such soldiers and sailors remaining unmarried, are entitled to $1,200.00 exemption in actual value. The act further provides that such soldiers, sailors or widows shall receive a reduction in said amount at the time the assessment is made by the assessor. There being no publication clause, the act will not be in effect until July 4th next, and therefore such exemption will not be allowed on the assessments made this year.

Your letter of the 25th ult., relating to the same matter, was duly received but the same did not receive attention ere now because of the large amount of official business to be transacted in this department.

Of course you will understand that this is not an official opinion, as the attorney general is not required by law to render official opinions in matters of this kind, to private individuals, and the above is written in a personal way as a courtesy to you.

Very truly yours,

N. J. LEE,
Special Counsel.

FISH NETS AND SEINES—SIZE OF MESH.—Section 2541 of the code prohibits the use of seines with larger or smaller mesh than three-eighths of an inch.

May 16, 1911.

HON. GEORGE A. LINCOLN,
State Fish & Game Warden,
Cedar Rapids, Iowa.

DEAR SIR: I am directed to make reply to your esteemed favor of the 15th inst., addressed to the attorney general, in which you request his opinion as to whether the provisions of section 2541 of the code prohibit the use of a seine larger or smaller than a 3-8 inch mesh, for the purposes mentioned in said section.

I think the intent of the legislature was to prohibit the use of a seine with a mesh smaller than 3-8 inch, for the purposes mentioned in said section. I do not see what harm or, rather, what object of the law would be defeated by the use of a seine with a

larger mesh than 3-8 of an inch. No matter what sized mesh is used, one of the conditions upon which it may be used is that certain fish must always be restored unharmed to the water. While I may not understand the very object sought to be accomplished by limiting the size of the mesh to 3-8 of an inch, yet it seems reasonable that it was the intent to permit the use of a net with a size mesh that would not hold minnows that were so small that they ought not to be taken for bait.

Very truly yours,

N. J. LEE,
Special Counsel.

MULCT SALOONS—NUMBER OF ENTRANCES.—Mulct saloons must be operated in a single room having but one entrance or exit which must open upon a public business street.

May 20, 1911.

MR. HALL ROBERTS,
Postville, Iowa.

DEAR SIR: Your inquiry of May 16th addressed to Attorney General Cosson has been handed to me for answer.

In reply to your inquiry as to whether or not a saloon which has a door in the rear thereof is a violation under the mulct law, will say that the statute provides:

> "Said selling or keeping for sale of intoxicating liquors shall be carried on in a single room having but one entrance or exit, and that opening upon a public business street."

This law requiring that there be but one entrance has been strictly construed. The latest ruling upon this point by the supreme court is found in 133 Iowa, 416. In that case the room in which the business was carried on had a back door in addition to the regular entrance opening on the public street, but this back door was not used for any purpose save sometimes for ventilating purposes. In holding this a violation of the requirements of the statutes, the court said:

> "It is immaterial whether such rear door was, in fact, used or was convenient for use in leaving or entering the defendant saloon. It is enough that it could be so used, and we may certainly take judicial notice of the fact that a step of three feet is not impossible to an ordinary able bodied man. The

statutory requirement that the saloon business shall be carried on in a single room having but one exit or entrance has been strictly applied. *State vs. Gifford,* 111 Iowa, 648; *Bell vs. Hamm,* 127 Iowa, 343; *State vs. Donohue,* 120 Iowa, 154. The court should have granted a temporary injunction as prayed, and its refusal to do so was error."

Believing that the above sufficiently answers your question, I beg to remain,

Yours very truly,
GEORGE COSSON,
Attorney General of Iowa.

CITY FUNDS.—The city council may not loan out the funds of the city at interest. The treasurer is their legal custodian. He could not deposit the funds for any definite period but might arrange for payment of interest on daily balances.

May 25, 1911.

MR. A. M. JACKLEY,
Seymour, Iowa,

DEAR SIR: I am directed to make reply to your letter of the 12th inst., addressed to the attorney general, requesting his opinion as to the right of your city council to loan out or place at interest certain funds raised for the purpose of constructing a sewer, and which funds, for certain reasons, were not required to be used at once.

Inasmuch as the city or town treasurer is the legal custodian of all funds of the municipality, and therefore probably not under the control of the city council, and there being no law, as I now recall it, requiring city funds to be placed at interest, the city council would not have the authority to make such disposition of the funds as you suggest, especially against the wishes of the treasurer. I doubt if the treasurer could deposit the funds for any definite period, as he would be required to cash proper warrants and drafts thereon whenever presented, but if a bank saw fit to allow interest on the fund without any agreement, tying up the funds for any definite length of time, there probably would be no objection to that.

Very truly yours,
N. J. LEE,
Special Counsel.

SALOON CONSENT PETITION—NUMBER OF SIGNERS.—A majority of those who voted at the last preceding election as shown by the poll books even though some have moved out of the voting precinct is required to constitute a sufficient petition.

May 26, 1911.

MR. H. B. PIERCE,
Rock Rapids, Iowa.

DEAR SIR: I am in receipt of your communication of the 24th instant requesting to be advised as to whether in the securing of the general consent petition, the necessary per cent of the persons voting at the last preceding election as shown by the poll books of said election, governs; or whether it is competent to introduce evidence before the board of supervisors to the effect that different persons who voted at the last election had since removed from the city or county, and hence it was only necessary to secure a majority of those who voted and were still residents of the city or county.

I think the law clearly contemplated that it requires the necessary majority of all those who voted at the last preceding election as shown by the poll books of said election. While I have no time to re-examine the cases carefully, I think this doctrine is sustained by the case of *Porterfield vs. Butterfield,* 116 Iowa, 725; *Wilson vs. Bohstedt,* 110 N. W., 898, and *Mills vs. Halgreen,* 124 N. W., 1077.

Yours very truly,
GEORGE COSSON,
Attorney General of Iowa.

BANKS—PRIVATE—TAXATION—MONEYED CAPITAL—DEDUCTION OF INDEBTEDNESS.—Money employed in private banks is moneyed capital within the meaning of chapter 63, acts of the thirty-fourth general assembly, and indebtedness is not to be deducted therefrom.

May 26, 1911.

B. E. NORTON, *County Auditor,*
Algona, Iowa.

DEAR SIR: This will acknowledge receipt of your letter of the 19th inst. addressed to the attorney general in which you ask to be advised as to whether the assessment for taxation of private or partnership banks is affected by the act of the thirty-fourth general assembly, known as senate file No. 387.

As a courtesy to you, I may say in a personal and unofficial way that the act in question undoubtedly does apply to the assessment of so-called private banks this year. The only specific reference to private banks in the act is that section which amends section 1321 of the supplement to the code, 1907, the effect of which is to strike from that section the provision permitting the deduction of certain debts and exemptions from the property and assets on which said banks were assessed under the section. But private banks as defined in that section undoubtedly is moneyed capital within the meaning of the new act, so that unless private banks as defined by the statute are assessed upon the same basis as the corporations mentioned in the new act, and upon the same basis as moneyed capital within the meaning of that act, a discrimination would result in the assessment this year against state, savings and national banks, and loan and trust companies, and moneyed capital other than private banks. There is a provision in the new act which expressly prohibits the deducting of debts from the value of moneyed capital and from the value of the property of the corporations mentioned in the new act, for the purpose of taxation, and if private banks are assessed under the old statute without reference to the new act, they would have the privilege of deducting their debts which results in the discrimination referred to.

Very truly yours,

N. J. LEE,

Special Counsel.

TAXATION—BANK SHARES—UNDIVIDED EARNINGS.—The undivided earnings should be taken into account in fixing the value of bank stock for purpose of taxation.

May 26, 1911.

R. R. CRAIG, *Cashier,*
Corydon, Iowa.

DEAR SIR: This will acknowledge receipt of your letter of the 24th inst. addressed to the attorney general, in which you state that your bank on the 1st day of January last had undivided earnings amounting to over $15,000.00 and that on the 4th day of January, you paid out as dividends therefrom the sum of $12,600.00 and charged off a further sum of $529.00 and you ask to be informed as to whether said undivided earnings should be taken

into account in determining the value of the shares of stock of said bank for the purpose of taxation under the act of the thirty-fourth general assembly, known as senate file 387, providing for the taxation of state banks and other banks and corporations.

In a personal and unofficial way I may state, as a courtesy to you, that said undivided earnings undoubtedly should be taken into account in determining the value of the shares of stock of said bank, for the purpose of taxation this year. The value of all property for the purpose of taxation is determined and fixed as of January 1st of the year in which it is assessed. There is nothing in the new act which in any way changes this rule with respect to the property to be assessed thereunder. The statement and data required by this act and other sections of the statute to be furnished to the assessor by banks to enable him to perform his duty should include, among other things, the undivided earnings as of January 1st.

Very truly yours,

N. J. LEE,
Special Counsel.

ROAD DISTRICTS.—The township trustees, when the proper petition is presented, should divide the township into separate road districts.

May 26, 1911.

J. E. BICKLEY, J. P.,
Clarksville, Iowa.

DEAR SIR: This will acknowledge receipt of your letter of the 10th inst. addressed to the attorney general, in which you state that Jackson township, Butler county, has been under the one district plan and that prior to last April a petition was signed by the voters of said township, requesting that said township be divided into road districts, in accordance with chapter 98, laws of the thirty-third general assembly, and presented to the township trustees at its regular meeting last April, and that said trustees refused to act in the premises and to make a division of the township into two or more road districts, on the ground that they had no authority to appoint road superintendents of such new districts and would have no legal right to make such division until the April meeting in the year 1912, and you request to be advised as to whether said township trustees were required at the last April

meeting to make a division of the township into road districts and as to whether they had the power and authority to appoint road superintendent until such officers could be elected by the voters.

If a proper petition was presented to the township trustees at their last April meeting asking for the division of the township into road districts, it was the duty of the trustees to act thereon and make a division, the said division to take effect on the 1st day of January succeeding. But the township trustees would not have the authority to appoint road superintendents until such officers could be elected by the voters at the next regular election, so you will see that nothing would have been gained by making the division last April, as the election of road superintendents could not take place until the general election in the year 1912. But, nevertheless, the trustees should recognize and act on the petition that was presented, if it was in compliance with the statute, and not make it necessary for another petition to be presented. Such a petition can be presented at any regular meeting. I suppose it was an oversight on the part of the law-makers in not providing for the election of road superintendents at a special election in the year in which there is no general election, in case a division of the township is made in the year no election is held, or in providing that the township trustees should have the power to appoint road superintendents under such circumstances, but the failure to provide against such contingencies cannot be supplied by judicial construction of the act.

You also inquire if the township trustees under the one district plan are authorized to fill the office of road superintendent without advertising for bids. I think the trustees have this authority, if they see fit to exercise it.

Very truly yours,

N. J. LEE,
Special Counsel.

TRACTION ENGINES—PLANKING BRIDGES.—Since November 1, 1910, the operator of a traction engine is no longer required to plank bridges or culverts over which he desires to move such engine.

May 27, 1911.

MR. DICK R. HAYES,
Hedrick, Iowa.

DEAR SIR: Replying to your favor of May 17th, addressed to Attorney General Cosson, will say that prior to the 1st day of

November, 1910, no traction engine could cross any bridge, crossing or culvert in the public highway or street unless sound, strong planks not less than one foot wide and two inches thick were placed and kept continuously under the wheels.

On March 25, 1909, an act was passed, making the old law void and of no effect after November 1, 1910, so that it is no longer necessary to plank bridges, culverts or street crossings. You will understand that this is not an official opinion, but merely an expression of my personal views upon the question involved, given out of courtesy to you. It is hardly necessary to say that this department cannot render official opinions upon questions of this character, since they are of a personal and private nature.

Trusting that the above is sufficient for your purposes, I am,

Yours very truly,

HENRY E. SAMPSON,
Special Counsel.

SEWER ASSESSMENTS—CHURCH PROPERTY—EXEMPTIONS.—Church property is not exempt from special assessments, such as sewer assessments and the like.

May 27, 1911.

REV. A. L. CURTIS,
Missouri Valley, Iowa.

DEAR SIR: Your favor of May 19th, addressed to Attorney General Cosson, has been handed to me with a request to answer same.

Replying to your inquiry as to whether or not church property is exempt from a sewer assessment, will say that the general exemptions from taxation do not apply to special assessments, and for that reason the city can legally assess church property to meet the expense of constructing a sewer.

Title VII, chapter 1 of the code provides for the assessment of taxes for the general support of the government. That chapter provides for the exemption from such general taxes of all church property. (Code section 1304, div. 2.)

Title V, chapter 7 provides for the building of sewers and assessing the property abutting said sewer, in order to meet the expense of constructing said improvement, but this chapter makes no exemptions as to church property.

You can readily understand that taxation for the maintenance of the government is entirely different from that of an assessment for the construction of a public improvement. The statute expressly exempts church property from the former; it makes no such exemption from the latter. Furthermore, in the matter of exemptions, it is construed strictly in favor of the authority making the assessment.

If you have access to the following authorities you may be interested in reading them:

Griswold College vs. Iowa, 46 Ia., 275;

Cassady vs. Hammer, 62 Ia., 359;

Sioux City vs. Ind. Dist. Sioux City, 55 Ia., 150.

It is my personal opinion that the special assessment of which you complain can be legally made if the city authorities so desire. You will, of course, understand that this is not an official opinion, but simply my personal views upon the matter, given out of courtesy to you.

Very truly yours,
HENRY E. SAMPSON,
Special Counsel.

PEDDLERS—HUCKSTERS' WAGONS—DEFINED.—A peddler by the express terms of code section 1347-a includes transient merchants and persons running a huckster wagon. A huckster is one who travels through the country exchanging small articles of merchandise for farm produce and retailing small articles for household use.

May 27, 1911.

MR. C. R. JENNINGS,
Victor, Iowa.

DEAR SIR: Replying to your favor of May 26th addressed to Attorney General Cosson, which has been handed to me for reply, will say that code section 1347-a, of the supplement to the code, provides, among other things, that peddlers plying their vocation in any county in the state of Iowa, outside of a city or incorporated town, shall pay an annual county tax of $75.00 for each two-horse conveyance.

The above mentioned section provides, however, that the word "peddlers" under the provision of said act, shall be held to include transient merchants, but excludes, by express stipulation, persons running a "huckster wagon."

The only question remaining now is as to whether or not you can be considered as running a "huckster wagon," and this is one of fact. It is my personal opinion that the exception clause, "persons running a 'huckster wagon,'" as is used in the above mentioned statute, refers to persons who run a wagon through the country exchanging small articles of merchandise for farm produce, and retailing small articles for household use. It is a custom in many towns in Iowa for local merchants to send wagons into the country with small articles of merchandise for sale or exchange for farm produce, and we believe that they are "persons running a huckster wagon."

A failure to comply with the provisions of the above named section of the code is made a misdemeanor, and upon conviction the party must pay the county treasurer, in addition to the penalty imposed therefor, double the amount of the tax for one year.

The license issued to peddlers under the provisions of the statute mentioned above is good only in the county in which issued.

You will, of course, understand that this is not an official opinion, but merely my personal views upon the matter, given out of courtesy to you.

Yours truly,
HENRY E. SAMPSON,
Special Counsel.

MONEYED CAPITAL—DEDUCTION OF CAPITAL INVESTED IN GOVERNMENT BONDS.—Moneyed capital is capital invested in loans or securities for the payment of money where the object of the business is the making of profit by its use as money. Since the enactment of chapter 63, acts of the thirty-fourth general assembly, a state bank is not allowed to deduct from the value of its shares the amount of its capital invested in government bonds.

May 29, 1911.

HON. SHERWOOD A. CLOCK,
Hampton, Iowa.

DEAR SIR: Referring again to your valued letter of the 5th inst. addressed to the attorney general, in which you requested the attor-

ney general to render an opinion as to certain questions arising in the application of the act of the thirty-fourth general assembly providing for the taxation of banks, moneyed capital, etc., I have to say that because of the large amount of official business demanding the attention of the entire department, it has been impossible to render an opinion construing all of the features of the act referred to, which it was the purpose to do.

The two questions you submit are:

"1. What is meant by 'moneyed capital' as used in said act?

"2. Is a state bank allowed to deduct the amount of its capital invested in government bonds?"

It is not practicable to so define the terms "moneyed capital" as to indicate therein just what it applies to. The definitions of "moneyed capital" as contemplated by section 5219 of the revised statutes of the United States, as set forth in various decisions of the courts are more or less general. You will notice that the legislature in the act in question used the term "moneyed capital" as within the meaning of said section of the United States statutes, and there is no attempt in the act itself to point out just what is included therein, and we are, therefore, left to ascertain what the courts have held "moneyed capital" to be within the meaning of said section 5219.

I select a statement of the United States supreme court in the case of *Mercantile National Bank vs. New York,* reported in 121 U. S., 138, which is as complete and satisfactory a definition as can be found:

> "The terms of the act of congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way, invested in loans, or in securities for the payment of money, either as an investment of a permanent character or temporarily with a view to sale or repay-

ment and reinvestment. * * * * This definition of moneyed capital in the hands of individuals seems to us to be the idea of the law, and ample enough to embrace and secure its whole purpose and policy."

Answering your second inquiry, I do not think that a state bank is entitled to deduct any part of its capital that may be invested in government bonds. The bank as a corporation is not assessed or taxed. The shares of stock of the bank are assessed to the individual stockholders and I do not think it was the intention of the legislature to permit such deductions.

Of course, you will not regard the statements contained in this letter as in any sense the expression of an official opinion from this department, but are largely the personal views of the writer, made without opportunity to make a proper and full study and investigation of the subject.

Very truly yours,

N. J. LEE,
Special Counsel.

MONEYED CAPITAL DEFINED—VALUE OF MONEYS AND CREDITS—HOW DETERMINED—TOWNSHIP ASSESSORS' COMPENSATION.—Moneyed capital embraces capital employed in banking and in other lines of business where profit is sought to be made by the use of moneyed capital as money. The value to be placed upon moneys and credits for the purpose of taxation is its actual market value. Additional compensation should be allowed assessors for correcting the assessment to conform to the provisions of chapter 63, acts of the thirty-fourth general assembly.

May 29, 1911.

HON. P. J. NELSON, *County Attorney,*
Dubuque, Iowa.

DEAR SIR: Referring again to your letter of the 14th ult. in relation to the act of the last legislature providing for the taxation of banks, trust companies, moneyed capital and moneys and credits, I have to say that this department has been so occupied with important official business that no time was found to prepare an opinion construing the provisions of the act in question.

The questions you submit are:

"1. What is meant by 'moneyed capital?'

"2. How is the value of moneys and credits to be determined?

"3. Are township assessors entitled to additional compensation for their services in connection with the new act?"

It is not practicable to so define the term "moneyed capital" as to indicate therein just what it applies to. The definitions of "moneyed capital" as contemplated by section 5219 of the revised statutes of the United States, as set forth in various decisions of the courts are more or less general. You will notice that the legislature in the act in question used the term "moneyed capital" as within the meaning of said section of the United States statutes, and there is no attempt in the act itself to point out just what is included therein, and we are, therefore, left to ascertain what the courts have held "moneyed capital" to be within the meaning of said section 5219.

In the case of *Mercantile Bank vs. New York*, 121 U. S., the supreme court said that:

> "The term 'moneyed capital' as used in section 5219 embraces capital employed in national banks and capital employed by individuals when the object of their business is the making of profit by the use of their moneyed capital as money; but it does not include moneyed capital in the hands of corporations, even if its business be such as to make its shares moneyed capital when in the hands of individuals."

In the same case the court, after having reviewed the previous decisions, states:

> "It follows as a deduction from these decisions that 'moneyed capital' in the hands of individual citizens does not necessarily include shares of stock held by them in all corporations whose capital is employed, according to their respective corporate powers and privileges, in business carried on for the pecuniary profit of shareholders, although shares in some corporations, according to the nature of their business, may be such moneyed capital. The rule and test of this difference is not to be found in that quality attached to shares of stock in corporate bodies generally whereby the certificates of ownership have a certain appearance of negotiability, so as easily to be transferred by delivery * * * * It does not follow, because these are invested in such a way as properly to con-

stitute moneyed capital, that the shares of stock in the corporations themselves must necessarily be within the same description. * * * * The true test of the distinction, therefore, can only be found in the nature of the business in which the corporation is engaged."

The court also used this language, which probably is as good a definition as can be found:

"The terms of the act of congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way, invested in loans, or in securities for the payment of money, either as an investment of a permanent character or temporarily with a view to sale or repayment and reinvestment. * * * * This definition of moneyed capital in the hands of individuals seems to us to be the idea of the law, and ample enough to embrace and secure its whole purpose and policy."

The valuation of moneys and credits for the purpose of taxation as contemplated by the new act, undoubtedly has reference to the market value, what the value actually is.

As to your third question, I hardly know what to say. The board of supervisors in fixing the compensation of assessors this year, did so in view of the work to be done under the old law and virtually fixed the amount of time that was to be devoted to the work. The duties to be performed under the new act are not made necessary because of any neglect or omission of duty on the part of the assessors, but is due to a fault in the previous law, and it seems to me that where any material additional time is required to bring the assessment of the matters covered by the new act in harmony therewith, it would be only fair and equitable that additional compensation be made to the assessors. In any event, if the board of supervisors are disposed to allow additional compensation proportionate to the extra amount of time put in, I think it would be all right.

Of course, you will not regard the statements herein in the light of an official opinion. They are largely the personal views of the writer, and made without opportunity of full investigation of the subject.

Yours truly,

N. J. LEE,
Special Counsel.

BOARD OF REVIEW—MEETINGS OF.—The meeting of the board of review need not be published. The only persons interested are those notified to appear.

May 31, 1911.

JOHN F. DERMODY, *Town Clerk,*
Saint Ansgar, Iowa.

DEAR SIR: Your letter of the 8th inst. addressed to the attorney general has been referred to me for reply.

Your first question, briefly stated, is whether or not the final meeting of the board of review must be an open and public meeting or whether their final action may be taken in private.

In my judgment, there is no necessity for this meeting being a public one. The only persons interested are the ones to whom notice has been given by the board of its intention to increase their assessment. They should, of course, have ample opportunity to appear with their counsel and such witnesses as they desire to use before the board, and there is no reason why the public generally might not be excluded from the meeting.

Your second question is whether or not the final meeting of the board may be transferred from the usual place to a room across the street, and persons interested required to appear at the latter place of meeting.

Code section 1370 provides: "The board shall meet on the first Monday of April at the office of the township, city or town clerk or recorder, and sit from day to day until its duties are completed."

Code section 1372 provides:

> "At the conclusion of the action of the board, the clerk shall post an alphabetical list of those whose assessments are thus raised.

"The board shall hold an adjourned meeting with at least five days intervening after the posting of notices before final action, and the posted notices shall state the time and place of holding such adjourned meeting, which time and place shall also be stated in the proceedings of the board."

It will thus be seen that the law fixes the place at which these meetings should be held, viz., at the office of the township, city or town clerk or recorder.

In the case of *Funk vs. Carroll County,* 64 N. W., 768, it was held by our supreme court that where the law fixed the time and place of holding a district court and the judge adjourned the court to a private house for the purpose of a trial that the court thereby lost jurisdiction and that the proceedings at the house were of no effect, and I see no reason why the same rule should not apply to proceedings of the board of equalization.

With reference to the assessment of moneys and credits the new law, section 1 of senate file 387 requires all parties to furnish the assessor, upon demand, a full, complete, itemized sworn statement, showing the amount of same.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

ROAD TAX.—The one mill tax required to be levied for the dragging fund should be certified by the township clerk to the county auditor in the same manner that he certifies the levy of the property road tax and it should be entered on the tax list and collected the same as property road tax.

June 13, 1911.

HON. J. P. HERTERT,
Harlan, Iowa.

DEAR SIR: This will acknowledge receipt of your letter of the 10th inst. to the attorney general, in which you request an opinion as to how long a time the county auditor has in which to make his report to the state auditor under section 1377 of the code in view of section 6 of senate file No. 387, an act of the thirty-fourth general assembly, which took effect April 8th last, and requesting his opinion further as to how the one mill tax required to be levied by the township trustees for a dragging fund under the so-called new road drag law passed by the thirty-fourth general assembly is to be collected.

It is true, as you suggest, that under the provisions of section 6 of said senate file No. 387, the board of review is given until July 1st of this year in which to review assessments made under that act and, of course, the county auditor cannot make his report as to so much of the matters he is required to report on as are affected by the proceedings under said section 6, but I would think that the county auditor should make his report by the time specified in the statute, according to the record as it then exists and within a reasonable time after the boards of review have acted under said section 6 he should make such supplemental report to the auditor of state as will show the facts.

I think the one mill tax required to be levied by the township trustees for dragging fund should be certified by the township clerk to the county auditor in the same manner that he certifies the levy of the property road tax, and the same should be entered on the tax list and collected the same as property road tax.

Yours very truly,

N. J. LEE,
Special Counsel.

FISHING—IN MEANDERED AND NON-MEANDERED STREAMS.—In meandered streams the right to fish is in the public generally, but in non-meandered streams it is in the owner of the adjacent land exclusively.

June 20, 1911.

MR. J. E. POOL,
Woolstock, Iowa.

DEAR SIR: Yours of the 15th inst. addressed to the attorney general has been referred to me for reply.

Your inquiry is as to whether or not a person has the right to fish on Boone river without the consent of the person owning the land through which the stream flows.

The rule is that the owner of the land through which a non-meandered stream flows has the exclusive right to fish therein and, hence, he would have the right to exclude all persons attempting to fish therein without his permission. The rule is otherwise as to meandered streams, but as there are few meandered streams in this state except the boundary rivers, I would say that the rule as stated above would apply in the case mentioned by you.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

CITIES AND TOWNS—RIGHT OF COUNCILMEN TO CONTRACT.—While a councilman may not be interested in a contract with the city he may lawfully be employed by one who has contracted with the city.

June 22, 1911.

EMORY NICHOLSON,
Winterset, Iowa.

DEAR SIR: Yours of the 20th inst. addressed to the attorney general has been referred to me for reply.

Your question briefly stated, is whether or not a member of the city council may lawfully work for and draw pay from another who has a contract with the city.

I enclose an extract from a former opinion rendered by this department from which it will be seen that the councilman could not directly enter into a contract with the city. The section of the statute reads: "Nor shall he be interested directly or *indirectly* in any contract or job for work, or the profits thereof, or services to be performed for the corporation."

The question propounded by you requires a construction of the words "interested indirectly" as used in this statute. If by reason of his employment the councilman can be said to be indirectly interested in the contract by reason of his being employed by the contractor, then such employment would be prohibited.

The supreme court of Minnesota, in the case of *Nelson vs. Johnson,* 36 N. W., at page 868, considered a contract wherein it was stipulated "should I at any time within a period of five years violate my agreement above mentioned, by engaging in the lumber business, either directly or *indirectly,* I agree to pay to the said Nelson the sum of two thousand dollars," and in passing upon the question of whether or not this contract had been violated by the obligors being employed in another lumber yard said: "The words 'directly or indirectly' emphasize the agreement, and permit no evasion of its purpose and object. To engage his services to or in assisting a rival dealer in the same business, to solicit and make sales and to influence buyers in that market, including his old customers, would, we think, be fairly within the terms of the contract. But it refers to *engaging* in business; it does not extend merely to isolated acts which might tend to interfere with the

plaintiff's business, or to occasional services voluntarily rendered for the convenience or accommodation of another in good faith. Nor do we think it would include subordinate employment, not affecting the management or control of the business, or directly influencing custom."

Hence, I am of the opinion that if the city's contract with the contractor was fairly made and there was no collusion between the members of the council to award him the contract in consideration of his employing members of the council, the contractor should not be deprived of the right to employ a councilman to do work on said contract.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

FIRE CRACKERS—SALE OF—TOY PISTOLS—SALE OF TO MINORS.—It is unlawful to sell or keep for sale fire crackers more than five inches in length and more than three-fourths inch in diameter. It is unlawful to sell or give any pistol, revolver or toy pistol to a minor.

June 22, 1911.

MR. R. L. APFEL,
Waterloo, Iowa.

DEAR SIR: This will acknowledge the receipt of your letter of the 21st instant to the attorney general in which you request to be advised as to whether you are authorized under the law to sell blank cartridges of 22-32-38 caliber, where the same are not to be used in toy pistols or toy revolvers.

Section 5028-p of the supplement to the code, 1907, provides that "no person shall use, sell, offer for sale or keep for sale within this state, any toy pistols, toy revolvers, caps containing dynamite, blank cartridges for toy revolvers or toy pistols, or fire crackers more than five inches in length and more than three-fourths of an inch in diameter."

Section 5004 of the code provides that no person shall knowingly sell, present or give any pistol, revolver or toy pistol to any minor.

These are the only provisions of the statute relating to this subject that I know of. Of course cities and towns have the power

by ordinance to regulate or prohibit the sale of fire crackers, fire works, torpedoes, Roman candles, sky rockets and other pyrotechnic displays under section 712 of the code.

Yours very truly,

N. J. LEE,
Special Counsel.

CORPORATIONS—EXEMPT FROM FILING FEE.—Farmers mutual co-operative creamery associations, corporations and organizations for the manufacture of sugar beets grown in Iowa, and domestic and local building and loan associations, and savings and loan associations are exempt from payment of incorporation filing fee.

June 24, 1911.

MR. R. N. JOHNSON,
Fort Madison, Iowa.

DEAR SIR: Yours of the 21st inst. addressed to the attorney general has been referred to me for reply.

Your question calls for a construction of section 1 of chapter 104 of the acts of the thirty-third general assembly as amended by substitute to senate file No. 272 of the thirty-fourth general assembly.

So far as I am advised, this department has not heretofore had occasion to construe this section as amended, but as I view it, the amendment has the effect to enlarge the class of corporations exempted from the payment of the incorporation filing fee, so as to exempt domestic and local building and loan associations and savings and loan associations.

Prior to this amendment, the only corporations for pecuniary profit exempt from the payment of this filing fee were farmers' mutual co-operative creamery associations and corporations organized for the manufacture of sugar from beets grown in Iowa.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

REGISTRATION OF FARM NAMES—PRIORITY IN FILING—FRACTIONS OF A DAY.—Fractions of a day are not recognized in law and one who files the necessary papers and makes the deposit fee is held to have complied with the law on the first moment of that day. Where the same farm name is selected by two applicants and filed on the same day, the one first filed should take precedence, and if they are received by mail the letter first opened should take precedence.

June 24, 1911.

MR. J. L. DODD,
Centerville, Iowa.

DEAR SIR: Yours of the 21st inst. addressed to the attorney general has been referred to me for reply.

Your first question, briefly stated, is whether or not persons desiring to register a farm name would gain any priority in the choice of such name by filing the same with you prior to the date on which the law takes effect.

The law takes no notice of a fraction of a day and if a person desiring to comply with this law should file with you the name desired and deposit the fee required previous to the day when the law takes effect, he should be held to have complied with the law on the first moment of that day, i. e., twelve o'clock and one minute a. m., and hence would have priority over a person filing the same name later in that day.

Your second question is as to how you should dispose of two applications for the same name received on the same mail.

You should file the same in the order in which the letters are opened.

In my judgment, you would not be required to take any official notice of these instruments prior to the date on which the law takes effect.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

ROAD DRAG FUND.—The one mill road drag fund provided for in the new law is in addition to the six mill tax authorized to be levied by the statutes under code supplement section 1528.

June 26, 1911.

MR. V. A. BURLEY, COUNTY AUDITOR,
Sibley, Iowa.

DEAR SIR: Replying to your letter of the 23rd inst. to the attorney general in which you request to be advised as to whether the one mill to be levied for dragging fund under the new road drag law is included in the six mills that the trustees are authorized to levy before the enactment of such law, will say that such one mill for dragging fund is not so included but is in addition to the maximum that could be levied by the trustees under section 1528 of the supplement to the code, 1907.

Yours very truly,

N. J. LEE,
Special Counsel.

POOL AND BILLIARD HALLS.—Pool and billiard halls may be operated outside the limits of incorporated city or town.

June 26, 1911.

MR. A. A. SMITH,
Long Grove, Iowa.

DEAR SIR: This will acknowledge receipt of your letter of the 15th inst. addressed to the attorney general in which you request his opinion as to whether a pool and billiard hall can be operated in a town not incorporated; whether minors may remain for hours in a pool and billiard hall; whether a pool hall may be kept open on Sunday; whether people are allowed to play cards for the drinks or money in a pool hall; whether minors are allowed to participate in pool and billiard games and whether minors are allowed to take care of pool and billiard tables.

All of your questions, except the first one, must be answered in the negative. There is no state law prohibiting the operation of pool and billiard halls, but cities and towns have the power, by ordinance, to regulate or prohibit such places, and it follows, there-

fore, that outside of the limits of cities and towns, such places might operate.

Yours truly,

N. J. LEE,
Special Counsel.

ITINERANT VENDOR OF DRUGS.—An itinerant vendor is required to have the license provided for by code section 2594 even though he is acting as the agent for another who has taken out such license.

June 26, 1911.

MR. GEORGE F. STAUFFER,
Garrison, Iowa.

DEAR SIR: Your favor addressed to Attorney General Cosson relative to license fee required of agents of the Larkin Company, has been handed to me for reply.

We are informed that the commissioner of pharmacy is of the opinion that you, as such agent, would come within the provision of section 2594 of the code, which provides as follows:

> "Any itinerant vendor of any drug, nostrum, ointment or application of any kind for the treatment of any disease or injury * * * * shall pay to the treasurer of the commission of pharmacy an annual fee of one hundred dollars upon receipt of which the secretary of the commission shall issue a license for one year from its date."

Since the Larkin Company sells other articles than those mentioned in the above section, you, as such agent, might also come within section 1347-a of the supplement to the code, which reads as follows:

> "Peddlers plying their vocation in any county in this state, outside of a city or incorporated town, shall pay an annual county fee of twenty-five dollars for each hawker on foot * * * * Such tax shall be paid to the county treasurer who shall issue to the person making such payment duplicate receipts therefor, and upon presentation of one of the same to the county auditor, he shall issue to the person presenting such receipt a license which shall not be transferable, authorizing such person to ply the vocation of a peddler in such county for the term of one year from the date thereof.

The word 'peddlers' under the provision of this act, and wherever found in the code, shall be held to include and apply to all transient merchants and itinerant vendors selling by sample or by taking orders, whether for immediate or for future delivery."

Yours very truly,

HENRY E. SAMPSON,
Special Counsel.

SCHOOLS—NON-RESIDENT PUPILS.—A school board may admit non-resident pupils on such terms as they may prescribe.

June 28, 1911.

MR. A. L. CRAIG,
Saline, Mo.

DEAR SIR: Replying to your favor of June 12th addressed to Attorney General Cosson, relative to the authority of the township school board to admit non-resident pupils, will say that non-resident children and those sojourning temporarily in any school corporation may attend school therein upon such terms as the board may determine. The statute gives the board the power to determine the amount of tuition to be paid.

Yours very truly,

HENRY E. SAMPSON,
Special Counsel.

TOWNSHIP TRUSTEES—MAY NOT DO ROAD WORK.—Township trustees are prohibited from doing work on the roads and drawing compensation therefor from the township funds.

June 29, 1911.

MR. W. E. PARSONS,
Carroll, Iowa.

DEAR SIR: This will acknowledge receipt of your letter of the 26th inst. addressed to the attorney general in which you complain that there is considerable trouble in getting the roads dragged in the vicinity of Carroll and other parts of Carroll county, and I note that you say the county attorney has urged the township trustees to do their duty under the law, but that no attention is paid to his directions. You also state that certain trustees have

let contracts for road work to a third person and that certain trustees have performed work for such contractor on the roads and have received or will receive compensation therefor. You inquire whether there is some way to compel the trustees to drag the roads in accordance with the new road drag law, and whether there is some way to prevent such trustees as perform work on the roads in the manner stated, from drawing any compensation therefor.

The attorney general is not authorized to render official opinions in matters of this kind to private individuals. Moreover, the official business in this department is so great as to take the entire time of the office force. In this instance, however, inasmuch as the questions you propound involve a matter of public concern, and as a courtesy to you, I may say in a personal way that the provisions of the new road drag law as to the dragging of certain roads are both specific and mandatory and there can be no wilful evasion of them and I know of no reason why the trustees cannot be compelled to carry out the provisions of the law in a suitable proceeding. Of course, when it comes to the matter of determining whether road work is satisfactory or not, it is a difficult thing to get it done to a fixed standard of efficiency because of the fact that the township trustees and the road superintendent are primarily the authorities who have to do with the working of roads and a wide latitude of discretion is vested in them and I suppose they may do their work in a more or less unsatisfactory way without any actual and satisfactory remedy therefor.

With reference to the right of the township trustees to render service of any kind in connection with the working of the roads or for the township, and receiving compensation from the township therefor, I have to say that the rendering of such service by a township trustee and the drawing of township funds therefor is absolutely prohibited by law and the same would constitute an indictable misdemeanor and the payment for any such service could be enjoined. I refer you to section 468-a of the supplement to the code, 1907, which provides that "Members of boards of supervisors and township trustees shall not buy from, sell to, or in any manner become parties directly or indirectly to any contract to furnish supplies, material or labor to the county or township in which they are respectively members of such board of supervisors or township trustees." A violation of any of the provisions of the section quoted has been held by the supreme court

to amount to a misdemeanor for which the offender may be indicted and punished. I cite you to the case of *State vs. York*, reported in the 131st Iowa, page 635. In this case the supreme court construes the section of the statute just quoted and applies the same to a state of facts very similar to the facts you recite in your letter. But I think aside from any statutory prohibition, the rendering of such service by a township trustee and the receiving of compensation therefor from the township, directly or indirectly, is contrary to sound public policy and could be enjoined. I cite you also the case of *Bay vs. Davidson,* reported in the 133rd Iowa, page 688.

As already stated, this is not to be regarded as an official opinion from this department, but represents the views of the writer without having had the opportunity of giving the question very full investigation but I have no doubt that the conclusions announced are well supported by sound legal principles, by the statute and the decisions of our courts.

Yours very truly,

N. J. LEE,
Special Counsel.

SOLDIERS' EXEMPTIONS.—The widow of a Union soldier who remarries one not a soldier and again becomes a widow is not entitled to the exemption provided for soldiers' widows by code supplement section 1304.

July 1, 1911.

HON. R. L. MCCORD,
Sac City, Iowa.

DEAR SIR: Your letter of the 23rd of May to the attorney general requesting his opinion as to whether the widow of a Union soldier who afterwards remarried and again became a widow, is entitled to claim the exemption under section 1304 of the supplement to the code, 1907, has not been noticed before now because of the unusual amount of official business to be cared for.

I have not gone into this matter very thoroughly but am inclined to agree with the conclusion that you have reached, viz., that a strict construction of the provision of the statute would not entitle such widow to such exemption, having in mind that taxation is the general rule and that exemptions are the exception and, literally, she did not remain unmarried after the death

of her first husband. The assessor might allow exemptions to such persons on other grounds subject to the approval of the board of supervisors under another subdivision of the same section.

Respectfully yours,

N. J. LEE,
Special Counsel.

PUBLIC WATERS.—The public has the right between low and high water mark along the banks of meandered streams, but where the stream is not meandered the owner of the land through which the stream flows has the exclusive right to fish in the stream and has the right to exclude persons from the adjacent land as well as the stream.

July 1, 1911.

MR. WILSON NICKUM,
Manning, Iowa.

DEAR SIR: Yours of recent date addressed to the attorney general making inquiry as to the rights of the public along the Nishnabotna river, for the purposes of hunting and fishing, has been referred to me for reply.

The rule is that the public has the right between low water mark and high water mark along the banks of meandered streams, but that in non-meandered streams they have no such right, and in such non-meandered streams the owner of the land through which the stream flows has the exclusive right to fish in such stream, and, hence, would have the right to exclude persons attempting to fish in the stream without his consent. There are very few meandered streams in this state and, as I understand it, the Nishnabotna is not one of them.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

LAKES.—The owner of land adjoining meandered lakes would have no right to make objection to persons camping on the lake shore within high water mark.

July 1, 1911.

E. P. BELL, M. D.,
Pleasantville, Iowa.

DEAR SIR: Your letter of the 31st of May to the attorney general, in which you request to be advised as to the rights of residents of Iowa around lakes in northern Iowa, duly received.

Any person would have the right to camp on the lake shore within the high water mark and the adjoining owners would have no right to make objection thereto. Of course, one might have to get permission to cross private land to get to a lake, if there were no public highway leading to the same. What I have said has application to meandered lakes.

Respectfully yours,

N. J. LEE,
Special Counsel.

GAME LAWS—VIOLATION OF—SUFFICIENCY OF EVIDENCE TO CONVICT.—A person may carry a gun without having a hunter's license. He is only prohibited from pursuing, killing or taking any wild animal, bird or game with a gun. The having of a gun in possession in forests or fields of the state and his failure to produce a license when demanded is prima facie evidence of guilt but not conclusive.

July 3, 1911.

HON. GEORGE A. LINCOLN,
State Fish and Game Warden,
Cedar Rapids, Iowa.

DEAR SIR: This will acknowledge receipt of your letter of the 30th ult. to the attorney general in which you request his opinion as to whether any person, under section 11, chapter 154 of the laws of the thirty-third general assembly, has a right to be out with a gun in the fields or forests or on the waters of the state or upon the ice of the same, without a license, as provided in section 2 of said chapter, and whether it is incumbent upon the state to prove that the party was hunting. And you add further that it is your understanding of the law that any person carrying a gun must have a license as provided in said chapter.

Your question must be answered in the affirmative. Said section 11 merely furnishes a rule of evidence. The only things a person is prohibited by said chapter from doing without procuring a license is to hunt, pursue, kill or take any wild animal, bird or game in this state, with a gun. The mere carrying of a gun or having possession of a gun in the forests of the state is not of itself a violation of this chapter. The gun may be carried for an innocent and lawful purpose. A person would have a right to carry a gun in the fields or forests of the state, on the waters, or upon the ice of the same, if he does not do it for any of the prohibited purposes. He would have a right to have a gun in his possession in the forest, for instance, to shoot at a mark. But common experience tells us that when a person has a gun in his possession in the forests or in the fields or upon the waters of the state he is usually pursuing game, and this furnishes the reason for the rule of evidence laid down in section 11 of said chapter. Under this rule, if the state shows that a person was found with a gun in his possession in the forests of the state and failed to produce a license when demanded of him, it would be sufficient evidence to establish a violation of section 2 of said chapter, without any evidence to the contrary. But such evidence would not be conclusive of guilt. The defendant would be permitted to show in defense that he had possession of the gun under such circumstances for a purpose that was not declared to be unlawful. However, the state, in every instance, would not be required to show that the person was, in fact, hunting, pursuing, killing or taking a wild animal or bird with a gun, in order to sustain conviction for a violation of section 2, for, as already stated, the possession of a gun in the fields or forests or on the waters of the state or upon the ice of the same and a failure to display a license when demanded by anyone, dispenses with such proof and would be necessary only when the facts which are made prima facie evidence of guilt are rebutted.

Respectfully yours,

N. J. LEE,
Special Counsel.

MULCT SALOONS—DISTANCE FROM CHURCHES OR OTHER BUILDINGS. —Where a room in which a mulct saloon is conducted is within the prescribed distance from a church the statute may not be evaded by partitioning the room within the prescribed distance. If the portion partitioned off were used for some other business a different rule might apply.

July 5, 1911.

MR. JENKS E. DAVIS,
Oskaloosa, Iowa.

DEAR SIR: I am in receipt of your communication of the 22nd ultimo requesting to be advised as to whether a partition of a room could be made to the end that a part of a building would not be within three hundred feet of a church in violation of the mulct law.

In the case of *McCall vs. Rally & Fisher,* Judge Deemer held that a partition made in a room for the mere purpose of evading the law, and which was not used for any business purpose, was a mere subterfuge and did not operate to remove the room in question where liquor was sold, the required distance from a church.

I do not know what the court would hold in the event a partition in a room was made in good faith leaving the part partitioned off to be used for some business purpose, and the other part opening on the main street, and otherwise complying with the law. If this difficulty however was removed there would still be the question of complying with the Moon law.

Yours very truly,

GEORGE COSSON,
Attorney General of Iowa.

PRIZE FIGHT.—"Battle Royal" discussed and held to be a prize fight within the meaning of code section 5036.

July 5, 1911.

MR. J. C. MASON,
Altoona, Iowa.

DEAR SIR: Replying to yours of the 23rd instant, I happen to know what a "battle royal" is.

Section 5036 of the code prohibits a prize fight, but there may be some doubt in view of the number of persons who engage in a battle royal and the method of conducting the same, whether it would properly be construed to be a prize fight, which is generally understood to be between two persons.

Section 5038-a supplement to the code, 1907, provides:

> "Whoever engages in any boxing contest or sparring exhibition with or without gloves for a prize, reward or anything of value, at which an admission fee is charged or received, either directly or indirectly, and whoever knowingly aids, abets, or assists in any such boxing contest or sparring exhibition, and any owner or lessee of any ground, lot, building, hall, or structure of any kind knowingly permitting the same to be used for such boxing contest or sparring exhibition, shall be fined not exceeding three hundred dollars, or imprisonment in the county jail not exceeding ninety days."

I am of the opinion that a battle royal would come within the terms of section 5038-a.

The method of having the same stopped would be to notify the sheriff and county attorney and request that they prevent same from taking place, and if the same takes place to arrest the offenders, file information against them pursuant to the provisions of said section and let prosecutions follow accordingly.

Yours very truly,

GEORGE COSSON,
Attorney General of Iowa.

INTOXICATING LIQUORS—DUTIES OF COUNTY ATTORNEY.—It is the duty of the county attorney under chapter 105, acts of the thirty-fourth general assembly, to procure from the internal revenue collector quarterly each year a certified copy of the names of all persons paying special tax to the federal government for the purpose of selling intoxicating liquors and file the same with the county auditor.

July 7, 1911.

COUNTY ATTORNEY W. R. HART,
Iowa City, Iowa.

DEAR SIR: I am in receipt of your communication of the 5th instant advising that you have not yet received the session laws

of the thirty-fourth general assembly, and requesting to be advised as to your securing from the internal revenue collector for Iowa certified copies of the names of all persons who have paid to the federal government the special tax imposed upon the business of selling intoxicating liquors within your county.

Section 1 of chapter 105, acts of the thirty-fourth general assembly, provides that the several county attorneys of the state are authorized and directed to secure from the federal internal revenue collectors for Iowa on or before the 15th day of January, April, July and October of each year a certified copy of the names of all persons who have paid to the federal government the special taxes imposed upon the business of selling intoxicating liquors within their respective counties, except such persons within their counties as are engaged in the sale of intoxicating liquors under the mulct law and registered pharmacists who hold valid permits to keep and sell intoxicating liquors for medicinal purposes.

Said act further provides that upon the receipt of certified copies of the names of such persons, the county attorney shall first examine the list and then file the same with the county auditor; and also provides that the county auditor shall record this list of names in a book kept therefor, and that said list of names shall be open to public inspection.

Section 3 of the act further provides that a certified copy furnished by the internal revenue collector of the names of persons who have paid to the federal government the special tax imposed upon the business of selling intoxicating liquors, except those selling under the mulct law and registered pharmacists, shall be prima facie evidence that said person is engaged in the sale, or keeping with intent to sell, intoxicating liquors in violation of law, and that the burden of proof is on the defendant that he has complied with all the terms of the mulct law, or that he is a registered pharmacist actually engaged in the business as such.

I wish to direct your attention to a matter which may be easily overlooked by a casual reading of the act, and that is that the law does not contemplate that you shall receive a certified list of names of persons engaged in the sale of liquor in your county under the mulct law or registered pharmacists in your county who hold valid permits to keep and sell intoxicating liquors for medicinal purposes. The internal revenue collector has no means of knowing whether persons who pay the special tax to the government are engaged in selling liquor under the mulct law, under

a valid permit as a registered pharmacist, or as to whether they are mere bootleggers. It will, therefore, be necessary for you and each of the county attorneys in the state to ascertain from the records in the auditor's office and the clerk's office the names of all persons who are engaged in the sale of liquor under the mulct law and the names of all persons who hold valid permits to keep and sell intoxicating liquors for medicinal purposes as registered pharmacists, and forward that list to the internal revenue collector with the request that he furnish you a certified list of the names of all persons who have paid to the federal government the special tax imposed upon the business of selling intoxicating liquors within your county, except the persons named in said list. Unless this method is followed, great confusion will arise. If the plan is followed, however, no difficulty will arise as I had previously examined the federal statutes and taken the matter up with the internal revenue collectors before the bill actually became a law.

The law contemplates that you should secure your first list of names before the 15th day of July, 1911.

Let me say in conclusion, in my opinion, this is a most salutary piece of liquor legislation, and if the several county attorneys of Iowa will avail themselves of all the advantages of this law, there will be very little bootlegging in Iowa from now on. While citizens may disagree as to whether liquor should be sold or absolutely prohibited, there is no good citizen but what condemns the common bootlegger and the illicit method of dispensing liquors.

Yours very truly,

GEORGE COSSON,
Attorney General of Iowa.

SHERIFF—FEES OF WHEN PERFORMING DUTIES IN JUSTICE COURTS. —The fees of a sheriff when performing the duties of a constable in justice court are those allowed constables.

July 7, 1911.

MR. JOHN H. CROWELL,
Rockford, Iowa.

DEAR SIR: Yours of the 6th inst. addressed to the attorney general has been referred to me for reply.

Your question, briefly stated, is, "what fee is a sheriff or deputy sheriff entitled to for serving a warrant issued by a justice of the peace?"

The answer to your inquiry will be found in subdivision 23 of code supplement, section 511, which provides:

"When sheriffs perform official duties in justice courts, their fees shall be the same as allowed constables," and in subdivision 13 of code section 4598, which provides the fee for constables as follows: "For serving each warrant of any kind, seventy-five cents."

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

COLLEGES—BOARD OF EDUCATION—APPROPRIATIONS.—The state board of education is allowed wide discretion in reference to expenditure of funds appropriated to the colleges for their support, where the act does not specify how the funds shall be expended, but may not arbitrarily divert funds to a purpose not contemplated by the act appropriating the same.

July 10, 1911.

MR. E. W. STANTON,
Acting President Iowa State College,
Ames, Iowa.

DEAR SIR: Your letter of the 3rd inst. to the attorney general was referred to me for reply.

You state that the finance committee desire you to secure the opinion of the attorney general as to the legality of appropriating from the support fund of the college the sum of fifty dollars each year for the maintenance of what is known as the Graduate School of Agriculture, which is under the auspices of the American Association of Agricultural Colleges and Experiment Stations.

You state further that this graduate school holds each summer a session at such agricultural college as the association may designate, and that fees are charged which sustain the school in part, and that the deficit is made up by assessing the different institutions belonging to the association.

What is known as the "support fund of the Iowa State College of Agriculture and Mechanic Arts" is made up from various sources, viz., the interest earned on the permanent fund derived from the sale of the lands granted the college by the federal government, annual appropriations by the congress, annual appropriations by the state and certain fees collected by the college. The acts of congress granting and appropriating said funds in support of the college placed such restrictions about their expenditure as would, in my opinion, make a use of any part thereof for the purpose named in your inquiry improper.

The money appropriated by the general assemblies of the state for the general support of the college is variously designated as "support fund," "additional support fund," and "educational support fund." Various appropriations have also been made from time to time for certain specific purposes.

The acts of the general assemblies making appropriations to the college for its support fund do not specify how such funds shall be expended. The state board of education, however, is empowered by the act which created it "to direct the expenditure of all appropriations the general assembly shall, from time to time, make to said institutions, and the expenditure of any other moneys."

The board of education, under the power so conferred upon it, must, necessarily, be allowed wide discretion with reference to the expenditure of such funds, but the board, in the exercise of this power, may not arbitrarily divert any funds so appropriated to a purpose or use not clearly contemplated by the act appropriating the same. But as to whether any part of the appropriations made to the college, designated as "support fund" may properly be devoted to the purpose stated in your communication, is not, it seems to me, under the facts stated, primarily a legal question, but rather is one that is to be determined in light of the administrative and educational policy of the institution. The proper rule or test would appear to be, would an expenditure for such a purpose as you suggest directly tend to increase the efficiency of the college and be in furtherance of the work it was established to do. And whether such result is to be attained from any given expenditure from said fund is, I think, within the sound discretion of the state board of education to determine, subject to what has already been said.

Respectfully yours,

N. J. LEE,
Special Counsel.

INTOXICATING LIQUORS—PERUNA—REGISTERED PHARMACISTS.—Peruna containing seventeen per cent alcohol is an intoxicating liquor and may not be sold except by a registered pharmacist.

July 11, 1911.

MR. I. W. CLEMENTS,
President Iowa Board of Pharmacy,
Marengo, Iowa.

DEAR SIR: Your letter of the 26th ult. to the attorney general has been referred to me for reply. You submit three questions:

"First. Is the sale of the preparation known as Peruna restricted under the law by registered pharmacists, said preparation being a proprietary medicine, and containing, according to the statement on its label, 17 per centum of alcohol?

"Second. May one who is not a registered pharmacist sell a proprietary preparation which contains 6 grains of opium to each ounce?

"Third. Under section 2, chapter 123, acts of the thirty-fourth general assembly, is it optional with the pharmacy board as to whether any of the examinations referred to herein are held in Iowa City and may said board hold less than five such examinations and fix dates for holding the same?"

Your first question must be answered in the affirmative. No one but a registered pharmacist may sell any medicine or preparation if it contain any intoxicating liquors or poison. Section 2588 of the code leaves no doubt as to this being a proper interpretation.

Your second question must be answered in the negative. Only registered pharmacists may sell opium and other poisons mentioned in section 2593 of the supplement to the code, 1907, and preparations containing any of said poisons. The clause in said section "excepting those containing less than 2 grains to the ounce" has reference to the duty of the registered pharmacist and does not give one other than a registered pharmacist the right to sell any preparation when it contains two grains or less of opium to the ounce or when it contains any other poison.

Answering your third question will say that it is not mandatory upon the board to hold any such examination at Iowa City but said board may hold one examination at that place, if it de-

sires to do so. It may hold five such examinations or any number less than five, as it deems best and may fix the dates thereof. Of course, all examinations not held at Iowa City must be held at Des Moines.

Respectfully yours,

N. J. LEE,
Special Counsel.

REGISTRATION OF FARM NAMES—PRIORITY OF RIGHT. —The law providing for the registration of farm names did not take effect until July 4, 1911, and an application filed prior to that date and retained by the recorder would have priority over an application for the same name filed at any time on or after July 4, 1911.

July 11, 1911.

MR. IRA B. OFFICER,
Leon, Iowa.

DEAR SIR: Your letter of the 8th inst. to the attorney general was referred to me for reply.

You request to be advised whether the right of priority to record a name as the name of a farm dates from the taking effect of chapter 153, acts of the thirty-fourth general assembly, which was July 4, 1911, or from the date of filing application for the registration of such name if before that date.

Said chapter provides for the recording of farm names and that when any name shall have been recorded as the name of any farm in a county, the same name shall not be recorded as the name of any other farm in the same county. Legal application could not be made for the recording of the name of a farm prior to the taking effect of this act. If anyone made application to the county recorder prior to July 4th last to have a name recorded as the name of his farm, the county recorder was not bound to take any notice of the same. But if application was made to the county recorder prior to July 4th for the recording of the name of a farm and the county recorder received the application and retained the same for the purpose of recording the name together with the description of the land covered by the application, immediately upon the taking effect of said act then it would be legal and sufficient recording of such name under the law from the time it was so recorded and I am inclined to

think that the person making application for the recording of such name under the circumstances suggested, would have priority of right to have such name recorded from the time the act took effect. The mere fact that a person has used a certain name as the name of his farm for any length of time will not entitle him to any preference of priority in the use of said name or in the right to have the same recorded as against one who had had the same name recorded under the circumstances I have suggested above.

Respectfully yours,

N. J. LEE,
Special Counsel.

POLICE AND FIRE COMMISSIONERS—AUTHORITY TO ISTRUCT POLICEMEN OR GRANT LEAVE OF ABSENCE—REPEAL OF CHAPTER 32.—The police and fire commissioners have no authority to grant leave of absence to a member of the police or fire department nor to give instructions to individual policemen. Chapter 33 of the acts of the thirty-fourth general assembly had the effect of repealing chapter 32 of the acts of the thirty-fourth general assembly after July 4th, 1911.

July 12, 1911.

HON. S. H. HARPER,
Ottumwa, Iowa.

DEAR SIR: Your first question, briefly stated, is whether chapter 33, acts of the thirty-fourth general assembly, had the effect to repeal chapter 32 of the acts of the thirty-fourth general assembly, each of which chapters was amendatory of section 679-h of the supplement to the code, 1907.

The second question is whether or not the board of police and fire commissioners have authority to grant leave of absence to a member of the police or fire department, and the third question is as to whether said board has authority to give instructions to individual policemen with regard to their work when on duty.

A careful examination of the act creating the board of police and fire commissioners and the amendments thereto fails to disclose that they have any authority with reference to either of the matters referred to in your second and third interrogatories and, hence, it follows that both the second and third interrogatory should be answered in the negative.

Your first and chief interrogatory involves a consideration of the two chapters referred to, as well as the section which was sought to be amended by said chapters. The original section provided for the removal of members of the police force and firemen by the board of police and fire commissioners for misconduct or failure to perform their duty. Chapter 32 was approved April 15, 1911, and took effect by publication April 21st. This chapter took nothing from the original section but added thereto a provision whereby policemen and firemen might be removed or discharged by the mayor when the revenue of the city available for payment of their salaries was insufficient to pay the same. This act undoubtedly became effective upon publication and until July 4th should have been read in connection with and following the original section and as a part thereof.

Chapter 33 repealed the original section and enacted a substitute therefor. This act was approved April 1st but as there was no publication clause it did not take effect until July 4, 1911. The thought suggesting the question propounded is, that inasmuch as the original section was repealed after July 4th by chapter 33, that chapter 32 would expire at the same time and cease to be effective and this is the real question presented.

The repeal and simultaneous re-enactment of substantially the same statutory provision is to be construed, not as an implied repeal of the original statute but as a continuation thereof. In practical operation and effect, the new statute is to be considered as a continuation of the old, rather than as an abrogation of the old and the re-enactment of a new one.

36 Cyc., 1084;

Robinson vs. Ferguson, 119 Ia., 325;

State vs. Prouty, 115 Ia., 657.

Nor does a later law, which is merely a re-enactment of the former, repeal an intermediate act which qualifies or limits the first one, but such intermediate act will be deemed to remain in force, and to qualify or modify the new act in the same manner as it did the first.

36 Cyc., 1084;

Horn vs. The State (*Ga.*), 40 S. E., 297.

Where two acts relating to the same subject matter are passed at the same legislative session, there is a strong presumption

against implied repeal and they are to be construed together, if possible, so as to give effect to each.

36 Cyc., 1086;

Eckerson vs. City of Des Moines, 137 Ia., 452 at 489.

In view of the subject matter of chapter 32 and in view of the fact that the same necessity for the provisions thereof would exist after as well as prior to July 4, 1911, and in view of the fact that its provisions are not at all inconsistent with the provisions of chapter 33 and can be read in connection therewith and at the end thereof with as much harmony as it could have been read in connection with the original section, 679-h, and in view of the fact that chapter 33 had actually passed both houses and been approved prior to the passage and approval of chapter 32, and in view of the fact that under the foregoing authorities the original section was not in fact repealed but rather continued and carried into chapter 33 which is a substitute for the original section, I am inclined to the opinion that chapter 32 would not be held to be repealed and ineffective after July 4th but that after said date it should be read in addition to, and at the end of and as a part of chapter 33 and that prior to July 4th it should have been read at the end of the original section and in addition thereto.

While the question is not entirely free from doubt, yet it is reasonably clear that this construction would be placed upon the two chapters under examination by the courts of this state.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

CITIES AND TOWNS—MAYOR—RIGHTS AND DUTIES OF.—The mayor since the enactment of chapter 26, acts of the twenty-second general assembly, is no longer a member of the council and has no right to make a motion before the council. He has the right, under code section 685, to veto ordinances and resolutions but this section does not confer the right to veto motions.

July 12, 1911.

WM. S. GALLAGHER, *County Attorney,*
Tama, Iowa.

DEAR SIR: Yours of the 10th inst. addressed to the attorney general has been referred to me for reply.

You enclose a copy of the ordinances of an incorporated town with 950 population and propound the following questions:

"1. Is the mayor a member of the town council?

"2. Has the mayor a right to make a motion?

"3. Has the mayor a right to veto motions when passed by the council?"

Prior to the acts of the thirty-second general assembly subdivision 5 of section 658 of the code and supplement provided with reference to mayors as follows:

> "In towns, he shall be a member of the council and presiding officer thereof, with the same right to vote as a councilman."

In the case of *Griffin vs. Messenger*, 114 Ia., 99, it was held, under this statute, that the mayor was a member of the council and even though he had no right to vote except in case of tie, yet he should be counted for the purpose of determining whether or not a proposition was carried by a three-fourths vote, as a member of the council. With the statute in this shape, I would be inclined to the view that the mayor would have a right to make a motion. However, said section was amended by chapter 26 of the acts of the thirty-second general assembly and subdivision 5 thereof was repealed and the following enacted in lieu thereof:

> "He shall be the presiding officer of the council with the right to vote only in case of a tie."

I am of the opinion that the purpose of this change, as well as the effect thereof, was to render the mayor no longer a member of the city council, hence, your first and second interrogatories should be answered in the negative.

Code section 685 gives the mayor power to veto ordinances and resolutions only and does not confer the right to veto motions passed by the council.

The ordinance which you enclosed confers no additional power with reference to either of the interrogatories propounded and it, therefore, follows that the third interrogatory, as well as the first and second, must be answered in the negative.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

COUNTY ATTORNEY—DUTY OF—SCHOOL FUND LOANS.—It is not the duty of the county attorney to examine abstracts of title submitted to the county auditor in connection with a loan on the school fund but the county auditor may consult the county attorney in connection therewith.

July 12, 1911.

MR. E. J. RIEGEL,
Rock Rapids, Iowa.

DEAR SIR: You inquire, first whether you as a county auditor have a right to request the county attorney to examine an abstract of title submitted to you in connection with making a loan from the permanent school fund.

Second, whether you as county auditor have the authority to submit such abstract of title to a private attorney for his opinion thereon, if it is not the duty of the county attorney to examine same, and to charge the fees of such private attorney for said service to the borrower.

Third, if the county attorney does examine such abstract when requested by the county auditor, is he entitled to charge a fee for that service and, if so, is such fee properly chargeable to the borrower?

Section 2850 of the supplement to the code, 1907, makes it the duty of the county auditor to examine any abstract of title which the proposed borrower from the school fund may submit and he is required to perform certain other services in connection with the making of loans from the permanent school fund, and for such services he is allowed $2.00 in addition to his regular compensation, which is paid by the borrower. While the county attorney is the official adviser of the board of supervisors and other county officers, including the county auditor, yet he may not be required to do everything which such officers may request him to do. Subdivision 7 of section 2, chapter 17, acts of the thirty-third general assembly, requires the county attorney to give advice or his opinion in writing, without compensation, to the board of supervisors and other county officers, when requested so to do by such board or officers, upon all matters in which the state or county is interested or relating to the duty of the board or officer in which the state or county may have an interest. If it should be held that it is the duty of the county attorney to examine all such abstracts, then that officer would be perform-

ing a duty which has been expressly cast upon the county auditor. If it was the intention of the legislature that the county auditor need only pass the abstract of title over to the county attorney for such examination as is usually made of such instruments, it probably would have employed more suitable language to have expressed that intention. It is my opinion that the language in section 2850 of the supplement to the code, 1907, referred to, means just what it says, viz., that the county auditor shall examine the abstract of title there referred to. But I do not want to imply from what I have said that the county auditor may not, under any circumstances, request the advice or opinion of the county attorney with respect to questions that may arise in connection with the examination of such abstracts of title, for I think that if any doubt should arise in the mind of the county auditor as to the sufficiency of the title disclosed by the abstract that he might very properly submit such questions to the county attorney for his opinion, and in such cases as the county auditor is authorized to request the opinion of the county attorney in such matters the county attorney would not be permitted to make any charge for his opinion or service.

I do not think the county auditor, under any circumstances, would be authorized to submit such abstracts of title to a private attorney for examination at the expense of the borrower or at the expense of the county.

Respectfully yours,

N. J. LEE,
Special Counsel.

AUTOMOBILES—TAXATION OF FOR THE YEAR 1911.—Automobiles should be licensed for the year 1911 under chapter 72 of the acts of the thirty-fourth general assembly, and the license fee is in lieu of all other taxes; and where automobiles had already been taxed as personal property for that year such previous assessment should be cancelled.

July 12, 1911.

MR. AARON PRICE,
Grinnell, Iowa.

DEAR SIR: Your letter inquiring whether automobiles should be assessed for taxation this year, duly received.

If this were the only letter of this kind, it would have required very little time to have made reply to it but it is only one of many hundreds that come to this office concerning unofficial business.

Under section 9, chapter 72, acts of the thirty-fourth general assembly, it is the duty of the county auditor to cancel all assessments entered upon the assessor's books against automobiles for the year 1911. It is also provided in said section that the registration fees required to be paid to the state upon motor vehicles shall be in lieu of all taxes, general or local. This exemption from ordinary taxes does not apply to such vehicles of manufacturers or dealers. From what I have said you will readily see that if you did assess automobiles this year the county auditor is required to cancel same and such assessments will not be carried upon the tax list.

Respectfully yours,

N. J. LEE,
Special Counsel.

SCHOOL DISTRICTS—WHEN ORGANIZATION COMPLETED.—The provisions of code section 2794 requiring the organization of independent districts to be effected on or before the first day of August in the year in which it is admitted are directory and not mandatory.

July 14, 1911.

HON. W. S. ALLEN,
Fairfield, Iowa.

My Dear Senator: Your letter of the 13th inst. addressed to the attorney general has been referred to me for reply.

Your question, briefly stated, is whether or not time remains sufficient to form an independent school district under section 2794 of the code, in view of the fact that section 2796 provides that "the organization of such independent district shall be effected on or before the first day of August of the year in which it is attempted."

I call your attention to the case of *Munn vs. The School Township of Soap Creek,* 110 Ia., at page 657, where it was contended by one side that inasmuch as the organization had not been completed in the year 1908, it was then too late and the supreme court said:

"This statute relates to perfecting the organization already determined upon by the elected officers, and is directory only. 'Directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by the failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the fact is performed, but not in the time or in the precise mode indicated, it will be sufficient if that which is done accomplishes the substantial purposes of the statute.' "

And the court in that case directed the calling of an election, even in the following year. Hence, I am of the opinion that your parties will have ample time.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

DRAGGING ROADS AND STREETS IN CITIES AND TOWNS.—Under chapter 70, acts of the thirty-fourth general assembly, it is the duty of the city or town council of cities and towns to cause the main traveled roads within the corporate limits leading into the city or town to be dragged.

July 14, 1911.

J. N. COLEMAN, *Street Commissioner*,
Fredericksburg, Iowa.

DEAR SIR: You ask to be advised whether the new road drag law requires that the roads and streets within incorporated towns be dragged.

What is known as the new road drag law is found in chapter 70, acts of the thirty-fourth general assembly, and section 4 of this act provides that "It shall be the duty of the city or town council of cities or towns to cause the main traveled roads within the corporation limits leading into the city or town to be dragged, and so far as practicable and possible, the provisions of this act shall apply."

In view of this provision of the statute, it would seem that your question should be answered in the affirmative.

Yours very truly,

N. J. LEE,
Special Counsel.

INTOXICATING LIQUORS—DELIVERY OF SAME ON SUNDAY.—Intoxicating liquors may not be delivered on Sunday in Iowa even to complete an interstate shipment.

July 15, 1911.

MR. F. C. GENTSCH,
General Superintendent,
St. Louis, Mo.

DEAR SIR: Complaint is made to this department that your agents are delivering intoxicating liquors in Iowa on Sunday in violation of our Sunday laws. The specific complaint was filed this week from Imogene, Iowa. Of course I understand that these shipments are interstate shipments, and that generally speaking, no state laws may hinder or burden interstate traffic, but notwithstanding this, in my opinion, you are subject to certain police regulations, and that the delivery of intoxicating liquors on Sunday is in violation of our state laws even though an interstate shipment.

In the case of *Hennington vs. Georgia,* 163 U. S., 299, the statute of Georgia was upheld by the supreme court of the United States which prohibited the running of freight trains on Sunday in that state, and that states may generally prohibit any labor on Sunday even though it may affect interstate commerce. See

7 Cyc. under the title "Commerce" pages 446-449.

It was held in *Smith vs. Alabama,* 124 U. S., 465, that a statute of Alabama requiring all engineers to undergo an examination and obtain a license was valid even though it applied to engineers operating interstate trains or handling interstate traffic.

It was held in the case of *Densmore vs. New York Board of Police,* 12 Abbott, N. Cas. (N. Y.), 436, and in *Adams Express Company vs. Board of Police,* 65 How. Pr. (N. Y.), 72, that the delivery by express companies of non-perishable articles on Sunday may be prohibited; and see also on the Sunday law:

Petit vs. Minnesota, 177 U. S., 164;

State vs. Dolan, 14 L. R. A. (NS), 1259.

I have no disposition to arrest your local express agents if you will take this matter up and issue an order to your agents instructing them not to deliver intoxicating liquors on Sunday, and make the order in such terms that they will understand (as they do not sometimes understand) that this may not be done even to accommodate a friend.

As some of the local police officers are waiting to hear from me before instituting prosecution, I wish you would advise me at your earliest convenience what the disposition of your company will be with reference to this matter.

Yours very truly,

GEORGE COSSON,
Attorney General of Iowa.

INCOMPATIBLE OFFICES—MAYOR—VACANCIES IN OFFICE OF—VIOLATION OF ORDINANCES.—One person may not hold the office of justice of the peace and mayor at the same time. The town council has no power to appoint a person mayor during the temporary absence of the mayor; they may elect a temporary chairman from their own number. It is the duty of the mayor to try prosecutions for violation of city ordinance.

July 17, 1911.

J. H. LIGHTER,
Rolfe, Iowa.

DEAR SIR: I am directed to make reply to your letter of the 15th inst. to the attorney general.

You state that Mr. C. H. Moon and yourself are the two justices of the peace in the township in which the town of Rolfe is located and that Mr. Moon is also the mayor of Rolfe. You state further that Mr. Moon is temporarily absent from his home on a vacation and that during his absence the town council appointed Mr. Ferguson mayor, Mr. Ferguson not being a member of the council.

You request to be advised, first, whether the same person can hold the two offices of justice of the peace and mayor of an incorporated town.

Second, whether a town council has the power to appoint a person not a member of the council as mayor with the powers and jurisdiction of a mayor under the circumstances stated.

Third, are you the proper person to try cases for violations of the town ordinances of Rolfe during the absence of the mayor.

The offices of justice of the peace and mayor of a town are incompatible and may not be held by the same person at the same time. The acceptance of one of said offices vacates the one held before. That is, if Mr. Moon was justice of the peace when he was elected and qualified as mayor, it would have the effect of vacating the office of justice of the peace, and the converse of this would be true.

A town council does not have the power and jurisdiction to appoint a person mayor during the temporary absence of the duly elected, qualified and acting mayor, there being no vacancy in that office. As provided in subdivision 3 of section 668, supplement to the code, 1907, the council, in the absence of the mayor, may appoint a temporary chairman from their own number. A person so appointed is merely a presiding officer and would not have any powers, prerogatives or jurisdiction of the mayor.

I think section 691 of the code furnishes a satisfactory answer to your last question as noted above. The latter part of this section reads as follows:

> "If the mayor or judge of the superior or police court is absent or unable to act, the nearest justice of the peace shall have jurisdiction and hold his court in criminal proceedings and receive the statutory fees to be paid by the city or county, as the case may be."

Under this provision of the statute, you not only would have the jurisdiction but it would be your duty to try cases for violations of the city ordinances of Rolfe. I mean, of course, only criminal proceedings, and upon the assumption, too, that you are the only other justice of the peace in that township.

You will not regard this as an official opinion from this department, as it is not a matter upon which the attorney general can officially advise you. The conclusions expressed are the personal views of the writer and given without opportunity of making the

fullest investigation, but, personally, I have no doubt as to their correctness.

Respectfully yours,

N. J. LEE,
Special Counsel.

TAX COLLECTOR—CONTRACT ENFORCIBLE AFTER REPEAL OF THE LAW.—A tax collector having a lawful contract for the collection of delinquent taxes may enforce the same notwithstanding the law under and by virtue of which the contract was entered into is subsequently repealed.

July 17, 1911.

J. P. HERTERT, *County Attorney*,
Harlan, Iowa.

DEAR SIR: Yours of the 15th inst. addressed to the attorney general has been referred to me for reply.

You enclose copy of contract made between the board of supervisors of your county and M. W. Moir & Company, dated July 7, 1910, and expiring December 31, 1911.

You direct attention to chapter 66 of the laws of the thirty-fourth general assembly, which in terms prohibits the making of such a contract and which also repeals sections 1407-a, 1407-b, 1407-c, 1407-d and 1407-e, of the supplement to the code of 1907, under which the contract was made, and then propound the following question:

> "Can the tax collector, by virtue of his contract with the board of supervisors of Shelby county, regardless of the repeal of the law under which his contract was made, enforce the collection of the 15% commission, in case tax which has been omitted, has been paid into the county treasury?"

Section 21 of article 1 of our state constitution provides:

> "No bill of attainder, ex post facto law, or law *impairing the obligation of contracts,* shall ever be passed."

A similar provision is found in the federal constitution with reference to impairing the obligation of contracts. In the case of *Shinn vs. Cunningham,* found in the 120th Iowa, 383, a contract similar to the one submitted, except as to amount of compensation, made prior to the enactment of the law by which the contract

submitted was specifically authorized, was considered by our supreme court and in that case it was contended that the acts of the twenty-eighth general assembly should apply to that contract, the effect of which was to reduce the compensation from 50% to 15%. In disposing of this contention the court made use of the following language commencing on page 387:

> "The statute subsequently enacted (acts twenty-eighth general assembly, page 33, chapter 50), limiting the payment for the discovery of property omitted from taxation to fifteen per cent of the taxes thus obtained, having become a law after the contract in suit was entered into and the services in part performed, cannot affect the rights of the parties to this litigation. The principle cited in argument that an 'officer acquires no vested right in a public office' has no application here, by analogy or otherwise. If the board of supervisors had the power to enter into this contract, as we have held it had, it was not within constitutional power of the legislature to impair that contract, and compel Cunningham to accept a less compensation than was promised him. The valid contract of a municipal corporation is just as sacred from legislative interference or destruction as is one made between individual citizens. No precedent has been noticed to the contrary, and the general principle is too familiar to justify reference to authorities."

I am, therefore, of the opinion that your question should be answered in the affirmative.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

SOLDIER'S EXEMPTION.—Chapter 62, acts of the thirty-fourth general assembly was not effective until July 4th, 1911, and does not apply to assessments made prior to that date.

July 18, 1911.

MR. J. N. PROUTY,
Humboldt, Iowa.

DEAR SIR: I am in receipt of your communication of the 17th instant requesting to be advised as to whether the exemptions provided in chapter 62 acts of the thirty-fourth general assembly are to

apply to the tax levied for the year 1911, the assessment for the levy having already been made.

The act in question contained no publication clause and did not therefore go into effect until the 4th day of July, and would not, in the absence of language specially provided, be retroactive. I am therefore of the opinion that it does not apply to assessments made prior to the 4th day of July, 1911.

Yours very truly,

GEORGE COSSON,
Attorney General.

SHERIFF—COMPENSATION FOR OBTAINING EVIDENCE.—There is no authority for the county supervisors to reimburse the sheriff for sums paid out by him in obtaining evidence from a prisoner confined in jail.

July 18, 1911.

HON. WM. DENNIS,
Marion, Iowa.

DEAR SIR: I am directed to reply to your letter written some time ago to the attorney general requesting to be advised as to the legal right of Linn county to reimburse and compensate the sheriff of Linn county for certain moneys advanced and paid by him in obtaining evidence from a prisoner confined in jail.

With reference to the question you submit, I may say that it is not one upon which the attorney general is authorized to officially advise you or the sheriff. The county attorney is the official adviser of county officers. I suppose, however, you had some purpose in not submitting the question to that official and in making the request of this department.

While, as stated, I cannot officially advise you, I am permitted to say in a personal way, as a courtesy to you, that it is extremely doubtful if your county has the authority under the facts stated by you, to recognize and pay the sheriff the amounts he so expended. In fact, I do not think it can be done, although there would seem to be very much merit in the claim and that it was expended with the best of motives and good results were obtained

thereby and the county and state were the beneficiaries of such expenditure.

Respectfully yours,

N. J. LEE,
Special Counsel.

EXEMPTIONS OF PROPERTY FROM TAXATION.—Lands held by an agricultural association in order to be exempt from taxation under code supplement section 1304 should not be leased for a valuable consideration.

July 18, 1911.

MR. JOSEPH C. CAMPBELL,
Charles City, Iowa.

DEAR SIR: Your letter of April 29th to the attorney general has been referred to me for reply.

Your question briefly stated is, whether or not the lands (26 acres in extent) owned by the Floyd County Agricultural & Mechanical Association are exempt from taxation under section 1304 of the code when it is leased for $300.00 per year.

Subdivision 2 of the section provides:

> "All grounds and buildings used for public libraries, including libraries owned and kept by private individuals, associations or corporations for public use, and not for private profit, and for literary, scientific, charitable, benevolent, agricultural and religious institutions, and societies devoted solely to the appropriate objects of those institutions, not exceeding 160 acres in extent, *and not leased or otherwise used with a view to pecuniary profit* * * * * are not to be taxed."

It necessarily follows from the fact that the property in question is leased for $300.00 per year and has been so leased for a number of years, that it is both leased and held with a view to pecuniary profit within the meaning of this section and, hence, is not entitled to the exemption.

You will understand that this is not a matter upon which this department is authorized to render an official opinion and that the foregoing is the personal view of the writer.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

LIBRARY BOARD—NUMBER OF MEMBERS.—Where through misapprehension five members are appointed on the library board and only three are required, the first three appointed are the legal members of the board.

July 18, 1911.

MISS ANNA MAUDE KIMBERLY,
Marshalltown, Iowa.

DEAR MADAM: I am in receipt of your communication of the 17th instant advising that your mayor under a misapprehension of the law appointed five members on the library board, whereas only three should have been appointed.

I am of the opinion that if he first appointed three and their appointment was perfectly regular and valid, that they would be legally appointed and would constitute the legal board, and that any appointment or appointments thereafter made would be illegal and invalid. Of course if he certified five names; that is to say, five names were all voted upon at one and the same time, then a much more serious question arises, but I understand from you that three men were first appointed and that thereafter two additional men were appointed. In this event, it is my opinion that the first three, as before stated, would be legally appointed and would constitute the legal board.

Yours very truly,

GEORGE COSSON,
Attorney General of Iowa.

PEDDLER'S LICENSE—ANNUAL.—Section 1347-a, code supplement, providing for the licensing of peddlers makes provisions for an annual license only, and there is no provision or authority for accepting less than the annual license fee where the license is desired for less than one year.

July 18, 1911.

COUNTY ATTORNEY J. F. KIRBY,
Williamsburg, Iowa.

DEAR SIR: I am in receipt of your communication of the 17th instant advising that you have construed section 1347-a, supplement to the code, relating to the licensing of peddlers to mean that only an annual license may be granted; that is to say, that there is no authority for granting a license for six or three months or

any shorter period than one year. You request to be advised as to whether I concur in this interpretation of the law.

The department has had occasion frequently to construe this question and we have universally held that the law contemplates only an annual license. The wording of the act makes this clear wherein it states: "Peddlers plying their vocation in any county in this state outside of a city or incorporated town, shall pay an annual county tax of twenty-five dollars for each pack peddler or hawkers on foot, fifty dollars for each one horse conveyance, and seventy-five dollars for each two-horse conveyance."

Evidently an annual county tax does not mean a semi-annual or quarterly tax.

Yours very truly,

GEORGE COSSON,
Attorney General.

DEFECTIVE ACKNOWLEDGMENTS CURED.—Acknowledgments of all deeds, mortgages or other instruments taken prior to the enactment of chapter 151, acts of the thirty-fourth general assembly and which were recorded prior to that time, including acknowledgments taken by private corporations by their own notary, who is a stockholder were legalized by said act.

July 18, 1911.

PETERS TRUST COMPANY,
Omaha, Neb.

GENTLEMEN: Your letter of May 9th addressed to the attorney general has been referred to me for reply.

You call for a construction of chapter 151 of the acts of the thirty-fourth general assembly which you refer to as senate file 191 and which was in fact senate file 195, the title of the act being as quoted by you, "An act to legalize acknowledgments of instruments in writing heretofore taken by notary public additional to section 2492 of the code."

The statute referred to provides that:

> "The acknowledgments of *all* deeds, mortgages or other instruments in writing *heretofore* taken or certified and which instruments *have been recorded* in the recorder's office of any county of this state, *including* acknowledgments of instruments

made by any private or other corporation * * * * or certified by any notary public who was at the time of such acknowledgment or certifying a stockholder or officer in such corporation, be and the same are hereby declared to be legal and valid official acts of such notaries public and to entitle such instruments to be recorded, anything in the laws of the state of Iowa in regard to acknowledgments to the contrary notwithstanding."

It would seem that the language of this statute is broad enough to cover acknowledgments of all instruments taken and recorded in the office of any recorder in this state prior to the approval of the act in question and that that portion of the section which specifically includes acknowledgments taken by officers or stockholders of a corporation is certainly not all that was intended to be covered by the act and that this language was used for the purpose of showing the intent of the legislature to legalize acknowledgments taken by a person who might be interested, as well as others taken by disinterested notaries and defective for some reason. The provision that acknowledgments taken by notaries thus interested are to be *included,* necessarily implies that they are to be included with acknowledgments of some other class and when we inquire what other class of acknowledgments is to be included, the first lines of the section answer "The acknowledgments of all these mortgages or other instruments in writing heretofore taken, certified and recorded."

Yours very truly,

C. A. ROBBINS,

Assistant Attorney General.

REGISTERED PHARMACISTS—INTOXICATING LIQUORS.—A registered pharmacist may fill a prescription requiring as an ingredient alcohol provided the distinguishing characteristic of alcohol is destroyed after the prescription is filled if it is not to be used as a beverage.

July 19, 1911.

MR. PETER MAYER,

Marshalltown, Iowa.

DEAR SIR: I am in receipt of your communication of the 17th instant requesting an opinion as to the right of a registered pharmacist, not holding a permit, to fill several prescriptions of the con-

tents pointed out in your letter, which prescriptions contain whisky and alcohol.

I am inclined to think you should consult your county attorney. I may say to you, however, that the supreme court has held that a registered pharmacist may fill a prescription which contains some alcohol provided the distinctive characteristic of alcohol is destroyed, and provided further that the same is not sold for and cannot be used as a beverage.

Yours very truly,

GEORGE COSSON,
Attorney General.

COUNTY AUDITOR—EXTRA COMPENSATION NOT ALLOWED FOR RECEIVING PROOF ON POCKET GOPHERS.—The county auditor is not entitled to extra compensation for services in receiving proof of the destruction of pocket gophers where such proof is received for collecting bounty allowed by law.

July 19, 1911.

HON. O. W. WITHAM,
Greenfield, Iowa.

DEAR SIR: Your letter of the 17th inst. to the attorney general in which you say your county has paid a bounty of 8 cents for pocket gophers and allowed the auditor and justice of the peace 2 cents for each gopher as compensation for their services in receiving proof, and that you had advised that the county auditor was not entitled to any compensation when the proof was made before him, but that a justice of the peace was entitled to such compensation when acting as registrar and taking proof of the destruction of the gopher, as provided by law, and requesting to be advised whether your ruling is correct, was referred to me for reply.

The county auditor of your county has submitted substantially the same question, I understand, and he was advised that the question should be submitted to the county attorney and if there was doubt in his mind, that this department would render such assistance as it could.

I assume from your statement that the bounty in question was paid prior to the taking effect of chapter 101, acts of the thirty-fourth general assembly, which amends section 2348-a of the supple-

ment to the code, 1907, so as to fix the bounty at 10 cents for each pocket gopher, no more and no less.

I think you were entirely correct in holding that the county auditor was not entitled to any compensation in connection with the receiving of proof of the destruction of pocket gophers for the purpose of collecting bounty. The provision in the law which permits the county board of supervisors to appoint registrars does not directly authorize the board to pay any compensation for the services to be rendered by such registrars and I think it extremely doubtful whether the board can pay for such service out of the county funds. I do not believe the board can apportion the bounty between the person destroying the gopher and the person who receives the proof because the bounty clearly belongs to the person who destroys the gopher and makes proper proof.

Respectfully yours,

N. J. LEE,
Special Counsel.

SCHOOLS.—The statements of the proceedings of an independent school district are required to be published.

July 19, 1911.

MR. N. F. PURCELL,
Mechanicsville, Iowa.

DEAR SIR: Your favor of July 11th addressed to Attorney General Cosson relative to publication of official statements of independent school districts, has been handed to me for reply, owing to the fact that because of important litigation now in the office Mr. Cosson is unable to give the matter his personal attention.

Replying to your specific question, will say that while code section 2781 is not entirely clear as to its meaning, yet it is the opinion of the writer that by its provisions the official statement of the independent school district must be published either in some newspaper, published in the district, or by posting up in writing in not less than three conspicuous places in the district, and that publishing by either of these methods is a sufficient compliance with the statute.

Yours very truly,

HENRY E. SAMPSON,
Special Counsel.

MARRIAGE LICENSES—WHEN ISSUED.—Unless the clerk of the court to whom application is made for marriage license is acquainted with the parties he must take the testimony of competent and disinterested witnesses showing that the parties are competent to contract marriage.

July 20, 1911.

MR. AUGUST KRUEGER,
No. 9952, Ft. Madison, Iowa.

DEAR SIR: Your letter of the 9th inst. addressed to Attorney General Cosson has been handed to me for reply.

You first inquire whether there is any law in this state fixing the age at which children may be permitted to testify in court proceedings. We do not have any statute covering this subject and courts permit children to testify where it is shown that they understand the nature and solemnity of the oath. This is a matter to be determined by the court.

In your second inquiry you ask if there is any law requiring a couple who make application for marriage license to make affidavit as to their age. Section 3142 of the code reads as follows:

> "Unless the clerk is acquainted with the age and qualification of the parties for the marriage of whom the license is asked, he must take the testimony of competent and disinterested witnesses on the subject. He must make an entry of each application made for the issuance of a license, stating that he was acquainted with the parties and knew them to be competent to contract a marriage, or that the requisite proof of such fact was made to him by one or more witnesses named, in a book kept for that purpose, which shall constitute a part of the records of his office."

If either party making application for a license is a minor, it is necessary for such party to have the consent of his or her parents or guardian.

Yours very truly,
JOHN FLETCHER,
Assistant Attorney General.

INTOXICATING LIQUORS—SOLICITING ORDERS FOR.—It is unlawful for one to solicit orders for the sale of intoxicating liquors even though he represents a non-resident concern.

July 20, 1911.

MR. D. B. ALIEN,
Arlington, Iowa.

DEAR SIR: I am in receipt of your communication of the 18th instant advising that there are persons making your town and soliciting orders for intoxicating liquors.

This is clearly in violation of our statute and the decisions of our supreme court and the supreme court of the United States; that is to say, the supreme court of Iowa and the supreme court of the United States have upheld the validity of a statute similar to the Iowa statute prohibiting the soliciting of orders. I therefore suggest that you have your county attorney and sheriff or your constable file information against this man the next time he comes to your community. The section in question is 2382 supplement to the code, 1907, and this is held valid in the case of *McCollum vs. McConahey,* 141 Iowa, 172; and see also the case of *Delameter vs. South Dakota,* 205 U. S., 93.

Yours very truly,
GEORGE COSSON,
Attorney General.

INTOXICATING LIQUORS—POISONS—SALE OF.—Persons other than registered pharmacists are not permitted to sell proprietary medicines containing intoxicating liquors or poisons, but they may sell denatured alcohol, poison fly-paper, insecticides and fungicides under chapter 124, acts of the thirty-fourth general assembly.

July 20, 1911.

MR. I. W. CLEMENTS,
President Iowa Board of Pharmacy,
Marengo, Iowa.

DEAR SIR: Referring again to your letter of the 26th ult. to the attorney general inquiring if anyone not a registered pharmacist is permitted to sell proprietary medicines containing intoxicating liquors or poisons, I desire to supplement what I said in answer

to such question on the 11th inst. by the statement that persons other than duly registered pharmacists are not prohibited from selling concentrated lye or potash having written or printed on the package or parcel its true name and with the word "poison," nor from selling denatured alcohol and poison fly-paper, nor from selling insecticides or fungicides as defined and authorized by chapter 124, acts of the thirty-fourth general assembly.

What I want to be understood as saying in answer to your question as noted is that no one not a registered pharmacist is permitted, under the law, to sell any proprietary or patent medicine or other domestic remedy, if it contain any intoxicating liquor or poison, subject to the exceptions stated. I did not intend by anything I said to specify all of the things one not a registered pharmacist is not permitted to sell.

Yours very truly,

N. J. LEE,
Special Counsel.

TAXATION—BANK STOCK—DEDUCTIONS.—In taxing the shares of stock in national banks no deductions should be made on account of the fact that part of the capital of the bank may be invested in non-taxable securities.

July 21, 1911.

MR. F. P. HENDERSON,
Indianola, Iowa.

DEAR SIR: Again referring to the taxation of stock to shareholders in national banks, I regret that I have not had time since writing you on June 3d to re-examine the question; but after a re-examination I find my letter to you on June 3d expresses my opinion upon the question, and that is that if a law taxes only the shares of stock of national, state and savings banks and loan and trust companies to the individual shareholder, and there is no discrimination between national banks and other banks and other moneyed capital as the term is used in section 5219 of the revised statutes of the United States, that this does not amount to a tax upon United States securities, and that therefore no deduction may be made.

In the case of *Home Savings Bank vs. Des Moines*, 205 U. S., page 503, the court on page 517 said: "The tax on an individual

in respect to his shares in a corporation is not regarded as a tax upon the corporation itself." And on page 518, the court said: "The Van Allen case has settled the law that a tax upon the owners of shares of stock in corporations in respect of that stock is not a tax upon United States securities which the corporations own. * * * * The theory sustaining these cases is that the tax was not upon the corporations' holdings of bonds, but on the shareholders' holdings of stock, and an examination of them shows that in every case the tax was assessed upon the property of the shareholders and not upon the property of the corporation * * * * On the other hand, whenever, as in these cases, the tax has been upon the property of the corporation, *so far as that property has consisted of such securities*, it has been held void."

Yours very truly,

GEORGE COSSON,
Attorney General.

SALARIES OF COUNTY OFFICERS—HOW DETERMINED.—Where the population is changed as shown by the last preceding national or state census and the compensation of a public officer is made to depend upon the population, it will be governed by the population as shown by the new census.

July 24, 1911.

COUNTY ATTORNEY E. M. SABIN,
Northwood, Iowa.

DEAR SIR: I am in receipt of your communication of the 22d instant directing my attention to chapter 3 acts of the thirty-fourth general assembly, and requesting an opinion as to the exact date this act affects salaries of county officers in the event the population is either increased or decreased by the federal census.

Section 1 of the act provides:

"Whenever a general census is taken by the national government, it shall be the duty of the secretary of state to procure from the supervisor of such census, or other proper federal official, a copy of such part of said census as gives the population of the state of Iowa, by counties, and the population of the cities and towns of Iowa, and file the same in his office. He shall then, at once, cause such census report, giving the population of the state by counties, and the population of the

cities and towns of Iowa, to be published once in each of two daily newspapers of the state having general circulation, and from and after the date of such publication said census shall be in full force and effect throughout the state."

It is to be observed that the section provides that it shall be in full force and effect from and after the date of the publication of said census.

Publication of the census was made on the 27th day of March, 1911, and hence from and after that date the salaries of your county officers, which are governed by the population, will be controlled by the new census. This seems to me to be so clear as to be beyond controversy.

Yours very truly,

GEORGE COSSON,
Attorney General of Iowa.

INTOXICATING LIQUORS—TRANSPORTATION OF.—A drayman may lawfully transport liquors from a railway depot to the consignee's residence or place of business where the drayman is employed by the shipper or railway company to complete an interstate shipment but not otherwise.

July 24, 1911.

MR. H. L. WILLIAMS,
Primghar, Iowa.

DEAR SIR: I am in receipt of your communication of the 21st instant requesting to be advised as to whether it is legal for a drayman to haul liquor from the depot to the residence of purchaser.

While I cannot give you an official opinion, I may say to you that the supreme court of the United States has held that a purchaser of liquor from without the state may have the same hauled into the state and that the same will be protected until it arrives at its destination and is there delivered to the consignee. Under the holding in the case of *State vs. Wignall*, 128 N. W., 935, our supreme court has held that if the liquor arrives at its destination and is there receipted for by the consignee or his agent, that it would then be unlawful for a drayman or common carrier for hire to transport the same from the depot to other points in the state, unless the consignee had a permit to keep and sell intoxicating

liquors for medicinal purposes, or unless he was legally entitled to sell pursuant to the provisions of the mulct law.

Yours very truly,

GEORGE COSSON,
Attorney General.

INCOMPATIBLE OFFICES.—The office of mayor and justice of the peace may not be held by the same person at the same time.

July 28, 1911.

MR. FRANK G. PIERCE,
Marshalltown, Iowa.

DEAR SIR: Your letter of the 25th instant addressed to the attorney general requesting a copy of the opinion I rendered to the effect that the offices of justice of the peace and mayor of a town could not be held by the same person at the same time, was referred to me for reply. You also say that your attorneys have held that a man may hold these two offices.

This question was raised at Rolfe, Iowa, by Mr. Moon, who is the mayor and also a justice of the peace. That was about the first of May last. Prior to that time I had held that the office of police judge and that of justice of the peace were incompatible and could not be held by the same person at the same time, and that the acceptance of one of said offices while holding the other had the effect of creating a vacancy in the office held first. In answer to Mr. Moon's inquiry, I merely sent him a copy of this opinion and told him that in my judgment it applied with equal force to the question submitted by him. Quite recently the same question was propounded by another official at Rolfe, together with some other questions, and in answer to these questions I expressed the same opinion as to the office of mayor and that of justice of the peace, but I wrote no formal opinion in response to either of said inquiries.

I have no doubt, however, as to the correctness of the ruling made and I am satisfied that it is well supported by the great weight of authority. We have no express declaration in our constitution or statutes in general language prescribing what offices, from their nature, are incompatible. It then becomes a question as to whether any given offices are incompatible under the rules of the common law. Section 1266 of the code provides

that every civil office shall be vacant upon the happening of any one of a number of events which are there enumerated, but the acceptance of an office which is incompatible with one held at the time is not mentioned as one of the events or causes which creates a vacancy. However, the supreme court of this state, in a very early case, said:

> "Our opinion is that we are not confined to the statutory causes or events in determining whether a vacancy exists. If a party accepts another office which, within the meaning of the law and the cases, is incompatible with that which he holds, we have no doubt but that the first one would become vacant."

Where there is no express provision, the true test is whether the two offices are incompatible in their natures, in the rights, duties or obligations connected with or flowing out of them. Offices are incompatible or inconsistent when they cannot be executed by the same person; or when they cannot be executed with care and ability; or when one is subordinate to or interferes with another; or where the office is under the control of another; or when the holder cannot, in every instance, discharge the duties of each. It has also been stated by the courts that the incompatibility which shall operate to affect the first office exists where the nature and duties of the offices are such as to render it improper from considerations of public policy for one person to retain both. The question of incompatibility is to be determined from the natures and duties of the two offices, and not from a possibility, or even a probability that the incumbent might duly perform the duties of both.

Under our statute a mayor is a magistrate, before whom preliminary examinations may be held. In criminal matters he has the jurisdiction of a justice of the peace, co-extensive with the county, and in civil cases the same jurisdiction within the city or town as a justice of the peace has within the township and a change of venue may be taken from a mayor to a justice of the peace in certain cases. Where the same person holds both said offices, there would be a denial of the right to take such change of venue, because the holding of said offices by the same person has the effect of consolidating the same and reducing the number of courts having jurisdiction of the particular case. Such consolidation and reduction in number of such courts would also

diminish the number of examining magistrates in that jurisdiction. These are the grounds, I believe, upon which incompatibility in these two offices must be placed.

Of course this question has never been decided by our supreme court, so far as my investigation has gone, and my opinion is based upon the principles and rules announced by the text books and largely upon the decisions of the courts in other states.

I would be glad to have a copy of the opinion rendered by the attorneys to whom you refer, holding to the contrary. If I am wrong I would be glad to know wherein my error lies.

Respectfully yours,

N. J. LEE,
Special Counsel.

LAND CONTRACTS—TAXATION OF.—A land contract when taxable as moneys and credits should be taxed for the year commencing January 1st next after its date.

July 29, 1911.

HON. J. P. HERTERT,
Harlan, Iowa.

DEAR SIR: Your letter of the 27th inst. to the attorney general was referred to me for reply.

You inquire whether a contract of sale of a tract of land entered into in September last is assessable to the vendor as a credit for the year 1910.

I do not understand that right to tax this contract as a credit at all is involved but merely whether it should be listed for taxation for the year 1910. As to whether it is liable to be assessed at all would depend somewhat upon its terms, but I assume from what you say that it is liable. The cases reported in the 122nd Iowa at page 375 and in the 126th Iowa, page 637, would probably determine whether the contract is subject to assessment. In these cases there was no attempt to assess them as for the year in which they were made but the supreme court held that they should be assessed for the year following their making.

In view of the fact that all property is valued and listed for the purpose of taxation as of January 1st in each year, it would

seem that the contract you mention would not be assessable for the year 1910.

Yours very truly,

N. J. LEE,
Special Counsel.

BANKS—PRIVATE—TAXATION OF.—The taxation of private banks is covered by code sections 1305 and 1321, supplement to the code, 1907, as amended, the provisions of which are discussed.

July 29, 1911.

MR. MILTON UPDEGRAFF,
Department of Navy,
Washington, D. C.

DEAR SIR: Your letter of the 26th instant addressed to the attorney general was referred to me for reply.

I note that you desire to know the present law concerning the taxation of moneys and credits in this state, and particularly the taxation of the stock of private banks, and request to be furnished a copy of the law.

Our last general assembly passed an act providing for the taxation of shares of stock in state and national banks, trust companies, moneyed capital and moneys and credits, a copy of which I enclose.

There is another section of our statute which deals with the taxation of private banks, being section 1321 of the supplement to the code, 1907, which reads as follows:

> "Private banks or bankers, or any person other than corporations hereinafter specified, a part of whose business is the receiving of deposits subject to check, on certificates, receipts, or otherwise, or the selling of exchange, shall prepare and furnish to the assessor a sworn statement, showing the assets, aside from the real estate, and liabilities of such bank or banker on January first of the current year, as follows:
>
> "1. The amount of moneys, specifying separately the amount of moneys on hand or in transit, the funds in the hands of other banks, bankers, brokers or other persons or corporations, and the amount of checks or other cash items not included in either of the preceding items;

"2. The actual value of credits, consisting of bills receivable, owned by them, and other credits due or to become due.

"3. The amount of all deposits made with them by others, and also the amount of bills payable;

"4. The actual value of bonds and stock of every kind and shares of capital stock or joint stock of other corporations or companies held as an investment, or in any way representing assets, and the specific kinds and description thereof exempt from taxation;

"5. All other property pertaining to said business, including real estate, which shall be specially listed and valued by the usual description thereof;

"The aggregate actual value of moneys and credits, after deducting therefrom the amount of deposits and the aggregate actual value of bonds and stocks, after deducting the portion thereof otherwise taxed in this state, and also the other property pertaining to the business, shall be assessed as provided by section thirteen hundred and five (1305) of this chapter, not including real estate, which shall be listed and assessed as other real estate."

I have quoted this section as amended by section 2 of the act which I enclose. The act I enclose is now officially designated as chapter 63. acts of the thirty-fourth general assembly.

Yours very truly,

N. J. LEE,
Special Counsel.

INTOXICATING LIQUORS.—Barley brew, hop tonic and all such beverages containing any percentage of alcohol may not be legally sold.

July 29, 1911.

MR. F. R. LOCK, *Mayor*,
Hartley, Iowa.

DEAR SIR: I am in receipt of your communication of the 29th instant relative to the sale of "Barley Brew" and "Hop Tonic."

Our supreme court has many times held that any liquor sold as a beverage which contains any per cent of alcohol is prohibited. Barley Brew, Hop Tonic and all such brands contain some per

cent of alcohol and the sale of which has universally been held to be illegal under our statute, although the percentage is usually so slight that the federal government does not exact a special tax.

See *State vs. Colvin*, 127 Iowa, 632.

Yours very truly,

GEORGE COSSON,
Attorney General.

CITIES AND TOWNS—CONSTRUCTION OF BRIDGES BY.—A city or town is not authorized to vote a tax to aid in the construction of a county bridge the cost of which is less than $10,000.

August 1, 1911.

MR. D. H. MURPHY,
Stacyville, Iowa.

DEAR SIR: Your letter of the 24th ult. addressed to the attorney general has been referred to me for reply.

You inquire whether the town of Stacyville is authorized by section 759 of the code to vote aid in the construction of a county bridge when the contract price of such bridge is $6,000.00 and if this authority does not exist but said town has already attempted to vote such aid by a large majority of the persons voting upon the question, can the tax or a portion thereof so voted be used for the purpose of constructing sidewalks on each side of such bridge when constructed by the county alone.

I do not believe your town is authorized to vote aid in the construction of a county bridge under section 759 of the code and the sections immediately following the same, unless the cost of such bridge shall be at least $10,000. The statute is very clear on that point and a $10,000.00 cost seems to be a condition precedent to the right of an incorporated town to vote a tax in aid of constructing a county bridge. Municipal corporations have only such powers as are specifically granted and those necessarily implied therefrom and statutes conferring powers upon municipalities are usually strictly construed. The vote that was had upon this question by your town, therefore, is of no avail and in legal effect no valid tax was voted for any purpose and no part thereof can be used for any purpose. No right would exist to levy or collect it.

I have not had time to give the subject very much investigation and the foregoing views are given largely offhand from a reading of the statutes and upon general principles and what has been said will not be regarded as in any sense an official expression from this department.

Respectfully yours,

N. J. LEE,
Special Counsel.

PUBLICATION OF OFFICIAL PROCEEDINGS.—The reports of the county treasurer, the board of supervisors and township clerks should be published in itemized form but the report of the expert accountant showing result of his examination of the books of the county officers is not part of the board proceedings and need not be published.

August 7, 1911.

MR. O. E. SMITH,
Spirit Lake, Iowa.

DEAR SIR: Yours of the 3rd inst. addressed to the attorney general has been referred to me for reply.

Your questions briefly stated are:

"1. Should the county treasurer's report be published at the close of the business, January and July 1st, of each year?

"2. Is it not necessary that all board proceedings be published under the laws of Iowa?

"3. Should not the reports of the township clerks be published in itemized form?

"4. Should the expert accountant's report of his examination of the books of the county officers be published as board proceedings?"

I think each of the foregoing interrogatories should be answered in the affirmative, except the last one, which should be answered in the negative.

For decisions bearing upon this matter, I call your attention to the following cases:

Haislett vs. Howard County, 58 Iowa, 377;

McBride vs. Hardin County, 58 Iowa, 219;

Clark vs. Lake, 124 N. W., 866.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

JUSTICE OF THE PEACE—POWER OF.—A justice of the peace may in the absence of the mayor or judge of the superior or police court hold such courts under section 691 of the code and independent of any city ordinance.

August 9, 1911.

MR. G. H. KICK,
Pilot Mound, Iowa.

DEAR SIR: Your letter of the 5th instant to the attorney general requesting his opinion as to whether you, as justice of the peace, have the jurisdiction and power, in the absence of the mayor or his inability to act, to act as mayor in virtue of an ordinance of your town attempting to confer such powers, was referred to me for reply.

Section 691 of the code provides in part that "if the mayor or judge of the superior or police court is absent or unable to act, the nearest justice of the peace shall have jurisdiction and hold his court in criminal proceedings, and receive the statutory fees, to be paid by the city or county, as the case may be."

The provision just quoted would give you such power if you are the nearest justice, and under the other conditions mentioned in the section quoted, but you would derive such jurisdiction and power from the statute and not from the town ordinance, as a town could not adopt an ordinance on this question which would be in conflict with the statute in any particular. Of course your jurisdiction would be limited to trials for violations of ordinances —criminal proceedings.

You will not regard this as an official opinion from this department but the personal views of the writer.

Respectfully yours,

N. J. LEE,
Special Counsel.

COUNTY AUDITOR—COMPENSATION OF.—The county auditor is only entitled to the salary fixed by statute and is not entitled to retain anything on account of the destruction of gopher scalps.

August 12, 1911.

MR. O. W. WITHAM,
Greenfield, Iowa.

DEAR SIR: Yours of the 10th inst. enclosing copy of the resolution of the board of supervisors with reference to the gopher bounty matter, also with reference to erroneous tax matter, duly received.

In regard to the matter of the two cents on each gopher retained by the auditor from the amount authorized to be paid to the person destroying the gopher, I am inclined to believe that if the party destroying the gopher permitted the auditor to retain this amount, under the mistaken belief that he was authorized by law to do so, the money would be paid under mistake of law and could not be recovered by the gopher catcher, but this rule would not apply as against the county in such a manner as to prevent it from recovering any money unlawfully paid to the auditor.

State vs. Young, 134 Ia., 505 at 516.

If this be the true situation, I cannot see on what theory the bondsman would not be liable. The money was collected in his official capacity and even though he had no right to collect the same, he should account therefor.

Moore vs. Mahaska County, 61 Ia., 177;

Calloway vs. Henderson, 24 S. W., 437;

Hennepin County vs. Dickey, 90 N. W., 775;

Frontier County vs. Kelley, 46 N. W., 704;

Finley vs. Territory (Okla.), 73 Pac., 273.

My understanding of the holding in the Estherville case is not that the law was held to be unconstitutional, either by the state court or by the United States court, but that on account of the fact that the supreme court of the United States had held that under the Iowa statute the state and savings banks were not taxed and that hence a statute which sought to tax the national banks and permit the state and savings banks to go untaxed amounted to

a discrimination against capital invested in national banks and was prohibited, not by any constitution but by section 5219 of the revised statutes of the United States, and that inasmuch as the state banks could not be lawfully taxed, the court would not permit the taxation of national banks. It should be remembered, however, that in the Estherville case the plaintiff bank had resisted the right of taxation under this statute all along the line. It appeared before the board of equalization and made the objection and pursued the objection even to the supreme court of the state and for that reason, in that particular case, and in other cases where the objection was timely made, the taxation would be erroneous and could be recovered back where paid under protest. But in cases like the Slimmer case, to which I called your attention, a different rule would apply.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

COUNTY SURVEYOR—ABOLISHMENT OF OFFICE.—The office of county surveyor was abolished immediately upon taking effect of chapter 24, acts of the thirty-fourth general assembly, to-wit, July 4, 1911, and not at the expiration of the term of office then being served.

August 12, 1911.

HON. J. G. PATTERSON,
Oskaloosa, Iowa.

DEAR SIR: Your letter of the 10th inst. to the attorney general was referred to me for reply.

You say you have the understanding that this department has made a ruling to the effect that the office of county surveyor has been abolished and that you desire a copy of such opinion.

This question has been raised a number of times since the adjournment of the last general assembly and in answer to these questions I expressed the opinion that such office was abolished upon the taking effect of chapter 24, laws of the thirty-fourth general assembly.

I have not had the time to make such investigation of the authorities bearing upon this question as I should like but from the investigation I have been enabled to make I believe that the

proper construction of section 1 of said act is that immediately upon the taking effect of the same the office of county surveyor is abolished. Section 1 referred to repeals the section of the statute creating the office. While only the word "surveyor" is stricken from section 1072 of the supplement to the code, 1907, which is the section providing for the election of county surveyor, yet for the purpose of determining this question the whole section is in effect repealed and the authorities, so far as I have examined them, agree that the repeal of a statute creating an office abolishes the office itself. This doctrine is announced in Throop on Public Officers and also finds support in the case of *Chandler vs. Lawrence,* reported in the 128th Mass., page 213.

According to these authorities the office of county surveyor, as provided for by our statute, was, therefore, abolished on the taking effect of this act by virtue of section 1 thereof, without regard to the provisions of any of the succeeding sections in the same act. The authorities also announce the doctrine that where the functions and duties of an office are transferred to another officer such office is by implication abolished and under this doctrine I think the language of section 2 of the act would be sufficient without reference to section 1, to abolish the office of county surveyor and if it were not for the provisions contained in section 1 of the act there would be considerable force in the claim made by some boards of supervisors that the office of county surveyor would not be abolished until the board should exercise the power of appointment as provided in section 2, providing the power of appointment should be exercised by the time the term of the incumbent in the office of county surveyor had not expired, for you will observe that the provisions of section 2 are not mandatory upon the board. In either view, if they should fail to exercise the power conferred, there would be no one authorized or empowered to discharge the duties heretofore discharged by county surveyors. But that is a contingency or situation which the legislature ought to have foreseen and provided against. In view of the fact that section 1 expressly repeals the section of the statute creating the office of county surveyor, it is thereby abolished and the consequences that may follow therefrom cannot control as to the interpretation of the act in question.

As already stated, the section conferring the power upon the board of supervisors to employ a competent person to perform the duties of county surveyor is not mandatory and one board

of supervisors might exercise the power and another board, for some reason, fail to exercise the power, and under such circumstances we would have two different policies in two different counties in the state with respect to the office of county surveyor.

My notion is that when the office of county surveyor becomes vacant in one county it becomes vacant in all of the counties of the state upon the same date and under the same conditions. I do not think there will be any question whatever about the right and power of the board of supervisors to appoint a person to act as county surveyor after July 4th last because there is no limitation upon their power to appoint such person after the taking effect of the act.

It is claimed by some that it was not the intention to abolish the office of county surveyor until the expiration of the terms of the present county surveyors and further that it was the intention that the board should not exercise the power of appointment until such terms of office had expired. It is a very familiar and fundamental rule of statutory construction that the legislative intent must be arrived at from the law itself and there is not a word in the whole act which supports the claim that the board of supervisors is not to exercise its power until the terms of the present county surveyors shall expire and there is not a word in the statute which has the effect of continuing in office the present incumbents of the office of county surveyor. The method adopted by the legislature for abolishing this office was by repealing the law creating it, without any saving clause.

Yours very truly,

N. J. LEE,
Special Counsel.

AUTOMOBILES—AGE OF OPERATOR.—A person under fifteen years of age is prohibited by section 4, chapter 72, acts of the thirty-fourth general assembly, from operating a motor vehicle even though he be a part owner thereof.

August 14, 1911.

MESSRS. J. G. CHRYSLER & SON,
Lake Park, Iowa.

GENTLEMEN: I have your letter of the 10th inst. in reply to mine of the 9th inst. relative to the right of a person under fifteen years of age to operate a motor vehicle.

I note you say you were in error in giving the age of your son in your first letter and that he is in fact fourteen years old and a part owner with yourself in an automobile and that the same is registered in the name of J. G. Chrysler & Son and your query is, may such minor son operate said vehicle without violating the law.

It is my personal opinion that a proper construction of section 4, chapter 72, laws of the thirty-fourth general assembly, would prohibit a person who is not fifteen years of age from operating a motor vehicle, even though he be part owner thereof. I think it was the intention of the legislature to prohibit all persons under the age of fifteen years from operating motor vehicles regardless of any other fact or condition and that the exception or proviso that a person under fifteen years of age might operate such vehicle when accompanied by the owner, presupposes that the owner himself is not under fifteen years of age.

Respectfully yours,

N. J. LEE,
Special Counsel.

ROAD TAX—HOW COLLECTED.—Where a township has been divided into road districts as provided by chapter 98, acts of the thirty-third general assembly, the road superintendent has no authority to collect the tax but the same should be collected by the treasurer.

August 16, 1911.

HON. E. J. VAN NESS,
Algona, Iowa.

DEAR SIR: Your letter of the 8th inst. to the attorney general was referred to me for reply.

You inquire whether the superintendent of roads is authorized to collect that part of the property road tax that is to be paid in cash where the township has been divided into road districts as provided in chapter 98, laws of the thirty-third general assembly.

I do not think the road superintendent has authority to collect such tax. I think said act contemplates that that part of said tax which is payable in cash is to be collected by the county treasurer. This question has been raised before and it was answered in the same way. It would seem that section 5 of said

chapter would be so clear that there would be no room for controversy on this point.

Respectfully yours,

N. J. LEE,
Special Counsel.

ITINERANT VENDOR OF DRUGS.—Provisions of the statute concerning the same discussed.

August 16, 1911.

HON. DAVID E. HADDEN,
Alta, Iowa.

DEAR SIR: Your letter of the 19th ult. to the attorney general was referred to me for reply. You request an opinion upon the following questions:

"1. Can one be considered an itinerant vendor of drugs, etc., under section 2594 of the code, who travels from place to place and publicly by means of circulars and otherwise professes to treat and cure diseases and solicits orders for medicine for future delivery to the customer at the place of business of the seller and manufacturer, said treatment consisting of the application of antiseptic medicines applied externally and is a part of and contingent upon the placing of an order for other medicines to be used internally?

"2. Can the state pharmacy commission adopt the following rule: Section 2594 of the code entirely governs the licensing of itinerant vendors of drugs, nostrums, ointments and appliances of any kind for the treatment of any disease or injury and includes all those who travel from place to place and by means of circulars or otherwise publicly profess to treat or cure diseases, injury or deformity of man or animals, either by taking orders for immediate or future delivery by themselves or otherwise. The words 'any itinerant vendor' applies to each traveling agent or seller who itinerates for the sale of his drugs or appliances, and not to the manufacturer, unless said manufacturer also acts as an itinerant vendor."

It is my opinion that your first question should be answered in the affirmative but I do not think that section 2594 of the code will bear the interpretation you seek to place upon it in the proposed rule embodied in your second question. I think the diseases,

injuries and deformities referred to in said section relate to those of human beings. Moreover, I do not think it advisable to attempt by a rule to indicate everything that is embraced in the language of section 2594. I think it is better to interpret and apply the law as it is written, to the varying facts as they arise from time to time instead of endeavoring to indicate all the things and acts which would amount to a violation of section 2594.

Respectfully yours,

N. J. LEE,
Special Counsel.

CITIES AND TOWNS—USE OF COUNTY JAIL.—Cities and towns have the right to use the county jail for the confinement of prisoners but are liable to the county for the cost of keeping such prisoners.

August 21, 1911.

MR. F. B. MANSEN,
Eddyville, Iowa.

DEAR SIR: Yours of the 14th inst. addressed to the attorney general has been referred to me for reply. Your inquiry is with reference to the right of the constable to have access to and the use of the jail. I know nothing about the former conference between the constable and the attorney general, and you fail to state in your letter whether or not the jail is one maintained by the city or by the county.

Inasmuch as your town is not the county seat I assume that the jail to which you refer is one maintained by the city, under code section 735, which provides:

> "Cities and towns shall have power to erect, establish, and maintain a city jail which shall be in keeping of the marshal, under such rules and regulations as the council shall provide."

Unless the council had adopted the rule or regulation by which county prisoners could be kept in this jail, a constable having in charge a prisoner charged with or convicted of a crime against the state laws as distinguished from the ordinances of the city, would not have the absolute right to confine prisoners in such jail. But he would have the right to confine such prisoners in any county jail within the county.

Code section 735, above cited, further provides:

> "Any city or town shall have the right to use the jail of the county for the confinement of such persons as may be liable to imprisonment under the ordinances of such city or town, but it shall be liable to the county for the cost of keeping such prisoners."

There is no corresponding provision in the statute authorizing counties to use city jails by compensating the city for the cost of keeping such jails, and for this reason the city marshal would have exclusive control of the city jail in the absence of a rule or regulation by the council as above suggested.

If the ordinances of the town provide ample punishment for the crime in question, prosecutions could be instituted under the ordinances instead of under the state laws, and thus avoid all question as to the right to use the city jail. I take it, however, from your letter that the officers of the town are not strong on law enforcing, and while this may be true, yet in a clear case they would hardly dare to fail to perform their duty, especially in view of chapter 78 of the laws of the thirty-third general assembly, section 1 of which provides:

> "Any county attorney, sheriff, mayor, police, marshal, or constable, shall be removed from office by the district court or judge upon charges made in writing and hearing thereunder for the following causes:
>
> "1. For wilful or habitual neglect or refusal to perform the duties of his office.
>
> "2. For wilful misconduct or maladministration in office.
>
> "3. For corruption."

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

SOLDIERS' ROSTER.—Chapter 202, acts of the thirty-fourth general assembly should be liberally construed so as to include former as well as present members of the board.

August 22, 1911.

HON. GUY E. LOGAN,
Adjutant General.

DEAR SIR: I am in receipt of your recent communication requesting to be advised as to whether the roster board, as the term is used in chapter 202, acts of the thirty-fourth general assembly, would include former members who are not now serving because of the expiration of the term of office for which they were elected.

In my opinion this act should receive a liberal interpretation and I am of the opinion that it was the intention of the legislature in the use of the term roster board to include the members of the board as it was originally constituted and as at present constituted.

Yours very truly,

GEORGE COSSON,
Attorney General of Iowa.

AUTOMOBILES—AGE OF OPERATOR.—Persons under age of fifteen years not authorized to operate a motor vehicle unless accompanied by the owner.

August 24, 1911.

WALDO LUNDT,
Linn Grove, Iowa.

DEAR SIR: Answering your inquiry of the 3rd inst. addressed to the attorney general, I will say that a person under fifteen years of age is not authorized to operate a motor vehicle unless accompanied by the owner thereof.

Respectfully yours,

N. J. LEE,
Special Counsel.

CONCURRENT JURISDICTION ON BOUNDARY RIVERS.—The state has concurrent jurisdiction on boundary streams and may punish offenses committed anywhere on the waters thereof although beyond the thread of the stream and near the opposite shore.

August 28, 1911.

HON. FRANK L. MAY,
Lansing, Iowa.

DEAR SIR: Your letter of the 14th instant addressed to the attorney general was referred to me for reply.

You desire to know whether one selling intoxicating liquors on a boat on the Mississippi river opposite your county is violating the laws of this state and amenable thereunder.

I think this question has been settled. The district court of the state in counties bordering on the Mississippi river has jurisdiction of offenses committed anywhere on the waters thereof, although such offenses are committed beyond the thread of the stream and near to the lands of a co-terminus state.

See *State vs. Mullen*, 35 Iowa, 199;

Section 3 of the Code;

Section 3, chapter 48, *U. S. Statutes at Large*, Vol. 5, page 742.

Respectfully yours,

N. J. LEE,
Special Counsel.

ELECTION ON HOLIDAY.—It is doubtful whether an election held on September 4th, or Labor day, which is a legal holiday, would be lawful.

August 31, 1911.

MR. CARL B. GALLOWAY,
Casey, Iowa.

DEAR SIR: Yours of the 29th inst. addressed to the attorney general has been referred to me for reply.

Your question briefly stated is whether a special election of your town could be lawfully held on September 4th, that being Labor day.

As a general rule, a holiday does not suspend the transaction of public or private business, unless specified in the act designating the holiday, and where a statute enumerates the private acts which may not be performed on designated holidays, the performance of other acts are legal and valid.

21st Cyc., page 441.

Our code section 3053 provides that the first Monday in September (and certain other days named) "shall be regarded as holidays for all purposes relating to the presentation for payment or acceptance, and the protesting and giving notice of the dishonor of bills of exchange, drafts, bank checks, orders and promissory notes."

So it will be seen from this statute that Labor day is a holiday for limited purposes only. However, the act of congress, dated June 28, 1894, provides:

> "That the first Monday of September in each year, being the day celebrated and known as Labor's holiday, is hereby made a legal public holiday, to all intents and purposes, in the same manner as Christmas, the 1st day of January, the 22nd day of February, the 30th day of May, and the 4th day of July, are now made by law public holidays."

No one would think of holding an election on Christmas or New Year's day, and while under the state law I believe the election could be held, yet this United States law would make the legality so doubtful that you had better change the date if possible.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

CITY OFFICES—VACANCIES IN—HOW FILLED.—Vacancies in the office of councilman or mayor and other elective city offices are filled by appointment of the council.

September 1, 1911.

MR. F. L. HALOUPEK,
Belle Plaine, Iowa.

DEAR SIR: Replying to yours of the 29th ult., while I cannot advise you officially, I direct your attention to section 1272 of the code supplement, which provides in part that: "Vacancies

in the office of * * * * councilman or mayor of any city, and all other elective city offices, the council may appoint any qualified elector to fill such vacancy, who shall qualify in the same manner as persons regularly elected to fill such office, and shall hold such office until the qualification of the officer elected to fill such vacancy, who shall be elected at the next regular municipal election; in all city appointive offices, unless otherwise provided by law, in the same manner as the original appointment was made; in all town offices, by the council at its first regular meeting after such vacancy occurs, or as soon thereafter as practicable."

Yours very truly,

GEORGE COSSON,
Attorney General.

ITINERANT VENDOR OF DRUGS.—One traveling from place to place and publishing by means of circulars professing to treat and cure diseases and soliciting orders for medicines for future delivery consisting of antiseptic medicines to be used in connection with other medicines to be administered internally is an itinerant vendor of drugs.

September 5, 1911.

HON. ED J. MOORE,
Secretary Commission of Pharmacy,
State House.

DEAR SIR: Your communication of the 2d inst. addressed to the attorney general, was referred to me for reply. I note from your communication that the commission of pharmacy desires the opinion of the attorney general upon the following question:

"Can one be considered an itinerant vendor of drugs, etc., under section 2594 of the code, who travels from place to place and publicly by means of circulars and otherwise professes to treat and cure diseases and solicits orders for medicine for future delivery to the customer at the place of business of the seller and manufacturer? In the case we refer to, a treatment consisting of the application of antiseptic medicines is given and is a part of and contingent upon the placing of an order for other medicines to be used internally."

I think the section of the statute referred to clearly prohibits the acts and things set forth in your question, and your question, therefore, must be answered in the affirmative.

Respectfully yours,

N. J. LEE,
Special Counsel.

CITY OFFICIALS—COMPENSATION NOT TO BE CHANGED DURING TERM OF OFFICE.—Code section 667 prohibits any change in the compensation or emoluments during term of office for which they are appointed or elected.

September 5, 1911.

MR. S. W. BRYANT,
Centerville, Iowa.

DEAR SIR: Yours of the 4th inst., addressed to the attorney general, has been referred to me for reply.

Code section 667 is the provision that would govern in your case, and it provides in substance as stated by you, that the compensation or emoluments of city officers shall not be changed during the term of office for which they are elected or appointed.

In order to make the matter doubly sure, it is further provided that no person shall be eligible to re-election or reappointment after having resigned for any part of the term covered by his previous election or appointment, where there had been an increase made in the compensation.

Our supreme court has held in the case of *Cox vs. Burlington*, 43 Ia., 612, that such an increase could not be made during the interim between the election and the qualification of the officer.

And the rule that the compensation could not be increased was again recognized in the case of *Council Bluffs vs. Waterman*, 86 Ia., 688.

It is, therefore, my opinion that there is no way in which the compensation of a city officer can be increased during the term of office; and if the matter is of sufficient importance that the increase be made, that the only way I know of would be to permit the present officers to resign, the increase be made, and the new officers be elected or appointed.

While this is probably not what your city would desire to do, yet it is the only way that an increase could be made at the present time. An increase might be provided for now to take effect with the next regular election or appointment of officers.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

AUTOMOBILES—REGISTRATION—KINDS EXEMPT.—Chapter 72, acts of the thirty-fourth general assembly providing for the registration of automobiles excepts from its operation motor trucks, motor drays, motor delivery wagons, traction engines, road rollers, fire wagons and engines, police patrol wagons, ambulances and such vehicles as run only upon rails or tracks.

September 5, 1911.

COUNTY ATTORNEY C. N. JEPSON,
Sioux City, Iowa.

DEAR SIR: I am in receipt of your communication of the 28th ultimo advising that the question has been presented as to the necessity of registration of motor trucks, drays and wagons, and automobiles used for this purpose, and the payment of the annual registration fee as prescribed by chapter 72, acts of the thirty-fourth general assembly.

Section 2 of chapter 72 aforesaid provides that the term "motor vehicle" as used in said act, except where otherwise expressly provided, "shall include all vehicles propelled by any power other than muscular power, except *motor trucks, motor drays, motor delivery wagons,* traction engines, road rollers, fire wagons and engines, police patrol wagons, ambulances, and such vehicles as run only upon rails or tracks."

It will be noted that the act does not except an automobile used as a motor truck, a motor dray or motor vehicle.

I am of the opinion, however, that the term properly construed would include all motor vehicles which were constructed exclusively for the purpose of a truck, dray or delivery wagon, and not for the purpose of transportation of persons, and that said term would also include automobiles which had been so transformed by the owner as to be available only for use as a motor

truck, delivery or dray wagon and actually used exclusively as such truck, dray or delivery wagon. If, however, the automobile is left in such condition that it either can or is used for pleasure or business in the way of transporting passengers instead of freight, that application for registration number should be made in the regular way and the regular registration fee paid; in other words, I am of the opinion that any automobile which is in condition to be used for the transportation of passengers, or which is actually used in the transportation of passengers should be registered, numbered and fee paid, and that an automobile so modified in its construction that it can only properly be used in the transportation of freight, coupled with the fact that it is exclusively used for such purpose, would bring it within the exception of section 2, chapter 72 of the acts of the thirty-fourth general assembly; in which event, no registration would be necessary and no fee required thereon.

This is also the position taken by the secretary of state.

Yours very truly,

GEORGE COSSON,
Attorney General of Iowa.

PEDDLER—DEFINED.—One selling fresh meat, coffees, teas, spices and other merchandise to farmers throughout the country is a peddler within the meaning of section 1347-a supplement to the code, 1907.

September 6, 1911.

HON. W. H. WEHRMACHER,
Waverly, Iowa.

DEAR SIR: Your letter of the 14th ult. was referred to me for reply.

You desire an opinion from this department as to whether one who sells fresh meat, coffees, teas, spices and other groceries from a wagon to farmers throughout the county is a peddler within the meaning of section 1347-a of the supplement to the code, 1907, and required to have a peddler's license.

From a reading of the statute in question, as applied to the above facts, it would seem that such person is a peddler within the meaning of the term "peddler" as defined therein and would not come within any of the exceptions noted.

You will not regard this as a strictly official opinion but as the views of the writer without having given the subject any great amount of thought.

Your letter would have received much earlier attention but for the fact that there was a large amount of official business to be cared for.

Respectfully yours,

N. J. LEE,
Special Counsel.

MILK DEALERS—CHARACTER OF VEHICLE USED IN MAKING SALES—FLOUR, INCLUDING MIXED FLOUR AND MEAL.—Chapter 113, acts of the thirty-fourth general assembly requires a dealer who sells milk in, or to be used in an incorporated town, from a vehicle to have both sides of the vehicle inscribed with the name of the dairy, person, firm or corporation to whom the license is issued. The term "flour" as used in chapter 180, acts of the thirty-fourth general assembly means to include graham, mixed flours, corn flour and corn meal.

September 6, 1911.

HON. W. B. BARNEY,
City.

DEAR SIR: Your letter addressed to the attorney general requesting to be advised as to the proper interpretation of chapter 113, acts of the thirty-fourth general assembly, also of chapter 180, acts of the thirty-fourth general assembly, in certain particulars, was referred to me for reply.

The matters on which you desire the opinion of this department are as follows:

"1. If a man is bottling some of his milk and cream and hauling it to the grocery store, and on the way delivers to two parties, would he be required to procure a license and have his name appear on both sides of the vehicle which he uses to deliver such products? The store buys milk and cream of the above party as it is needed and it is produced outside of the corporate limits of Marengo. If he delivers to the store alone, does it in any way alter the situation?

"2. I should also be pleased to have an opinion relative to what is required in the case of Mr. Eatinger, of Orient, correspondence concerning which is enclosed herewith.

"3. I am also enclosing herewith copy of the bill relating to the labeling of packages of flour to show the net weight. The Iowa Millers' Club has made inquiry as to whether this law would require net weight on packages of graham flour, mixed flours, corn flour and corn meal."

With reference to the questions contained in your first proposition as noted above, I have to say that as I read the law, any person who sells milk or cream in or to be used in any municipal corporation, except for the purpose of supplying the same for the purpose of manufacture, from a store or vehicle, is required to procure a license and pay the license fee. The requirement as to license does not appear to depend upon the number of customers one supplies nor the amount of the product sold or whether the selling of such product is purely incidental to the main or chief business of the seller, and the statement in section 3 of chapter 113, acts of the thirty-fourth general assembly, "Every sale from a vehicle not so inscribed shall be deemed a violation of this act," would seem to embrace every sale from a vehicle, and in addition to being required to procure a license and pay the license fee, such person would have to have the proper inscription made upon his vehicle. The fact that the milk or cream is produced outside of the corporate limits of any given municipality does not alter the case but a person making sales of such products otherwise than from a store or from a vehicle would not be required to have a license. There does not seem to be any limitation as to the amount of such products that a person may sell in or to be used in a town or city, if it is not sold from a store or from a vehicle.

The foregoing answers all the questions contained in Mr. Eatinger's letter which you enclose and it will not be necessary to refer to them more specifically.

Answering your third question, it is my opinion that the word or term "flour" as used in chapter 180, laws of the thirty-fourth general assembly, means and includes the different kinds of flour and meal specified in your question.

Respectfully yours,

N. J. LEE,
Special Counsel.

SCHOOL ELECTIONS—DEFINED.—The term "last school election" as used in section 2, chapter 143, acts of the thirty-fourth general assembly refers to the last annual meeting of the school corporation at which officers were chosen.

September 6, 1911.

MR. E. J. WENNER,
Waterloo, Iowa.

DEAR SIR: Your letter of the 17th ult., to the attorney general asking his opinion what the term "last school election" as used in section 2, chapter 145, laws of the thirty-fourth general assembly refers to, was handed to me for reply.

While I have not had time to investigate this question very fully it is my opinion that the election referred to means the last annual meeting of the school corporation at which officers were chosen.

Respectfully yours,

N. J. LEE,
Special Counsel.

SPECIAL ASSESSMENTS—RATE OF INTEREST AFTER DELINQUENT.—Special assessments levied under provisions of code section 825 draw the rate of interest fixed in the ordinance until such assessment becomes delinquent, after which the interest is at the rate of one per cent per month the same as other delinquent taxes.

September 7, 1911.

MR. C. C. HUNT,
Secretary County Treasurers' Association,
Montezuma, Iowa.

DEAR SIR: Your letter of August 30th, addressed to the attorney general, has been referred to me for reply.

Your question briefly stated is: "What rate of interest or penalty should be collected on special assessments after such assessments become delinquent, under the provisions of code section 825?"

This section provides for the levying of special assessments, and that when the owner of the property takes certain steps he is entitled to pay the special assessment in seven equal annual instalments, with interest prescribed by the ordinance not exceeding six per cent.

It will be observed that the first instalment of the assessments is payable on the date of such assessment, and the others, with interest on the whole amount not paid, annually thereafter, at the same time and in the same manner as the March semi-annual payment of ordinary taxes; and that, where the owner of the property does not avail himself of the right to pay in annual instalments, the whole assessment "shall mature at one time and be due and payable, with interest, on the date of such assessment, shall be collected at the next succeeding March semi-annual payment of ordinary taxes." "All such taxes with interest shall become delinquent on the first day of March after their maturity, and shall bear the same *interest* with the same *penalties* as ordinary taxes."

Turning to section 1413 of the code, which provides the interest and penalty for ordinary taxes, we find the following language:

> "If the first instalment of taxes shall not be paid by April 1st, the whole shall become due and draw *interest as a penalty* of one per cent per month until paid from the first of March following the levy."

It is a well established rule that a statute imposing or creating a penalty is to be strictly construed, and no penalty exacted thereunder which is not clearly provided therein. With this rule of law in mind, it would seem to be clear that the six per cent interest (if that be the amount provided for in the ordinance) should be computed from the date of the maturity of the assessment until the date on which it became delinquent, and that thereafter the interest or penalty should be one per cent per month upon the delinquent instalment, the same as ordinary taxes.

The phrase "and shall bear the same interest with the same penalties", made use of in the latter part of section 825, was probably employed, not for the purpose of providing a penalty in addition to the interest, but because the interest provided for delinquent ordinary taxes was designated by the words "*interest as a penalty.*"

In other words, the latter part of section 825 should be construed the same as though it read "and shall bear the same interest or penalty as ordinary taxes."

While the meaning of the language is not entirely clear, and I can see that some might claim a different construction, yet in view

of the rule referred to, I firmly believe that the courts would construe this section as above indicated.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

CITIES AND TOWNS—FISCAL YEAR.—The fiscal year of cities and towns begins April 1st instead of January 1st.

September 7, 1911.

MR. E. L. EDMONDSON,
Brighton, Iowa.

DEAR SIR: Your letter of the 10th ult., to the attorney general was referred to me for reply. It has been impossible, until now, to notice your letter because of the large amount of official business to be cared for in this department.

You inquire whether the warrants that may be issued under section 898 of the Code may be issued prior to the commencement of the fiscal year, the revenues of which are anticipated.

I think such warrants issued in anticipation of revenues must be issued in the fiscal year the revenues of which are anticipated. To illustrate, warrants in anticipation of the revenues of a municipality for the fiscal year of 1912 must be issued after the beginning of that fiscal year, which is April 1st next instead of January 1st, as you suggest.

You will not regard this as an official opinion from this department but rather as the personal views of the writer given without very much investigation.

Respectfully yours,

N. J. LEE,
Special Counsel.

CITIES AND TOWNS—LIMIT OF TAXATION—MEMBERS OF COUNCIL MAY NOT DEAL WITH TOWN—POWER TO COMPEL BUILDING OF TEMPORARY SIDEWALKS—COMPENSATION OF EMPLOYES AND OFFICIALS—SLOT MACHINES WHEN GAMBLING DEVICES—MINORS IN POOL HALLS.—A city or town may not legally tax property more than five per cent of its real or taxable value. A member of the city council may not sell supplies to the city nor loan money to it. The town may compel the owner to construct temporary sidewalks but not until the street has been brought to grade. An employe of the city is only entitled to compensation for the time employed but the council or mayor would have no right to deduct from the salary or compensation of a regular officer for time when he was off duty and he may be removed or discharged if his absence is so frequent as to interfere with the discharge of his duties. Slot machines which are mere vending devices involving no element of chance as to the value of the property distributed by it is not a gambling device. Minors are not permitted to remain in pool and billiard halls even with the consent of parent or guardian. A pool hall may be operated in the same room with that of some other business, but if minors are permitted to enter it must be separated from that part of the room in which the other business is conducted by a substantial partition.

September 7, 1911.

MR. THOMAS F. MURRAY,
Oxford, Iowa.

DEAR SIR: Your letter of the 4th inst., addressed to the attorney general has been referred to me for reply.

Your first question is: "Can we legally tax property more than five per cent of the real or taxable value?"

This question must be answered in the negative. The tax for the general fund is limited to ten mills on the dollar.

Code section 887.

The only other taxes which a town might levy are specified in section 894 of the code supplement, subdivisions 4, 5, 6, 7, 8, 9 and 10 thereof. And by chapter 38 of the acts of the thirty-third general assembly, extending to towns, subdivisions 11 and 12, of said section 498, these various levies could only be made for the purposes speci-

fied; for instance, a library tax could not be levied and used for any other purpose. And an electric light tax could not be levied if there were not an electric light plant in the town.

But even if all these were properly levied, the aggregate would only be, as I figure it, four cents and one mill on the dollar. You probably have in mind the constitutional limit of indebtedness fixed by section 3 of article 11 of our constitution; but this does not apply to taxes.

Your second question as to whether or not a comcilman or town officer can sell supplies such as coal or gasoline to the town, must be answered in the negative. I call your attention to code section 668, subdivision 14, which provides that no member of any council shall be interested, directly or indirectly, in any contract or job of work, or the profits thereof, or services to be performed for the corporation. See also the case of

Bay vs. Davidson, 133 Iowa, page 688,

where it was held that a councilman who had sold lumber to the city for the purpose of building a sidewalk, could not recover therefor. As to the penalty for such action on the part of the councilman, will say our supreme court has decided,

State vs. York, 131 Iowa 635,

that such a prohibited act is an indictable misdeamor, under code section 4905. And the following section, 4906, prescribes the punishment, which is a jail sentence of not more than one year, or a fine not exceeding $500.00, or both.

Any person knowing the facts could institute a prosecution, which should be in the state court, and effect of which would be to bind the parties over to the grand jury; and if the grand jury indict, then it would be the duty of the county to prosecute, and there would be no expense to the town.

Your third question is: "Can a councilman or other officer of a town loan any amount to the town, and receive six per cent for the same?"

This should also be answered in the negative. The statute above referred to would prohibit such contract.

Your next question is whether or not the town can compel the property owner to put in a new temporary sidewalk, the street not being brought to grade.

This power is conferred by section 777 of the code supplement of 1907, and the owner's refusal and offer to put in a permanent sidewalk when the street is brought to grade would have no effect on the town's right to proceed.

Your fifth question is as to whether or not the mayor or council can deduct from the wages of its officers or employes for the time they are off duty, regardless of the number of days or half days. An employe would only be entitled to pay for the time he actually works. As to a regular officer, I doubt if the mayor or council could deduct anything from his salary. If his absence from duty was so frequent as to interfere with proper discharge of his duties, he should be removed and his place filled.

Answering your sixth question will say that a slot machine, which is a mere vending device, and which always makes the same return for the coin deposited, is not a gambling machine; but if it is so constructed as that on each occasion the party depositing the coin has a chance to get something more, depending on the operation of the machine, it would be a gambling device; and a mayor who would neglect or refuse to prosecute the keeper of such a machine would be subject to removal from office. The person who keeps such a machine in his place would be guilty not only of gambling, but of keeping a gambling house, and should be indicted under the state law, in which case it would be the duty of the county attorney to prosecute. But, if the town undertook to prosecute under its ordinance, then it would have to pay the expense.

Your seventh question, as to whether or not the owners of pool rooms, or billiard halls may allow minors to play pool or billiards, either with or without charge for the playing of the game, where the written consent of the parents or guardian is first obtained, must be answered in the negative.

Code section 5002 provides that no person who keeps a billiard hall, beer saloon, nine or ten pin alley, shall permit any minor to remain in such hall. A violation of the provision of this section shall be punished by fine, not less than five, nor more than one hundred dollars, or imprisonment in the county jail, not exceeding 30 days. This prosecution is one which the county attorney may be required to conduct.

Your eighth question is: whether or not a pool room can be lawfully conducted in the same building with some other business, such

as a confectionery store, or barber shop, if partitioned off from public view, and no minors allowed to go there.

If this partition is of a character sufficient to fully obstruct the view as well as sounds of games being played in the pool or billiard hall, then the pool or billiard hall could be lawfully conducted in one part of the building occupied for other purposes. But if the rooms are accessible one to another by means of a doorway, or if only separated by screens or window shades, I am inclined to think it would be illegal.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

CITIES AND TOWNS—ORDINANCES OF SHOULD NOT CONFLICT WITH STATE LAWS.—Ordinances of a city or town seeking to punish operators of automobiles should conform to the laws of the state with reference to the same subject.

September 7, 1911.

MR. DAVID ALGYER,
Paullina, Iowa.

DEAR SIR: Yours, addressed to the attorney general, has been referred to me for reply.

You refer to sections 21, 22 and 23 of chapter 72, of the acts of the thirty-fourth general assembly of Iowa, and ask to be advised whether incorporated towns can provide by ordinance for the punishment of violation of those sections by a fine of from one to one hundred dollars. You make no mention of section 20 of this chapter, but I think it is essential that it be considered along with the other sections to which you refer.

Section 22 provides: "The violation of any of the provisions of sections from 3 to 15, both inclusive, of this act shall constitute a misdemeanor punishable by a fine not exceeding $50.00."

Section 23 provides: "The violation of any of the provisions of section 20 of this act shall constitute a misdemeanor punishable by a fine not exceeding $100.00."

Section 21 provides: "— and any ordinance, rule or regulation contrary, or in any wise inconsistent with the provisions of this act, now in force or hereinafter enacted, shall have no effect."

It is well settled in this state that where the power is conferred upon a city or town so to do, it may describe and punish an act as an offense, even though the same act may also be an offense against the state.

Town of Bloomfield vs. Trimble, 54 Iowa, 399.

While this is true, yet it has been held under statutes authorizing cities and towns to enact ordinances not inconsistent with the laws of the state that an ordinance defining an offense and prescribing punishment, different, that is greater or less than the punishment provided by the state law for the same offense, was beyond the power of the city to enact.

The supreme court, in passing upon the matter, said:

> "We cannot presume that the state is not fully competent to enforce its criminal laws. If so, it does not need the aid of municipal ordinance. On the other hand, the attempt of the city to take jurisdiction of criminal offenses, and punish by different penalties from those adopted by the state, might easily have the effect to impair the administration of criminal justice."

Foster vs. Brown, 55 Iowa, 686.

Iowa City vs. McInnerney, 114 Iowa, 586.

While ordinances have been upheld in the later cases of

Avoca vs. Heller, 129 Iowa, 227, and

Neola vs. Reichart, 131 Iowa, 492,

yet it will be observed that in each of these cases the penalty imposed by the ordinance for the act which it undertook to punish was the same that the state law imposed as a punishment for the same offense.

Hence, I am of the opinion that city and town ordinances seeking to punish violations of this chapter should conform to the state law with reference to the amount of punishment to be inflicted. In other words, if it is sought to punish a violation of sections 3 to 15, inclusive, of this chapter, that the ordinance shall prescribe a punishment by fine not exceeding $50.00, in order to be in harmony with section 22 of this chapter.

And if, by the same or another ordinance, it was sought to punish the violation of section 20 of the chapter, the ordinance

should provide punishment by fine not exceeding $100.00, in order to be in harmony with section 23 of the chapter.

It will be observed that this chapter does not confer upon cities and towns any power or authority whatever with reference to this subject, but that section 21 rather limits and defines the powers conferred under the general law.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

POLL TAXES—WHO REQUIRED TO WORK.—An able bodied man who reaches his forty-fifth year before the expiration of the road working period should be warned out before reaching the age of forty-five or he will not be bound to work his poll tax that year.

September 9, 1911.

MR. ROBERT E. GROVES,
Dowds Leando, Iowa,

DEAR SIR: Replying to your letter of the 7th inst., addressed to the attorney general, will say that the provision, with reference to poll tax is found in section 1550 of the code supplement and reads as follows:

> "The road supervisor shall require all able-bodied male residents of his district, between the ages of twenty-one and forty-five, to perform two days' labor upon the roads, between the first days of April and October of each year."

In my opinion, a proper construction of this section would authorize the supervisor to require a man to work the two days in each and every year after he was twenty-one years of age, until he was forty-five years of age, i, e., if during the current year he reached the age of forty-five before the 1st day of April, then he would not be liable for that year, even though his name was on the books as age 44. If he is to reach the age of forty-five years between the 1st day of April and the 1st day of October, then in order to get the work for that year, he must be warned out in time so that he can do the work before he reaches his forty-fifth birthday; otherwise, he will not be liable for that year.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

TRACTION ENGINES—PLANKING OF BRIDGES AND CULVERTS.—The state law requiring the planking of bridges and culverts when traction engines were moved across same expired November 1, 1910.

September 9, 1911.

MR. DICK HAYES,
Packwood, Iowa.

DEAR SIR: Your letter of the 8th inst. addressed to the attorney general has been referred to me for reply and while this department cannot give opinions to private parties, an examination of the statutes reveals the fact that for several years the law required persons operating steam engines upon the public highway to plank bridges, culverts and street crossings substantially as stated by you in your letter.

However, by the act of the thirty-third general assembly the law was so changed as that the provisions requiring the planking expired on November 1st, 1910. It, therefore, follows that you should not have been held liable for any damages under this law.

It may be, however, that the town had passed some ordinance and that you are held liable under the provisions of that ordinance. If the damages have been paid, it is probably too late for you to get any relief.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

INSANE PERSONS—CUSTODY OF BEFORE COMMITMENT.—Where a person is charged with being insane it is the duty of the commissioners to provide for his custody until their investigation shall be concluded and they may surrender him to the sheriff and he may be kept in the county jail in charge of the sheriff.

September 13, 1911.

WM. L. BECKER,
President Commissioners of Insanity.
Dubuque, Iowa.

DEAR SIR: Mr. T. J. Fitzpatrick, of your city, recently addressed a letter to the attorney general in which he requested that you be advised with reference to the authority of commissioners of insanity

to confine a person charged as being insane pending a hearing, which letter has been referred to me for reply.

The weight of authority is to the effect that an adjudication of insanity is a prerequisite to commitment to an asylum.

22 Cyc., 1158, Note 85.

However, our statute, code section 2265, provides with reference to the authority of the commissioners as follows:

> "And may require that the person for whom such admission is sought be brought before them. * * * They may issue their warrant therefor, and provide for the custody of such person until their investigation shall be concluded, which warrant may be executed by the sheriff or any constable of the county."

Section 2271 provides:

> "In the case of public patients the commissioners shall require that they be in like manner restrained and protected and cared for by the board of supervisors at the expense of the county, and they may accordingly issue their warrant to such board, who shall forthwith comply with the same. If there is no poor house for the reception of such patients, or if no more suitable place can be found they may be confined in the jail of the county in charge of the sheriff."

While it is true that the latter provision above quoted confers upon the board authority to provide with reference to the custody of the patient after the person has been found to be insane and pending an appeal, yet it seems to me that the authority conferred by the first cited section to "provide for the custody" would authorize the board to make specifically the same provision as is by the statute made in section 2271, and while they would have no authority to commit the party to an insane asylum for any specific length of time, yet the mere fact that the place in which they ordered him to be cared for pending their investigation happens to be a private hospital in which insane persons are kept and cared for would not render such restraint illegal or render the members of the commission liable for damages on account of their having ordered him to be there confined.

It should be borne in mind, however, that the statute contemplates a speedy investigation and it would only be in a rare case that there would be any necessity for such order. In fact, I doubt if any such order would be necessary in any case. The warrant of

the commissioners to the sheriff or constable is sufficient authority under which the patient might be retained in custody by the sheriff or constable and it might well be left to the sheriff or constable having the patient in custody to arrange for a place in which to keep the patient until the conclusion of the investigation.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

PUBLIC WATERS.—Whether or not a stream is navigable depends upon whether or not it was meandered by the government surveyors.

September 15, 1911.

MR. LOUIS KECK,
Wapello, Iowa.

DEAR SIR: Yours of the 12th inst. addressed to the attorney general has been referred to me for reply.

You request to be advised whether certain accretions along the east bank of the Iowa river belong to you or the state of Iowa. It has probably not occurred to you that it would be out of place for this department to give to a private individual an opinion concerning a matter in which the state might be adversely interested.

For your information, however, I will call your attention to the case of *Park Commissioners vs. Taylor,* and others, 133 Iowa, at 453, where you will find a very learned discussion of all the questions propounded in your letter.

With reference to the question of "whether or not the Iowa river at Wapello is to be considered a navigable or unnavigable stream", will say that that depends upon whether or not the stream at that point was meandered. The supreme court in the case to which you have already been referred, on page 458 of the opinion, makes use of the following language: "There can be no doubt that the approval of the surveying, when made, constituted a determination by the land department that the stream meandered was a navigable stream, and this determination is conclusive so far as the title of riparian owners is concerned."

Hoping that the foregoing may be sufficient for your purpose, I remain,

Very truly yours,

C. A. ROBBINS,
Assistant Attorney General.

SOLDIERS—FUNERAL EXPENSES OF—HOW PAID.—The funeral expenses of honorably discharged, indigent United States soldiers may be paid from the fund provided by the tax authorized in code supplement section 430.

September 18, 1911.

HON. WM. J. GREENE,
Clinton, Iowa.

MY DEAR SIR: Your letter of the 16th inst. to the attorney general was referred to me for reply.

You request an opinion as to whether the funeral expenses of an honorably discharged soldier of the United States can be paid from the fund provided by the tax referred to in section 430 of the supplement to the code, 1907, unless it be shown that such soldier did not leave sufficient means to defray the expenses of his funeral.

Section 430 referred to provides that a tax may be levied to create a fund for the relief of and to pay the funeral expenses of honorably discharged indigent United States soldiers, sailors, etc. It appears from this that in order to be entitled to have such expenses paid from this fund the deceased soldier must have been indigent. I take this to mean dying without sufficient means to defray the expenses of a suitable funeral. I think this relates to the financial condition of the deceased and not to the ability of relatives to provide burial.

A substitute was enacted for section 433 of the supplement to the code, 1907, which provides that the board of supervisors shall designate some suitable person in each township to cause to be decently interred the body of any honorably discharged soldier, sailor or marine who served in the army or navy of the United States during any war, who may die without leaving sufficient means to defray the expenses of his funeral.

I think, therefore, such funeral expenses are authorized to be paid where the circumstances of the deceased were as above suggested, regardless of the financial condition of the widow and I do not believe that the widow can be required to make a showing to the effect that she is indigent or is a pauper before the funeral expenses of her deceased husband are paid out of this fund.

Respectfully yours,

N. J. LEE,
Special Counsel.

COUNTY OFFICERS—COMPENSATION—EXTRA COMPENSATION NOT PERMITTED.—No contract may lawfully be made looking to allowance or payment to a public officer of any other or greater compensation than that fixed by law.

September 18, 1911.

E. B. STILES, *County Attorney,*
Manchester, Iowa.

DEAR SIR: Replying to yours of the 16th inst. addressed to the attorney general in which you make inquiry as to the duty, as well as the right of the board of supervisors to allow the county auditor extra compensation on account of the extra work imposed by the last legislature, will say that the attorney general has no recollection of having made any oral statement such as that to which you refer. If any such statement was made either by the attorney general or by any of the assistants, it was doubtless along the line that the legislature should provide additional compensation for the extra work imposed. I think the matter is controlled by the decision of our supreme court in the case to which you refer, *Benton vs. Decatur county, Iowa,* 36 Iowa, 504. See also *Massie vs. Harrison county,* 129 Iowa, at 280, where the supreme court says: "and we have distinctly ruled in several cases that no contract can be made looking to the allowance or payment to a public officer of any other or greater compensation than that fixed by law." And if public money is paid pursuant to such a contract it may be recovered back. *Massie vs. Harrison county,* 129 Iowa, at 280. *Heath vs. Albrook,* 123 Iowa, 559, at 568.

Very truly,

C. A. ROBBINS,
Assistant Attorney General.

HIGHWAYS—CATTLE LANE.—Where cattle-way is established under a public highway the obligation imposed by code section 1524 upon the owner of the land to keep the same in repair runs with the land, and hence falls upon a subsequent purchaser of the land.

September 21, 1911.

CHARLES E. SCHOLZ, *County Attorney*,
Guttenberg, Iowa.

DEAR SIR: Yours of the 18th inst. addressed to the attorney general has been referred to me for investigation and reply.

Your question, briefly stated, is, whether or not a cattle-way across a public highway, established under the provisions of code section 1524, runs with the land in such a way as that a subsequent owner of the land may be required to keep the same in repair.

I have been unable to find any authorities that would throw any light upon the question, but you will observe that this section provides, "the applicant shall construct the same at his own expense, and be responsible for all damages that may arise from its construction, or from the same not being kept in repair." The following section, 1525, provides, "*if the person on whose land* such cattle-way is constructed fails to keep the same in repair, it shall be the duty of the road supervisor to make all necessary repairs, and charge the same to the owner of the land upon which such way is constructed, and upon his refusal or failure to pay, the supervisor shall recover the same in an action brought in his own name, which money, when collected, shall be expended in improving or repairing the public roads in the road district where such cattle-way is constructed."

Clearly, this section was intended to apply to the subsequent owner rather than to the person who originally constructed the cattle-way, and with this idea in view, it would seem to me that this section affords ample relief and you would not be compelled to go into the question as to whether or not, in the absence of this section, the duty to keep the cattle-way in repair would run with the land.

You will understand, of course, that this is not a matter upon which this department should render an official opinion, and that the foregoing is simply the personal views of the writer.

Very truly,

C. A. ROBBINS,
Assistant Attorney General.

AUTOMOBILES—CHARACTER OF LAMPS REQUIRED.—The front lights of an automobile are required to be such as will be visible at least 500 feet in the direction in which the motor vehicle is headed.

September 22, 1911.

MR. ARTHUR L. OLDS,
Charles City, Iowa.

DEAR SIR: I am in receipt of your communication of the 20th instant requesting an opinion as to whether your side oil lamps located on the front of the dash is a sufficient compliance with the law which requires two head lights.

The attorney general is not authorized to give official opinions except to the various departments of state. I may, however, direct your attention to the provisions of section 18 of chapter 72, acts of the thirty-fourth general assembly, which provides that "The light or lights of the front lamps shall be visible at least five hundred feet in the direction in which the motor vehicle is proceeding." Unless your oil lamp could be visible at least five hundred feet it would certainly not be a compliance with the law.

Yours very truly,

GEORGE COSSON,
Attorney General.

SOLDIERS' EXEMPTIONS.—The soldiers' exemption law enacted by the thirty-fourth general assembly applies to assessments made after the law went into effect but not those previously made.

September 23, 1911.

MR. T. E. SWARTS,
Box 264, Blockton, Iowa.

DEAR SIR: I am in receipt of your communication of the 21st instant submitting certain questions for reply.

The attorney general is not authorized to give official opinions except to the various departments of state. The law relating to exemption of soldiers was amended by the last general assembly and will apply to assessments made after the law went into effect but not before and provides:

"The property not to exceed twelve hundred dollars in actual value, of any honorably discharged Union soldier or sailor of the Mexican war or of the war of the rebellion or of the widow remaining unmarried of such soldier or sailor. It shall be the duty of every assessor annually to make a list of such soldiers, sailors, widows, and to return such list to the county auditor, upon forms to be furnished by such auditor for that purpose; but the failure on the part of any assessor so to do shall not affect the validity of any exemption. All soldiers, sailors or widows thereof referred to herein shall receive a reduction of twelve hundred dollars at the time said assessment is made by the assessor unless waiver thereof is voluntarily made of said exemption at said time."

Paragraph 3 of section 1304 of the supplement to the code, 1907, provides:

"Household furniture to the actual value of three hundred dollars and kitchen furniture; beds and bedding requisite for each family; all wearing apparel in actual use; and all food provided for the family; shall be exempt, but the exemptions allowed in this subdivision shall not be held to apply to hotels and boarding houses except so far as said exempted classes of property shall be for the actual use of the family managing the same."

I would not want to advise you unofficially on the other matters without making an inspection of the premises and this of course would be impossible for me to do.

Yours very truly,

GEORGE COSSON,
Attorney General.

PUBLIC OFFICIALS—ELECTIVE OFFICERS MUST BE CITIZENS—APPOINTIVE OFFICERS DOUBTFUL.—None but qualified electors may hold an elective office. Whether one not a qualified elector is eligible to an appointive office, query.

September 26, 1911.

MR. JAMES GRAHAM,
Moville, Iowa.

DEAR SIR: Yours of the 25th inst. addressed to the attorney general has been referred to me for reply.

The question is, whether or not one not a citizen of the United States can hold an appointive office in any department of the state government.

Citizenship, although usually expressly required either by the constitution or statutes, would not seem in the absence of such requirement to be an absolutely necessary qualification for office. *29 Cyc.*, page 1377. But it has sometimes been held that it is a necessary qualification for *elective office*, even in the absence of the constitutional or statutory provision to that effect. *29 Cyc.*, 1377. *State vs. Van Beek*, 87 Iowa, at page 577.

In the last cited case our supreme court held that the office of sheriff could not be filled by an alien, and in the course of the opinion, made use of the following language: "There is no provision in our constitution or statute upon that subject, yet it is certainly a fundamental principle of our government that none but qualified electors can hold an *elective office*, unless otherwise specially provided." The office of state veterinary surgeon, as well as the office of his assistant, are not elective offices, but appointive offices. There is no constitutional provision specifying the qualifications of either. The statute, code supplement, section 2529, requires that the state veterinary surgeon shall be a graduate of some regularly established veterinary college and skilled in that science, and no other qualifications are specifically required. Code supplement, section 2533 provides: "The governor may appoint such assistant state veterinary surgeons as may be deemed advisable," and there are no further qualifications provided for in the statute. While there are many reasons why an officer should be a citizen of the state, which would apply with equal force to an appointive and to an elective office, yet there are some appointive offices where some of these reasons would not apply with such force. The exact question propounded by you is an open one in this state and is so close that it would not be wise for this department to undertake to determine the matter one way or the other, as it is a question which will doubtless arise in the courts before long, yet we have given you the benefit of the only decision of our court which would have any bearing on the matter.

Yours truly,

C. A. ROBBINS,

Assistant Attorney General.

OSTEOPATHY—RIGHT TO PRACTICE.—One passing the examination and receiving a certificate is entitled to practice osteopathy.

September 27, 1911.

DR. W. P. GRIMES,
General Medical Examiner,
Kansas City, Mo.

DEAR SIR: Your letter of the 23d inst. addressed to the attorney general was referred to me for reply.

You submit the following inquiries: First, what constitutes the rights of an osteopath to practice in this state; second, can an osteopath practice medicine, surgery, sign death warrants, etc.; third, do the laws of our state require a person taking out life insurance to be subjected to a medical examination.

Answering your first inquiry as noted, will say that an osteopath is entitled to practice as such in this state upon being granted a certificate, based upon examination, by the state board of medical examiners, but he is not authorized to prescribe or use drugs in his practice, nor to perform major or operative surgery, nor to sign death certificates.

Our laws do require those taking out life insurance to submit to a medical examination. This is also the ruling of our insurance commissioner.

Respectfully yours,
N. J. LEE,
Special Counsel.

EXECUTIVE CLEMENCY—PAROL OF PRISONERS—PUBLICATION OF NOTICE BY GOVERNOR.—The governor is not required to publish a notice of application made to him for clemency in murder cases unless it is his intention to extend clemency.

September 27, 1911.

MR. GEORGE A. WILLIAMS,
Register No. 7646,
Ft. Madison, Iowa.

DEAR SIR: Your letter of the 24th inst. addressed to the attorney general was referred to me for reply.

You inquire what the law is with regard to the publication of notices for the submission of applications for pardon to the board of parole in cases of persons serving a life sentence for murder in the first degree, and also as to whether it is mandatory upon the governor to cause to be published notices of such applications when they are made to him.

The attorney general is not required to render official opinions in matters of this kind, but in this instance, I may say in a personal way that it is my understanding of the law that no such application for pardon as you mention may be submitted to the board of parole for its advice thereon unless notice thereof is duly published in the manner prescribed by the law.

Answering the second part of your question, it is my opinion that it is not mandatory upon the governor to cause to be published notices of such applications made to him unless he intends to extend clemency. The provision of the statute is, that no pardon shall be granted by the governor in cases of conviction for murder in the first degree until he shall have presented the matter to, and obtained the advice of the board of parole, and as suggested, the matter may not be submitted to the board of parole until notice has been given, but there is no requirement that such notice shall be published by the governor if he refuses to grant the application or extend clemency and does not desire the advice of the board of parole thereon.

Respectfully yours,

N. J. LEE,
Special Counsel.

ALIENS—RIGHT OF TO SUE IN COURTS OF THIS STATE.—The courts of this state are open to all upon equal terms except that non-residents may be required to give security for costs.

September 28, 1911.

JAMES HARRIS VICKERY, *Counselor at Law*,
Friedrich Str. 61,
Berlin, W. 8, Germany.

DEAR SIR: Your communication of April 8th last addressed to the secretary of state of this state was referred to this department for attention. You inquire:

"1st. Can aliens (Germans) sue *in forma pauperis* if resident within this state?

"2d. Can they so sue if resident without the state or in a foreign country?

"3d. What proof of poverty must be produced?

"4th. Where is the law bearing on these matters to be found?"

With regard to these inquiries, I may say that there is no provision in our law making any distinction between any persons as to the terms or conditions upon which they may commence or prosecute causes in court. Our courts are open to all upon equal terms. There are some provisions in the law which may be in the nature of exceptions to the rule as stated, namely: Non-residents of the state and foreign and private corporations may be required to give security for costs, to be permitted to maintain actions in the courts of this state, upon a showing being made by the defendant that he has a good defense to the cause brought. Also in criminal proceedings the defendant is entitled to the assistance of counsel if he requests the same and shows to the court that he is not able to employ counsel at his own expense, and in criminal proceedings the defendant also is entitled to have subpoenas issued for his witnesses. I know of no provision in our law whereby a person, by making a showing that he is a pauper or is unable to pay the ordinary costs of litigation, may be permitted to commence and maintain actions at law or equity without liability for fees and costs.

Trusting this information will be of some value to you, I beg to remain,

Respectfully yours,

N. J. LEE,
Special Counsel.

SOLDIERS' EXEMPTIONS—SOLDIER'S WIFE NOT ENTITLED TO.—The exemption provided is in favor of the soldier and not in favor of the soldier's wife, yet where the property in fact belongs to the soldier even though the title is in the wife's name the exemption should be allowed.

September 28, 1911.

MR. A. E. SHAVER,
Plover, Iowa.

DEAR SIR: Your letter of the 26th inst. addressed to the attorney general was referred to me for reply.

You request an opinion as to whether the property of a Civil war soldier is exempt from taxation if such property is held in the wife's name, the soldier receiving the benefit therefrom.

The law applying to this year's assessment of taxes allowed an exemption of $800.00 to such soldiers, providing neither he nor his wife had property of the value of $5,000.00, but there would be no exemption to the wife if she owned the property. But you say the property in fact belongs to the soldier, but the legal title is in the wife's name. If the soldier in good faith owns the property and the mere naked legal title is in the name of the wife, I do not think that would prevent the allowance of the exemption.

Respectfully yours,

N. J. LEE,
Special Counsel.

INTOXICATING LIQUORS—PATENT MEDICINES.—Patent medicines containing alcohol are intoxicating liquors where capable of use as a beverage.

October 3, 1911.

DR. F. FORMANECK COMPANY,
Chicago, Ill.

GENTLEMEN: I am in receipt of your communication of the 2d instant requesting information concerning the law relative to the sale of patent medicine which contains alcohol from three to twenty per cent.

Our supreme court has held that where a prescription is filled wherein the distinctive characteristic of alcohol or intoxicating liquor is destroyed, and the same is filled as a medicine and used

as a medicine and of such a nature that it could not be used as a beverage, it is not in violation of law; we have, however, prohibited all sales of patent medicines which contain a sufficient per cent of alcohol to cause the same to be purchased by inebriates as a substitute for straight intoxicating liquor in territory where the sale of liquor as a beverage was prohibited and county attorneys and prosecuting officers are watching this matter much more closely than formerly. It is perfectly evident to any one that a number of patent medicines contain a sufficient amount of alcohol to cause the same to be purchased by inebriates in the event that they cannot secure anything better.

Yours very truly,

GEORGE COSSON,
Attorney General.

SUNDAY VIOLATIONS.—Code section 5040 prohibits the doing of labor on Sunday except works of necessity and charity. The sale of ice-cream, light refreshments, newspapers, is generally by common consent conceded to be works of necessity.

October 9, 1911.

MR. L. HILLER,
Waverly, Iowa.

DEAR SIR: Referring to the Sunday closing law, the section in question is 5040 of the code which provides that there shall be no labor on Sunday except works of necessity and charity. By common consent, however, the sale of ice-cream, light refreshments and newspapers, the running of street cars and trains, both steam and interurban, have been permitted. In a number of places there has been a real serious effort made to enforce the law, however, against others; that is, against picture shows and barbers. In some places the matter failed because the punishment could not exceed a fine of five dollars.

I suggest that you and some of the other good people of your town take the matter up with the county attorney to the end that all business which is generally recognized as secular business may be stopped.

Yours very truly,

GEORGE COSSON,
Attorney General.

SOLDIERS' EXEMPTIONS—ROAD DRAGGING CONTRACTS.—Chapter 62, acts of the thirty-fourth general assembly, increasing soldiers' exemptions from $800.00 to $1,200.00 does not apply to assessments for the year 1911. Contracts for the dragging of public highways entered into in April, 1911, pursuant to chapter 101 of the laws of the thirty-third general assembly and prior to the taking effect of chapter 70 of the laws of the thirty-fourth general assembly are valid and should be carried out.

October 9, 1911.

HON. L. H. MATTOX,
Shenandoah, Iowa.

DEAR SIR: Your letter of the 6th inst. addressed to the attorney general was referred to me for reply.

You say that you have ruled that the $1,200.00 exemption provided for in chapter 62, laws of the thirty-fourth general assembly, does not apply to the taxes levied for the instant year and desire to know whether your ruling is correct.

You also state that certain contracts for dragging were entered into between the trustees in certain townships in your county at the regular meeting last April, under chapter 101, laws of the thirty-third general assembly, and prior to the taking effect of chapter 70, laws of the thirty-fourth general assembly, and that the claim is made by some that such contracts are not valid and cannot be carried out but that the trustees and the persons with whom such contracts were made insist that the contracts are valid and that you incline to that view and desire to know whether your ruling to that effect is correct.

I think your holdings in both cases are correct. The law giving the exemption of $1,200.00 did not take effect until July 4, 1911, and there is nothing in the act which makes it apply to the assessment made in the year 1911.

With reference to the last proposition, will say that if the contracts in question were made in accordance with authority given by chapter 101, laws of the thirty-third general assembly, they will be upheld and enforced according to their terms. There is no provision in the new law which seeks to repudiate such contracts and even if there were, the courts undoubtedly would hold that they could not be impaired.

I call your attention to the case of *Disbrow vs. Supervisors*, 119 Ia., p. 538, and the case of *Shinn vs. Cunningham*, 120 Ia., p. 384. These cases, I think, support the ruling made.

You complain that you have not been able, thus far, to secure from the internal revenue collector a list of the names of those holding receipts from the federal government for the sale of intoxicating liquors, as authorized by recent legislation. If you do not receive this list within a reasonable time you may write this department again and we will take the matter up with the federal authorities to see what causes the delay.

Respectfully yours,

N. J. LEE,
Special Counsel.

TAXATION—VALUE OF PROPERTY.—Registered animals should be assessed at their actual value. Sometimes the registration adds to the value of the animal but this is not always so.

October 10, 1911.

MR. W. L. PEASE,
Washta, Iowa.

DEAR SIR: Your letter of the 6th inst. addressed to the attorney general was referred to me for reply.

You inquire whether the board of supervisors or the assessor is empowered to fix a higher taxable value on recorded animals than on those which are not recorded.

The attorney general cannot officially advise you in a matter of this kind but in this instance I may say in a personal way, as a courtesy to you, that the law requires that all property be assessed for taxation upon the basis of its actual value and one-fourth of such value is the assessable value and the mere fact that an animal is registered would not in and of itself determine whether it should be valued higher or lower than an animal which is not registered. Of course, ordinarily, it will be presumed that registered animals are more valuable, but it would not necessarily be so in every case. The value for purposes of taxation should be fixed according to the fact in each case.

Respectfully yours,

N. J. LEE,
Special Counsel.

OFFICER—TERM DEFINED.—A druggist who delivers a few lectures to the students at Ames College in veterinary science and who has nothing to do with the business side of the department is not an officer within the meaning of code section 189.

October 11, 1911.

E. W. STANTON, *Secretary,*
Ames, Iowa.

MY DEAR SIR: Your letter of the 5th inst. addressed to the attorney general has been referred to me for reply.

You say that the question often arises with you as to the proper interpretation to be placed upon the word "officer" as used in section 189 of the code and you inquire whether this term includes instructors and employes of the college who are not connected in any way with the purchase of supplies for the institution. I quote the following statement from your letter:

"For instance, Mr. Judisch, a druggist in Ames, delivers a few lectures to the students in veterinary science. He has nothing to do with the business side of the department. Would you consider that this section of the code makes it unlawful for our purchasing agent to buy medicine and supplies from him for the veterinary and other departments? The board desire your opinion upon this point."

The section of the code referred to reads as follows:

> "It shall be unlawful for any trustee, warden, superintendent, steward, or any other officer of any educational, penal, charitable or reformatory institution, supported in whole or in part by the state, to be interested directly or indirectly in any contract to furnish or in furnishing provisions, material, or supplies of any kind, to or for the institution of which he is an officer; and it shall be unlawful for any such trustee, warden, superintendent, steward, or other officer directly or indirectly, to receive in money or any valuable thing any commission, percentage, discount or rebate on any provision, material or supplies furnished for or to any institution of which he is an officer. And it shall be unlawful for any such trustee, warden, superintendent, steward, or other officer of any state institution, to be directly or indirectly interested in any contract with the state to build, repair or furnish any institution of which he may be an officer."

Upon your statement of fact it is my opinion that Mr. Judisch is not an officer within the meaning of that term as used in the section of the statute quoted and the prohibition contained therein would not apply to such transactions as you describe between him and the state board of education. I do not think that an instructor in the Iowa State College of Agriculture and Mechanic Arts is a public officer in any sense that excludes the existence of a contract relation between himself and the board which employs him, in respect to such employment. It seems to me that he stands in the same relation to the state board of education that a teacher in the public school occupies with respect to the school district by which such teacher is employed, and that is purely a contract relation. The very purpose of this provision in the statute is to prohibit the officers enumerated therein from acting in any transaction for themselves as individuals on the one part and as officers and agents of the institutions therein mentioned on the other part. The policy of the law is that such officers shall have but a single interest, that of the office or trust which is reposed in them. But where a person in the employ of one of the institutions mentioned is not an officer within the meaning of the term as used in the section of the statute quoted nor has any voice or part in the making of contracts for the furnishing of any of the materials or supplies referred to, no reason exists for the application of this rule, and it clearly was not the intent of the law-makers to embrace transactions with such employes within the scope of said section of the statute.

I may say further, however, that aside from this express prohibition in the statute against such officers of the institutions mentioned in said section being interested in any contract therein referred to, such contracts or transactions would be void at common law on the grounds that they would be both violative of the fundamental law of agency, and contrary to public policy. Judge Dillon, in his work on Municipal Corporations, has given expression to this rule in the following language:

> "It is a well-established and salutary rule in equity that he who is intrusted with the business of others cannot be allowed to make such business an object of pecuniary profit to himself. This rule does not depend upon reason technical in character, and is not local in its application. It is based upon principles of reason, of morality and of public policy. It has its foundation in the very constitution of our nature, for it

has authoritatively been declared that a man cannot serve two masters, and is recognized and enforced wherever a well-regulated system of jurisprudence prevails. One who has power, owing to the frailty of human nature, will be too readily seized with the inclination to use the opportunity for securing his own interest at the expense of that for which he is intrusted. * * * * The law will in no case permit persons who have undertaken a character or a charge to change or invert that character by leaving it and acting for themselves in a business in which their character binds them to act for others."

Our own supreme court, in a recent case, where this question was involved, through Justice Bishop, quoted with approval the following language, which was taken from a New York case:

"The council of the city were the agents of the city, and, while holding their relation to it, each member of that body was under such an obligation of absolute loyalty to the interests of the city, as prohibited him from entering into any arrangement with his associates by which his individual interests could come in conflict with the interests of his constituents, who are entitled exclusively to such an exercise of his caution and judgment in their behalf as an ordinarily prudent man would exercise in his own business."

The foregoing rules and principles of the common law would not apply to the case you put, for, as already noted, Mr. Judisch has no voice or part in the purchasing of the material which he sells to the college. In respect to such transactions he acts in a single capacity only—that of seller—and no prejudice can result to the public interest and I do not see that the transactions you mention are in any way prohibited by law or illegal in any sense.

Respectfully yours,

N. J. LEE,
Special Counsel.

SCHOOLS—CERTIFICATES OF RESIDENCE—PROFICIENCY OF PUPILS—IN OTHER COUNTIES.—The president and secretary of a school corporation should issue a certificate of residence to a pupil entitled to attend high school in another district. The proficiency of a pupil is determined by the certificate of the superintendent or an examination before the officers of the high school. A pupil entitled to attend high school outside his home district may attend in another county.

October 12, 1911.

MR. WALTER E. WELLONS,
Bussey, Iowa.

DEAR SIR: Your letter of the 10th inst. addressed to the attorney general was referred to me for reply.

You submit a number of inquiries in relation to chapter 146, acts of the thirty-fourth general assembly, which provides for the payment of tuition of pupils attending high schools outside of their own district in certain cases.

I note the questions as follows:

"1. Is it compulsory on the president or secretary of a school corporation to issue a certificate as to residence and age of a pupil desiring to attend in a high school?

"2. Do the above named officers or any director have any right to pass on the said pupil's proficiency as to studies or the entrance examination required by high schools?

"3. Does a pupil have to attend in the same county as his residence if any other high school is nearer or not nearer?

"4. Does a pupil have to have a certificate from the county superintendent of the county of his residence or would any other county superintendent's certificate suffice?

"5. Does not the language contained in the last clause of section 2 of said act mean that a pupil may be admitted to any grade of a high school upon examination and take the place of the county superintendent's certificate?

"6. In section 4 of the act how would the tax be certified from one school corporation in one county to another school corporation in a different county?"

Your first question should be answered in the affirmative because section 2 provides that such certificate shall be issued on application therefor. In answering this question as I have, I have assumed, of course, that the pupil making application for such a certificate is a resident of the district where the application is made and that the applicant is of school age and that the district in which he resides does not offer a four-year high school course and that he has completed the course of study offered in such school corporation.

Your second question should be answered in the negative. The proficiency of the pupil is determined either by the certificate of the county superintendent of the county of his residence or by an examination before the officers of the high school where he purposes to attend or under their direction.

Your third question must be answered in the negative. The pupil is free to attend any high school which will receive him, subject to the other conditions mentioned in said act.

Your fourth question is answered in the affirmative, subject to the qualification, however, that the pupil does not need a certificate from any county superintendent if he pass a satisfactory examination in the high school he desires to attend and the officers of said high school will admit him upon such examination, but such pupil in no case could be admitted to a high school upon the certificate of a county superintendent of a county other than that of the pupil's residence alone.

Your fifth question must be answered in the affirmative. The certificate of the county superintendent is not needed where the high school admits a pupil upon examination but, of course, the certificate of the county superintendent of the pupil's county is sufficient evidence of proficiency to admit the pupil to any high school without any examination before the high school, providing the high school is willing to receive the pupil, as it is not mandatory in any case upon a high school to receive a pupil.

I do not believe I can give an answer to your sixth question that will be any clearer than the language contained in section 4 of this act. I think you are slightly in error as to the method of paying this tuition when the home district refuses to pay it. The tax is not certified from one school corporation in one county to another school corporation in a different county, as you seem to think. Section 4 provides that where payment is refused by

the school corporation where the pupil resides that the board of the school corporation where he attends shall file with the county auditor of the county of the pupil's residence a statement certified by the president of the board specifying the amount due for tuition and for contingent expenses and the time for which the same was claimed and it then becomes the duty of the county auditor of the county of the pupil's residence to transmit to the county treasurer an order directing the treasurer to transfer the amount of such account from the school corporation of the pupil's residence to the school corporation where the pupil attends and that the treasurer shall pay such amount to the creditor corporation.

Of course, the amount to be paid is in no case to exceed the average cost of tuition in the nearest high school.

Respectfully yours,

N. J. LEE,
Special Counsel.

CITIES AND TOWNS—ORDINANCES—SPEED OF AUTOMOBILES—VALID. —An ordinance of a city or town providing that the speed of automobiles shall not be greater than one mile in five minutes is in conflict with section 21, chapter 72, laws of the thirty-fourth general assembly and invalid.

October 12, 1911.

MR. J. F. YOTHERS,
Toledo, Iowa.

DEAR SIR: Your letter of the 10th inst. addressed to the attorney general has been referred to me for reply.

You request an opinion from this department as to whether a city ordinance regulating the speed of automobiles providing that the speed shall not be greater than at the rate of one mile in five minutes is in conflict with the provisions of section 21, chapter 72, laws of the thirty-fourth general assembly.

In my opinion an ordinance containing a provision that the speed of automobiles shall not be greater than one mile in five minutes is in conflict with the provisions of section 21, chapter 72, laws of the thirty-fourth general assembly.

It is true, as you say, that the meaning of said section is not very clear but I think there can be no doubt as to what the intention of the legislature was in enacting the provision in said

section limiting the rate of speed. If the ordinance fixing the rate of speed at one mile in five minutes is valid, then an ordinance fixing the rate of speed at one mile in one minute would be equally valid. The purpose and intent of the legislature was to empower municipalities to adopt ordinances protecting persons in the thickly settled communities from the dangers incident to fast driving of motor vehicles and this intent could not be given effect and force unless the language is given the interpretation I suggest. It certainly could not have been the intention to prohibit cities and towns from passing ordinances fixing a lesser rate of speed than one mile in six minutes because there is no danger from slow driving.

Respectfully yours,

N. J. LEE,
Special Counsel.

UNITED STATES SOLDIERS—DEFINED.—The term "United States Soldier" as used in code supplement section 430 would include soldiers who served in the Spanish-American war.

October 13, 1911.

MR. HENRY HOWARD, *Pension Attorney,*
Clinton, Iowa.

DEAR SIR: Your letter of the 12th inst. addressed to the attorney general was referred to me for reply.

You request to be advised whether Spanish war veterans and their wives are entitled to relief out of the fund provided for the relief of indigent soldiers and their widows.

You also inquire whether relief may be furnished to persons who have property and not entitled to it.

Your first question must be answered in the affirmative and the second question in the negative. Section 430 of the supplement to the code, 1907, provides that a certain tax may be levied for the purpose of creating a fund for the relief of and to pay the funeral expenses of honorably discharged, indigent United States soldiers, sailors and marines and their indigent wives, widows and minor children, etc. This would include, without question, soldiers who served in the Spanish-American war and their widows.

The law provides that indigent soldiers and widows and children shall receive relief but I presume the commission having in charge the disbursement of such funds would have a reasonable discretion in determining who are indigent and needy persons and because one applying for relief from such funds has a certain amount of property it might not necessarily follow that he should be denied relief but if, as you say, such applicant has property and not entitled to the relief, it could not be granted under the law.

You will not regard this in any sense as an official opinion from this department but merely as the personal views of the writer given as a courtesy to you.

Respectfully yours,

N. J. LEE,
Special Counsel.

POLL TAX—WHO LIABLE FOR.—All able bodied male residents are liable to perform the two days' labor on the roads required by code supplement section 1550 whether citizens of the United States or not.

October 18, 1911.

MR. H. M. BARR, *Township Clerk,*
Edgewood, Iowa.

DEAR SIR: Yours of the 13th inst. addressed to the attorney general has been referred to me for reply.

Your question briefly stated is, whether an alien, or one not a citizen of the United States, is liable for poll tax.

Code supplement section 1550 provides:

> "The road supervisor shall require all *able bodied male residents* of his district between the ages of twenty-one and forty-five to perform two days' labor upon the roads between the first days of April and October of each year."

Our supreme court has held that: "A resident of the state is one who resides permanently or for a time in the state."

Mann vs. Taylor, 78 Iowa, 355.

Hence, in my opinion, a resident, whether a citizen or not, is liable for poll tax.

Very truly,

C. A. ROBBINS,
Assistant Attorney General.

INTOXICATING LIQUORS AND POISONS—BY WHOM SOLD.—One not a registered pharmacist may not conduct business of selling at retail drugs, medicines or poisons except proprietary medicines.

October 18, 1911.

CENTRAL MANUFACTURING COMPANY,
Iowa City, Iowa.

GENTLEMEN: Your letter of the 16th inst addressed to the attorney general was referred to me for reply.

You inquire whether a law has been passed prohibiting the sale of witch hazel, peroxide, face cream and other articles containing from six to fifteen per centum of alcohol by general, dry-goods and department stores.

I am not aware that any recent law of the tenor you mention has been passed. The section of the statute which undoubtedly regulates the sale of the remedies, drugs and articles that you mention is section 2588 of the code, with which you are, no doubt, familiar. This section provides in part that no person not a registered pharmacist, shall conduct the business of selling at retail, compounding or dispensing drugs, medicines or poisons or chemicals for medicinal use or compounding or dispensing physicians' prescriptions as a pharmacist, nor allow any one who is not a registered pharmacist to so sell, compound or dispense such drugs, medicines or chemicals, or physicians' prescriptions, except such as are assistants to and under the supervision of one who is a registered pharmacist, and physicians who dispense their own prescriptions only; but no one is prohibited by this section from keeping and selling proprietary medicines and such other domestic remedies as do not contain intoxicating liquors or poisons, nor from selling concentrated lye or potash, and certain other things.

Yours very truly,

N. J. LEE,
Special Counsel.

SCHOOLS—TRANSPORTATION OF PUPILS—DUTY OF BOARD TO PROVIDE. —Subdivision 1 of section 1, chapter 143, acts of the thirty-fourth general assembly, is mandatory and imposes upon the board the duty of providing suitable transportation in the manner prescribed.

October 18, 1911.

HON. A. M. DEYOE,
Superintendent Public Instruction,
State House.

DEAR SIR: Your communication of the 17th inst. addressed to the attorney general was referred to me for reply. You request an opinion upon the following:

> "Under section C of substitute for house file No. 33, enacted by the thirty-fourth general assembly, creating a law to govern consolidated independent school districts, would the school board have any discretion in the matter of transporting children? We shall appreciate your opinion on this question which will enable us to reach a conclusion in a case now pending."

I take it for granted that the section of the statute you describe is now known as subdivision "C" of section 1, chapter 143, laws of the thirty-fourth general assembly and I assume further that the discretion you refer to is whether it is mandatory upon the board to provide suitable transportation in the manner specified in said subdivision.

It is my opinion that the duty of the board to furnish transportation in such cases is mandatory and that the only discretion the board has in the premises is in the matters and instances clearly pointed out in said subdivision "C."

Respectfully yours,

N. J. LEE,
Special Counsel.

OSTEOPATHS—MAY NOT PRACTICE OPTOMETRY—PHYSICIANS MAY PRACTICE OPTOMETRY.—An osteopath having a certificate issued under the provisions of section 2583-a does not thereby acquire the right to practice optometry. Physicians licensed under the provisions of code supplement section 2576 may practice optometry.

October 26, 1911.

DR. NORMAN D. WILSON,
Manchester, Iowa.

DEAR SIR: Replying to your favor of October 23d addressed to Attorney General Cosson relative to whether or not you can legally practice optometry without the license required of those practicing optometry in the state of Iowa, will say that by the provisions of section 2583-a of the supplement to the code of 1907, the certificate issued to osteopaths merely authorizes the holder thereof "to practice osteopathy in the state of Iowa." You are, therefore, limited under your certificate to the practice of osteopathy and this cannot be considered broad enough to include the right to practice optometry. It is, therefore, the opinion of the writer that you are not authorized under your certificate to practice optometry in the state of Iowa without first securing the license required by statutes.

It seems that a different ruling has been made governing those who practice medicine, owing to the fact that by the provisions of section 2576 of the supplement to the code of Iowa for 1907, the certificate confers upon the holder the right to practice medicine, surgery and obstetrics, and be conclusive evidence thereof, and this has been given an interpretation broad enough to include the prescribing and fitting of glasses for the relief or cure of any ailment or disease, and is, therefore, included as a part of the practice of medicine.

This department is not permitted to render official opinions to other than state officials, and the above is only the opinion of the writer, made in deference to you.

Yours truly,
HENRY E. SAMPSON,
Special Counsel.

COUNTY SUPERINTENDENT—WHO ELIGIBLE.—The holder of first grade uniform county certificate duly verified, a state certificate or life diploma is eligible to the office of county superintendent.

October 26, 1911.

MISS ALTA M. DICE,
Fairfax, Iowa.

DEAR MADAM: Your letter of the 23d inst. to the attorney general was referred to me for reply.

You state that you are the holder of a life certificate issued during the present year and you inquire if you are eligible to hold the office of county superintendent.

The attorney general is not required to render official opinions in matters of this kind to private persons. In this instance, however, I may make reply in a personal way as a courtesy to you.

I assume that you were the holder of a first grade uniform county certificate which was duly validated and it is my opinion that this would render you eligible to the office of county superintendent. The statute provides that the county superintendent may be of either sex and shall be the holder of a first grade certificate or of a state certificate or a life diploma.

Respectfully yours,

N. J. LEE,
Special Counsel.

INCORPORATED COMPANIES—HOW INDICATED.—It is only where the business of incorporation is conducted under the name of an individual that it must be followed by the word "incorporated." Where the word "company" follows the name of the individual this is sufficient compliance with section 1608 of the code.

October 27, 1911.

D. H. FITZPATRICK,
Attorney at Law,
Mason City, Iowa.

DEAR SIR: Your letter of the 21st inst. to the attorney general was referred to me for reply.

You submit the following question on which you request an opinion from this department:

> "Under section 1608 of the code, does the word 'company' or words 'and company' used with individual names avoid the necessity of using the word 'incorporated'? For example, 'Schanke-Beck Co.' and 'Schanke-Beck & Company;' are those permissible?"

It is my opinion that it is not necessary to use the word "incorporated" in connection with or as a part of the name of a corporation where the word "company" is used, even though the name or names of individuals only are used as the name of the corporation and I think it is the intention of the statute to require the word "incorporated" to be used where only names of individuals are used as the name of the corporation and the word "company" does not appear. The word "company" in connection with the name or as part of the name of a corporation does not necessarily imply that it is a corporation, whether names of individuals constitute the name of the corporation or some other word or term is used as the name of the corporation. To illustrate, it cannot be said with certainty whether the Chicago & Northwestern Railway Company is a corporation or a co-partnership, from its name. I think as a matter of fact it is a corporation. Neither can it be said with certainty whether the United States Express Company is a corporation or a co-partnership, from the name alone, and that concern is a co-partnership or voluntary association or unincorporated stock company of some sort. I think the word "company" as a part of the name of a corporation or of a co-partnership implies that it is not an individuual and may be a corporation and that accomplishes the purpose of the statute.

Respectfully yours,

N. J. LEE,
Special Counsel.

CHIROPRACTOR—WHO MAY PRACTICE.—A licensed osteopath may practice as a chiropractor.

November 3, 1911.

HERBERT E. HADLEY, *County Attorney,*
Nevada, Iowa.

DEAR SIR: Your letter of the 2d inst. addressed to the attorney general has been handed to me for reply.

You state that a regularly licensed and registered osteopath holds himself out as a chiropractor, and that he treats diseases by that system. Your query is whether in practicing as a chiropractor he is violating any law.

I believe that the practice of osteopathy covers all there is in the methods used by a chiropractor, and more too, and that one who is properly registered as an osteopath may practice as a chiropractor if he so desires and that in so doing he does not violate any of the statutes relating to the practice of medicine.

Yours very truly,
JOHN FLETCHER,
Assistant Attorney General.

SCHOOLS—CHANGE OF TEXT BOOKS.—A school board may not lawfully adopt, change or purchase text books without advertising for bids.

November 4, 1911.

HON. A. M. DEYOE,
SUPERINTENDENT OF PUBLIC INSTRUCTION,
State House.

SIR: On September 13th, 1911, you submitted to this department the following inquiry:

> "Can the school board of cities, towns, or any school corporation, under sections 2824 to 2837 legally adopt text books, change text books and contract for the same without advertising for bids?"

On the 14th of the same month the writer hereof rendered an opinion upon the matter to the effect that such school corporation might legally adopt or change text books without advertising for bids, but that such school corporation could not contract for such books without advertising for bids.

Since the foregoing opinion was rendered, my attention has been called to the decision of the supreme court in the case of *McNees vs. School Township of East River, County of Page,* 110 N. W., 325, wherein it is held in substance that the board cannot adopt or change text books without advertising for bids, the last line of the opinion reading as follows:

"As notice was not published as required by section 2828 of the code, neither the *adoption* nor purchase of text books by the board of directors on August 31st, 1903, was valid."

Hence, my former opinion is modified to conform to this ruling, and hence, it follows that the school corporation must advertise for bids, not only when it contracts for books but when it adopts or changes text books.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

COMPULSORY EDUCATION.—Code supplement section 2825-a applies to children between the ages of seven and fourteen years, and should be construed to apply to a child during all of its fifteenth year or until it reaches the full age of fifteen years.

November 4, 1911.

COUNTY ATTORNEY WILLIAM T. OAKES,
Clinton, Iowa.

DEAR SIR: I am in receipt of your communication of the 3d instant requesting an interpretation of section 2823-a supplement to the code, 1907, and specifically as to whether the phrase "any child of the age of seven to fourteen years inclusive" should be construed that a child is subject to the compulsory education law from the time it becomes seven years of age until it becomes fifteen years of age; or whether the child is exempt from said law at the time it becomes fourteen years of age.

I am of the opinion that the phrase "any person having the control of any child of the age of seven to fourteen years inclusive" includes all children after they arrive at the age of seven and all children until they actually become fifteen years of age.

Yours very truly,
GEORGE COSSON,
Attorney General of Iowa.

AUTOMOBILE—REGISTRATION FEE.—Where an automobile is operated upon the highway during any portion of the year in which registration fee is required it should be registered and the registration fee paid, but if not used at all upon the highways it need not be registered but should then be taxed as other vehicles.

November 4, 1911.

MR. W. C. GARBERSON,
Sibley, Iowa.

DEAR SIR: I am in receipt of your communication of the 2d instant requesting an interpretation of chapter 72, acts of the thirty-fourth general assembly, specifically as to whether or not a person owning a motor vehicle which has not been operated since July 1, 1911, is required to pay the license registration fee for the year commencing January 1, 1912.

I have advised the secretary of state in an informal way that I was of the opinion that if the motor vehicle was not to be operated upon the public highway at all during the ensuing period for which the registration fee was to be paid, the owner was not required to pay the registration fee specified in said act; but that if the vehicle was actually operated at all under any circumstances it was incumbent upon the owner to pay the registration fee as therein provided.

Section 3 of said act provides that every owner of a motor vehicle *which shall be operated or driven upon the public highways of this state* shall * * * cause to be filed in the office of the secretary of state a verified application for registration" etc.

I agree with you that the fee in question is both a license fee and a means of taxation, but in view of the language above quoted, I take it that it was the thought of the legislature that the vehicle should be operated at least to some extent upon the public highway if the owner were to be required to make application and pay the registration fee above provided, and if, as before stated, the machine is operated at all, be it never so little the owner is required to pay the fee; but if the machine is not actually operated and it is not the intention of the owner to operate said machine at all then I think it may be held in storage, in which event it should be taxed as other personal property at its actual value.

Yours very truly,
GEORGE COSSON,
Attorney General of Iowa.

PUBLIC LANDS AND WATERS—HUNTING ON.—The title to land between high and low water mark along meandered streams and lakes and the bed of such streams and lakes is in the state and licensed hunters may hunt thereon without the consent of adjoining land owners.

November 6, 1911.

MR. JOHN M. MARKHAM,
1220 Jefferson St.,
W. Waterloo, Ia.

DEAR SIR: Your letter of recent date addressed to the attorney general has been referred to me for reply.

Your question briefly stated is: Whether or not a hunter having a license may not have the right to hunt between high and low water mark along the banks of the Cedar river between Waterloo and La Porte City, Iowa.

The title to the land between high and low water mark along the meandered streams is in the state, and along such meandered streams hunters having a license would have the right to hunt without the permission of the owner of the land adjacent to such stream, and above such high water mark. As to whether or not the stream to which you refer was meandered at the time of the original government survey between the points you mention, I am unable to state, but that is a matter that you could readily ascertain by reference to the records in your county.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

HUNTER'S LICENSE—WHEN EFFECTIVE.—One who has applied for a hunter's license but has not yet received the same is not entitled to hunt.

November 6, 1911.

MR. E. J. STAFFORD,
Nichols, Iowa.

DEAR SIR: Yours of October 31st addressed to the attorney general has been referred to me for reply.

Your inquiry briefly stated is: Whether or not a person who applied for a hunter's license may hunt before the license is issued and delivered to him.

Section 2 of chapter 154 of the acts of the thirty-third general assembly provides:

> "No person shall hunt, pursue, kill or take any wild animal, bird or game in this state with a gun, without *first procuring* a license, as herein provided."

Hence, it follows that your inquiry must be answered in the negative.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

SHERIFF—COMPENSATION OF FOR CONVEYING PRISONERS—DUTIES OF TO SUPPRESS GAMBLING.—The sheriff is entitled to forty cents per hour for conveying convicts to the penitentiary in addition to his regular salary. It is the plain duty of the sheriff to ferret out crime and to arrest criminals and secure evidence and submit same to the county attorney and the grand jury.

November 9, 1911.

HON. H. D. WHITE, SHERIFF,
Charles City, Iowa.

DEAR SIR: Your letter of the 30th ult. to the attorney general was referred to me for reply. You request an opinion from this department on two questions which you submit, viz.:

> "1. Is a sheriff entitled to receive and retain the fees allowed by sub-division 20 of section 511 of the supplement to the code, 1907, for conveying convicts to the pententiary, in addition to his regular salary?
>
> "2. Is it the duty of a sheriff to suppress gambling and arrest those engaged therein when committed within the limits of a city, or do the officers of such city have exclusive jurisdiction over such crimes within the city?

Answering your first question will say a sheriff is not entitled to receive the 40 cents an hour for conveying prisoners to the penitentiary in addition to his regular salary.

Answering your second question will say that it is the plain duty of the sheriff, by himself or deputy, to ferret out crime, to apprehend and arrest all criminals and, in so far as it is within his power, to secure evidence of all crimes committed within his

county and present the same to the county attorney and the grand jury; to file informations against all persons who he knows or has reason to believe have violated the laws of the state. Gambling and operating gambling houses are crimes denounced by the state law and it is as much the duty of a sheriff to arrest those guilty of committing such offenses within the municipality as those committed outside the borders of a municipality and the officers of a municipality have no power or discretion in permitting such violations to continue nor in any way to hinder or prevent a sheriff from enforcing the laws with reference to such crimes.

Respectfully yours,

N. J. LEE,
Special Counsel.

SUNDAY THEATERS—CITIES AND TOWNS MAY CLOSE.—Cities and towns have power to regulate, license or prohibit theaters and other exhibitions.

November 9, 1911.

MR. S. M. ANDREWS,
Oelwein, Iowa.

DEAR SIR: Yours of the 6th instant addressed to the attorney general has been referred to me for reply.

Your first question is: Whether the statutes specifically cover Sunday labor. Section 5040 of the code provides:

> "If any person be found on the first day of the week, commonly called Sunday, engaged * * * in buying or selling property of any kind, or in any labor except that of necessity or charity, he shall be fined not more than five nor less than one dollar, and be imprisoned in the county jail until the fine and costs shall be paid; but nothing herein contained shall be construed to extend to those who conscientiously observe the seventh day of the week as the Sabbath, or to prevent persons traveling or families emigrating from pursuing their journey, or the keepers of toll bridges, toll gates or ferrymen from attending the same."

Your second question is: Whether or not a city council, under the existing state law, can pass an ordinance which shall be effective in closing the Sunday theatre. Code section 703 provides:

"They (cities and towns) shall have power to regulate, license or *prohibit* circuses, menageries, theatres, theatrical exhibitions, shows and exhibitions of all kinds; but lectures on scientific, historical or literary subjects shall not come within the provisions of this section."

See also the case of *Wheeler vs. the City of Ft. Dodge*, 131 Iowa, 575, wherein it was held that by reason of the city's power under this section to regulate, license or prohibit shows and exhibitions of all kinds, and its failure to exercise such power, that the said city was liable to a person injured by such exhibition in the street of such city.

Hence, I would say that your second question should be answered in the affirmative, and that the city would have the power to either regulate or prohibit theaters, not only on Sunday, but on other days.

With reference to your third question as to whether or not pool halls might be lawfully opened on Sunday for some purpose other than that of conducting the place as an occupation, would say that there is no specific law covering this point, but it has been generally conceded that section 5040 was sufficient to prohibit the playing of pool or billiards as a business, the same as it could prevent a merchant from doing business on that day, yet we know of no provision of the law that would prevent the owner of a pool hall from having his place open on Sunday, providing he did not engage in the business.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

GAMBLING DEFINED.—Where the contest is one of skill, speed, energy or the like, such as horse races, foot races or for the best guessing, it is not gambling; but where the result of the contest is to be determined by luck or chance and not through energy or skill it is gambling.

November 9, 1911.

HON. P. O. BROWN, *Mayor,*
Jefferson, Iowa.

DEAR SIR: Replying to yours of the 8th instant concerning gambling I have to advise that the distinction between what is and what is not gambling consists in this: that if the person pays a

consideration and the amount he receives depends upon a game of chance or luck, it is gambling. If the contest is one of energy or skill or speed it is not gambling. Therefore, a purse to the fastest horse, to the winner in a foot race, a potato race, a prize to the student writing the best essay, a prize to the class having the largest number, and all matters of that nature are entirely within the law; but where a person pays a consideration to draw a number or take a chance, not knowing in advance what he will receive, the amount depending upon luck and not through any energy or skill on his part, it is gambling.

The merchant who gives tickets with each purchase with a statement that so many tickets gets a certain article and a greater number of tickets a more valuable article, the purchaser knowing in advance just what he will get when he receives so many tickets, is not gambling. The gambling element can be eliminated and yet many legitimate ways of advertising a man's business may still be resorted to.

Yours very truly,

GEORGE COSSON,
Attorney General.

BOARD OF SUPERVISORS—METHOD OF BORROWING MONEY.—It is doubtful if the board of supervisors have power to borrow money by using warrants rather than bonds.

November 10, 1911.

HON. HERBERT G. THOMPSON,
Muscatine, Iowa.

DEAR SIR: Your letter of the 24th inst. to the attorney general was referred to me for reply. I have not found time to notice your letter before now, owing to other matters in the department which demanded my attention.

You inquire whether the board of supervisors may lawfully cause to be issued a warrant against the general fund of the county for the purpose of obtaining funds with which to redeem warrants issued for the payment of claims duly filed and allowed.

I have not had time to investigate this question sufficiently to enable me to express a positive opinion thereon but upon the investigation I have made and the consideration I have given the subject it is my notion that the county cannot borrow money in

the manner indicated. In my view the transaction, in legal effect, is the borrowing of money. The person who receives the warrant and furnishes the money has no claim against the county and there is no other consideration for the issuing of the warrant but the funds which are obtained.

Under certain conditions the board of supervisors may fund or refund the debt of the county by issuing and negotiating bonds.

Upon a careful investigation of this question the foregoing views may be found to be erroneous and if the matter is of sufficient importance to your board of supervisors, and you care to do so, you may prepare a brief of authorities upon which you rely in holding that the board of supervisors may borrow money in the manner you describe, and I shall be glad to go over your brief and change the views here expressed if found incorrect.

Respectfully yours,

N. J. LEE,
Special Counsel.

PRISONERS—SEVERAL SENTENCES—TIME OF—HOW COMPUTED.—Where one is convicted of two or more offenses and sentenced to terms of imprisonment on each they should not be construed as concurrent and the term of imprisonment of one should commence at the expiration of the term of the other.

November 10, 1911.

HON. J. C. SANDERS, *Warden,*
Ft. Madison, Iowa.

DEAR SIR: Your communication of the 3d inst. to the attorney general requesting his opinion upon the following state of facts as set forth by you, was referred to me for reply:

> "Referring to the case of Suffecool No. 9636 sent up from Poweshiek county for 'larceny' and 'breaking and entering railway car,' I desire to have a ruling on the matter of computing his time. One of the commitments herewith inclosed states, 'The term of this sentence to commence at the expiration of that imposed in case *No. 7147 State of Iowa vs. William Suffecool et al.*, and defendant excepts.'
>
> "Each sentence standing alone would mean that he would have to serve on each only three years and nine months, or a

total of seven years and six months, whereas if the two were to be computed as a ten year sentence, the good time on this basis would let him out in six years and three months.

"This latter point is the one I desire to have the ruling on by which I may govern myself in similar cases."

I infer from the foregoing statement that judgment in the two cases referred to was entered by the court at the same time and in accordance with the provisions of section 5439 of the code. Said section reads as follows:

"If the defendant is convicted of two or more offenses, the punishment of each of which is or may be imprisonment, the judgment may be so rendered that the imprisonment upon any one shall commence at the expiration of imprisonment upon any other of the offenses."

In view of this provision in the statute and the judgment rendered in these cases, it is clear to me that the terms of imprisonment should not be computed together nor be considered as concurrent in any sense. The term of imprisonment for one of the offenses should commence to run at the expiration of the imprisonment of the other, taking into account good conduct or other thing which may shorten the first term of imprisonment.

Respectfully yours,

N. J. LEE,
Special Counsel.

WIDE TIRED WAGONS—REBATE OF TAX BY REASON OF USE.—Code supplement sections 1570-b and -e provide for a rebate of tax where the owner in hauling loads exceeding eight hundred pounds in weight upon the public highway uses wagons with tires not less than three inches wide.

November 11, 1911.

MR. WILLIAM HOKER,
R. R. No. 1, Wheatland, Iowa.

DEAR SIR: Yours of the 9th inst. addressed to the attorney general has been referred to me for reply.

Under code supplement sections 1570-b and 1570-e, before a party will be entitled to a rebate on his taxes on account of the use of wide tired wagons, the following conditions must exist.

"1st. He must in good faith use on the public highway for the hauling of loads exceeding 800 pounds in weight only wagons with tires not less than 3 inches in width.

"2d. He must make and subscribe to an affidavit that he has used only such wagons for hauling loads exceeding 800 pounds in weight on the public highways of the state.

"3d. The payment must be made by the trustees of the township in which such person resides, and a person residing in town would not be entitled to a rebate on his road taxes upon premises owned in another township."

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

BOOT-LEGGERS DEFINED.—A boot-legger is one who carries upon his person or vehicle or leaves in a place for another to secure intoxicating liquor with intent to sell and dispose of the same.

November 11, 1911.

WM. S. GALLAGHER, *Lawyer,*
Tama, Iowa.

DEAR SIR: Yours of the 10th inst. addressed to the attorney general has been referred to me for reply.

Code supplement section 2461-a defines a boot-legger as follows:

"Any person who shall, by himself, or his employe, servant or agent, for himself or any other person, company or corporation, keep or carry around on his person, or in any vehicle, or leave in a place for another to secure, any intoxicating liquor as herein defined, *with intent to sell or dispose of the same by gift or otherwise, in violation of law,* shall be termed a boot-legger."

Hence, it would seem to me that in the case you mention, the mere fact that the party had a suit case or other receptacle containing a number of bottles of liquor would not be sufficient evidence upon which to convict, but there should be some further showing of the unlawful intent, and this unlawful intent might

be shown in many ways, as by an unlawful sale or offer to sell or an admission by the defendant of his intention to sell.

Yours very truly,
C. A. ROBBINS,
Assistant Attorney General.

SCHOOLS.—Chapter 146 authorizing pupils to attend high school in other districts than their home district construed.

November 11, 1911.

J. A. CUTLER, *President School Board,*
Osage, Iowa.

DEAR SIR: Your letter of the 9th inst. to the attorney general was referred to me for reply.

You state that pupils residing in another school corporation are attending the high school in your school corporation but that another high school is nearer to the residence of such pupils than is your high school.

I infer from your letter that these pupils are attending your high school under the provisions of chapter 146, acts of the thirty-fourth general assembly, and you request an opinion as to the amount of tuition your school corporation is entitled to charge and receive from the school corporation in which such pupils reside.

You also state that the authorities of the high school which is nearest to the residence of these pupils have fixed the cost of tuition for pupils desiring to attend under the provisions of said chapter of the statute at an amount less than the actual cost of tuition in such high school.

Your question calls for an interpretation of sections 1 and 3 of the act referred to. Said section 1, in so far as it is material to this question, reads: "Provided the average cost of tuition allowed shall not exceed the average cost of tuition in the nearest high school."

Section 3 provides that "the school in which such student resides shall pay to the treasurer of the school corporation in which such student shall be permitted to enter, a tuition fee equal to the average cost of tuition and the average proportion of contingent expenses in the high school department in the latter corporation

during the time he so attend, not exceeding, however, a total period of four school years."

The language quoted from section 1 of said act fixes the maximum tuition that may be charged by any high school, and section 3 must be read and construed in connection with section 1, and I think the high school in which such non-resident pupils attend is entitled to charge as tuition an amount not to exceed the average cost of tuition in the high school nearest to the residence of such pupils, even though the high school nearest to the residence of the pupil has fixed the tuition for the attendance of pupils therein under the provisions of said chapter at an amount less than the average cost of tuition.

I do not mean to say that such nearest high school may not charge less than the average cost of tuition for pupils that attend therein, but if it does it cannot be made the basis for the cost of tuition in other high schools.

Respectfully yours,

N. J. LEE,
Special Counsel.

INTOXICATING LIQUORS—SALE OF TO WOMEN.—While code section 2448 prohibits the employment of women in a saloon yet women have the same right to purchase liquors at a saloon as men.

November 13, 1911.

H. O. OUREN, *Asst. County Attorney,*
Council Bluffs, Iowa.

DEAR SIR: Your letter of the 9th inst. addressed to the attorney general has been referred to me for reply.

You ask: "Whether or not persons engaged in the selling of intoxicating liquors at retail, as a beverage, under the provisions of the so-called 'Moon Law,' can lawfully make sales to women who may enter their place of business, the liquor to be carried out and not drank on the premises."

Chapter 142 of the acts of the thirty-third general assembly known as the "Moon Law" simply limits the number of saloons and makes no reference about the matter inquired about. However, I will say that I know of no provision that would prohibit the sale of liquor to women. In fact, I have doubts on the consti-

tutionality of such a law should one be enacted. Subdivision 8 of code section 2448 provides:

"No female shall be employed in the place (saloon)," but this would not have any bearing on the question of sales to women.

Your second question is: "How old does a lady have to be to be of age within the meaning of the statute wtih reference to the sale of intoxicating liquors?"

Section 2403 of the code provides that no person by himself, agent or otherwise shall sell or give any intoxicating liquors to any minor for any purpose, etc. Code section 3188 provides:

"The period of minority extends in males to the age of 21 years, and in females to that of 18 years, but *all minors* attain their majority by marriage." Hence, it follows that a woman becomes of age when 18 years old, and also by marriage at any age.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

ELECTIONS—SEPARATE BALLOT BOXES FOR WOMEN.—Separate ballot boxes should be provided for the use of women at all elections where women are entitled to vote.

November 13, 1911.

MR. R. M. STEWART,
Iowa City, Iowa.

DEAR SIR: Your letter of recent date addressed to the attorney general has been referred to me for reply.

You call attention to section 1131 of the code which provides for a separate ballot box at elections where women are permitted to vote, and in substance, inquire as to whether or not such separate ballot box is required only where the question upon which the women vote is different from the questions voted upon by the men at the same election; and whether or not an election would be invalidated where no separate ballot boxes were provided, and where the questions submitted to both classes of voters are the same throughout.

I believe the purpose of the legislature in providing for the separate ballot box was to provide a method of holding the election

which might result in a legal election, even though it might be held for some reason that the women did not have a right to vote at the particular election. For instance, if a vote was being taken on the question of voting bonds and it developed in the course of the trial that the women had no right to vote upon that particular question, if the vote as shown by the quantity of ballots in the ballot box provided for men be sufficient to carry the proposition independent of the vote of the women, then the election might be held valid, whereas, if no separate ballot box were provided, and both women and men voted in the same box, and it should be held that the women so voting had no right to vote, then the entire election would be void.

And with this view in mind, I am of the opinion that separate ballot boxes should be provided in all instances where women vote at the election. As to whether or not a failure to provide such separate ballot boxes would result in invalidating the election, is a question which might depend upon the character of the election being held, and is so doubtful that I would not care to express a positive opinion either way.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

FLOUR—WEIGHT OF.—The number of hundred pounds of flour contained in any package which is exposed for sale must be shown upon the package.

November 13, 1911.

KELLOGG ROLLER MILLS,
Kellogg, Iowa.

GENTLEMEN: Yours of the 10th inst. addressed to the attorney general has been referred to me for reply.

Section 1 of chapter 180, acts of the thirty-fourth general assembly covers this question, and reads as follows:

> "Every barrel, bag, parcel or package of flour, containing one pound or more, offered or exposed for sale in the state of Iowa, for use within this state, shall have affixed thereto in a conspicuous place on the outside thereof, distinctly printed in the English language, in legible type not smaller than eight point heavy gothic capital letters, a statement certifying the

number of net pounds contained in the package. Any person who shall sell any package of flour which shall be stamped or labeled with a greater number of pounds net than such package actually contains, or shall sell flour in any manner contrary to the provisions of this section, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in a sum of not less than ten dollars nor more than one hundred dollars, provided, that in determining the net weight at the time of sale, the reasonable and ordinary shrinkage, if any, may be included.

I may say further that the word "flour" has been construed to mean the ground product of any grain, and would, therefore, include cornmeal, buckwheat flour and rye flour, as well as white flour.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

GAMBLING DEFINED.—Where a game is played with the understanding that the loser is to pay for the use of the table it is gambling.

November 13, 1911.

MR. A. R. WHITMER,
Wilton Junction, Iowa.

DEAR SIR: Replying to yours of the 11th instant relative to pool halls permitting the loser of the game to pay for the use of the table, there can be no doubt but that this is in violation of law. (*State vs. Book*, 41 Iowa, 550; *State vs. Miller*, 53 Iowa, 154.)

A number of pool halls operating in clubs have for some time been charging for the use of tables by the hour or a fraction thereof. Of course it will reduce their revenue and that is just the reason why a continuation of the same should not be permitted because young boys if they are permitted to gamble will devote much more time and spend much more money in a pool hall than they otherwise would for the mere love of the game. As I said before, however, they could charge for the use of the table by the hour or a fraction thereof and keep entirely within the law.

Yours very truly,

GEORGE COSSON,
Attorney General.

TOWNSHIP ASSESSOR.—A township assessor may reside within the corporate limits of a town included within his township.

November 16, 1911.

COUNTY ATTORNEY P. J. NELSON,
Dubuque, Iowa.

DEAR SIR: Herewith copy of letter given to Joseph Schindler of your county in response to his request for an opinion.

I thought perhaps you might be interested in knowing that the attorney general passed directly upon this question in an opinion given to A. N. Wood, then county attorney at Grundy Center, Iowa, on the 21st day of September, 1897, in which he took identically the same position as you, and it has seemed to me that there was no escape from this conclusion. Attorney General Mullan, however, gave the following opinion to L. O. Rue at Nora Springs, Iowa:

> "In answer to your favor of the 15th instant, I will say that I know of no statute requiring an assessor, elected by the voters residing outside of the limits of an incorporated city or town, to be a resident of the part of the township lying outside of such corporate limits. I think it is within the power of the electors residing outside of the corporate limits of the city or town, to elect an assessor who resides within such corporate limits. In any event, such person so elected would be township assessor *de facto*, and all of his official acts would be legal and binding."

Yours very truly,
GEORGE COSSON,
Attorney General.

CHIROPRACTORS.—A chiropractor is guilty of practicing medicine if he practices his profession without first having received a certificate from the state board of medical examiners.

November 20, 1911.

CHARLES A. DEWEY, *County Attorney,*
Washington, Iowa.

DEAR SIR: Your letter of the 16th inst. addressed to the attorney general has been handed to me for reply.

You make inquiry as to whether a person who is practicing medicine as a chiropractor without having a license from the state board of medical examiners is violating the law.

It is undoubtedly a violation of the law for any person to practice the healing art without first having received a certificate from the state board of medical examiners and filing the same for record in the county in which he desires to practice. There are two cases where chiropractors have been prosecuted and had their cases determined by the supreme court of the state. These cases are as follows:

State vs. Corwin, 131 N. W., 659;

State vs. Miller, 124 N. W., 167.

In each of these cases the supreme court held that it was illegal to practice as a chiropractor without first having obtained a license from the state board of medical examiners.

Yours very truly,
JOHN FLETCHER,
Assistant Attorney General.

PROVISIONS OF THE ROAD DRAG LAW DISCUSSED.

November 20, 1911.

HON. FRANK A. NIMOCKS,
Ottumwa, Iowa.

DEAR SIR: Your first question relates to the compensation and allowance that may be made to the superintendent of dragging for the services that may be required of him and for his actual expenses while in the performance of his duty.

Section 2 of chapter 70, acts of the thirty-fourth general assembly, sometimes designated as the new road drag law, provides for the appointment of a superintendent of dragging and that the township trustees shall fix the amount of his compensation at not to exceed $2.50 per day and actual expenses for each day of eight hours while engaged in necessary work for the township, and for giving notice to contractors he shall receive such additional compensation as the board may direct.

From this provision of the law it is clear that the per diem fixed by the township trustees is to cover all services rendered by the superintendent of dragging, except the giving of notice to per-

sons who have contracted to drag the roads. In addition to such compensation the superintendent is entitled to be reimbursed for his actual expenses while engaged in the discharge of his duties and such expenses would seem to include meals and lodging away from home, postage, and conveyance in attending to his duties. The superintendent should not be allowed for such expenses unless they were necessary, and as to whether they are necessary and proper in a given case is largely within the discretion of the township trustees. As stated, the maximum amount that can be allowed as a per diem to the superintendent of dragging by the trustees for all services except the serving of notice upon contractors, is $2.50 per day. For the giving of notice to contractors the superintendent is entitled to additional compensation but it is discretionary with the trustees how much additional shall be paid.

Your next query is, "Who is to furnish the road drags and how are they to be paid for?"

Section 2 of said act provides that the township trustees shall furnish suitable road drags for the township and pay for same out of the township road fund. Section 8, chapter 24, acts of the thirty-fourth general assembly, in part provides that the township trustees at their April meeting shall determine the rate of property tax to be levied for road drags and other road machinery. In view of these provisions of the law it is very clear that road drags are to be paid out of the township road fund and no part of the dragging fund created by the one mill levy may be used for this purpose. While the statute does not specify the number of drags that a township must purchase or that the trustees are to provide, it is plain that a sufficient number must be furnished to answer the needs of the particular township.

Of course, it is true, as you suggest, that if the superintendent of dragging makes a large number of contracts for the dragging of short stretches of road, that the trustees would be handicapped in providing the requisite number of road drags. This is a matter, however, that must be left to the judgment and discretion of the authorities. It would be very impracticable in general statutes to regulate the number of drags that should be supplied, as the conditions in various parts of the state might differ a great deal.

You next ask for an interpretation of that clause in the new road drag law which provides for the compensation to be paid for the dragging of roads. The clause in question reads as follows:

"The township trustees shall at their regular meetings in November and April of each year settle with the superintendent of dragging and pay all claims for dragging in each district that have the approval of the superintendent of dragging and that are not inconsistent with this act, out of the dragging fund of the township, the amount to be paid for such dragging not to exceed the sum of fifty cents per mile for each mile traveled back and forth while dragging the roads."

This question has been propounded a number of times and this department has held that the amount that can be paid for dragging the roads is not to exceed fifty cents per mile for every mile necessarily and actually traveled with the drag upon the highway while in the act of dragging the same in accordance with the contract therefor. But this would not include travel in going to and from the place where the work is done upon the highway. You will note that the law says that the township trustees are to fix the compensation and the maximum amount at which they are allowed to fix the same is fifty cents. To illustrate: If the township trustees have fixed the compensation at fifty cents per mile and a person makes one round trip with a drag upon the highway in dragging one mile of road, he should be paid at the rate stated for two miles, or $1.00. I do not think there can be any doubt about this being the proper interpretation to be placed upon the provision in question and I believe it gives force and effect to the intention of the legislature. A number of reasons and considerations occur to me which support the interpretation given but I shall not attempt to set all of them out here. If the legislature had intended that the compensation should be at the rate of fifty cents for a round trip on a mile of road it would be equivalent to saying that the rate should be 25 cents for each mile of travel. I think the legislature meant to authorize the trustees to fix the rate per mile on the basis of the number of miles necessarily traveled in dragging. It occurs to me that the words "back and forth" are used in the new law for the purpose of emphasizing the fact that all the travel while in the act of dragging should be taken into account in determining the number of miles and does not have reference to a round trip in dragging a stretch of road. In any event, it is discretionary with the trustees in fixing the rate of compensation and if the maximum of fifty cents should prove to be too high under any conditions, the rate could be reduced to a point where it would be

fair and equitable under the conditions under which the work is done. But if the provision in question should be construed to mean that fifty cents is the maximum authorized to be paid for traveling two miles with the drag, it undoubtedly would have the effect in some localities of making it practically impossible to secure anyone to do the work.

Your next question is as follows: "I would like to ask in this connection whether the superintendent of dragging in a township has anything to do with the roads in the corporation limits. If not, does the city and town secure a part of this one mill levy, and if they do, under whose management would it be used and must this fund that the city receives as its share of the one mill levy be accounted for separately from other funds and a record kept of the dragging done?"

The superintendent of dragging has nothing to do with the dragging of roads within the corporate limits of cities and towns. Section 4 of the act makes it the duty of the city or town council of cities and towns to cause the main traveled roads within the corporation limits leading into the city or town to be dragged and also provides that in so far as practicable and possible the provisions of the act shall apply.

Section 2 of the act requires the township trustees at the time of making the annual levy of the township for road purposes to levy one mill on the dollar on the amount of the township assessment for that year, which shall be designated as the dragging fund and shall be expended only for the purpose of dragging the roads within the township. This one mill levy does not apply to the property within the limits of cities and towns but is made only upon the property of the township outside of cities and towns and hence cities and towns receive no part of the dragging fund, and as I construe the act, cities and towns are not required to levy a tax to be used exclusively for dragging the roads and streets within their limits. Very few of the provisions of this act are applicable to cities and towns. The expense of dragging the roads within the limits of cities and towns must be borne by such municipalities out of the funds authorized to be provided for the repair and grading and improvement of streets and highways.

Your next question relates to the time of electing a superintendent of dragging and as to when the contracts for dragging are to be let and you suggest that inasmuch as the superintendent of

dragging cannot be appointed earlier than April, that this would seriously interfere with the letting of contracts for dragging at the proper time.

Section 2 of the new road drag law does provide that the township trustees at their regular meeting in April, or at a special meeting called for that purpose, shall appoint a superintendent of dragging who shall serve for one year, unless sooner removed by the board. If this were the only provision in the law bearing upon the question of appointing a superintendent of dragging it would be broad enough to permit the trustees to appoint such officer before the regular April meeting. But the thirty-fourth general assembly, in an act passed three days after the enactment of the new road drag law, being chapter 24 of the acts of the thirty-fourth general assembly, provided, among other things, that the township trustees shall meet on the first Monday in February and at that meeting shall elect a superintendent of dragging. The act last referred to being the last expression of the legislature, it would seem to control as to the appointment of a superintendent of dragging.

Section 3 of the new road drag law provides that the superintendent of dragging shall, on or before the 15th day of April in each year, contract with as many suitable persons as he deems necessary to drag the roads in that township for that year. From this you will see that there is nothing to prevent the superintendent of dragging from entering into contracts for the dragging of roads at any time after his appointment in February.

You next inquire if there is any objection to paying the salary and expenses of the superintendent of dragging out of the township road fund. Also whether the township trustees may expend any portion of the township road fund for the dragging of roads after the dragging fund is exhausted.

I see no objection whatever to paying the salary of the superintendent out of the township road fund, nor do I see any objection to using money out of the township road fund to defray the expense of dragging the roads, after the dragging fund is exhausted. There is no such prohibition in the act in question. The law does say that the dragging fund may not be used for any other purpose than dragging the roads. Before the passage of this law there was no provision requiring that any portion of the township road fund or requiring that any funds be set aside or used for the dragging

of roads, but, nevertheless, there were mandatory provisions requiring that the roads be dragged. The dragging of the roads is only a species of road repair or road work and it would be very proper to use of the township road fund to pay for such work.

Another question you put relates to the kind and weight of drag to be used and you inquire if the township trustees have any discretion in this regard.

You are entirely right in assuming that the township trustees have a wide discretion as to the kind and weight of drag to be used. It will be presumed that this discretion will be wisely exercised. The law provides that the trustees shall furnish suitable drags. The law could not very well be more specific. Someone must be vested with power and discretion to carry into effect the various provisions of the law. If the judgment and discretion reposed in township road authorities by this law is abused in its exercise the remedy rests with the people in selecting for these positions men who are competent.

A great many complaints come to this department in regard to the manner in which this law is enforced and asking for advice. I replied to one of these letters recently, a copy of which I enclose, thinking it may contain some information that may be of benefit to you in your agitation of the subject of improving and dragging the roads.

Respectfully yours,

N. J. LEE,
Special Counsel.

SCHOOL DISTRICTS—CHANGE OF BOUNDARIES—WHEN AND HOW MADE.—The boundaries of school districts may be changed by a concurrent action of the respective boards at their regular meeting in July, or at special meetings called for that purpose at any time.

November 20, 1911.

HON. A. M. DEYOE,
Superintendent Public Instruction,
State House.

SIR: In yours of November 18th you ask for an opinion by this department upon the following question:

"May school boards by concurrent action legally change the boundaries of school corporations by detaching territory from one corporation and attaching said territory to another contiguous corporation between the time of giving notices of the election of directors on the first Monday in March and the date of the annual meeting in July, according to sections 2793 and 2802, supplement to the code of 1907?"

The first section above mentioned, as amended by chapter 142, acts of the thirty-fourth general assembly, provides:

"The boundary lines of contiguous school corporations may be changed by the concurrent action of the respective boards of directors *at their regular meetings in July, or at special meetings thereafter called for that purpose.*"

Hence, it follows that such a change in the boundaries may be made at any regular meeting, and as there is no prohibition against changing such boundaries between the time of giving notice of the election of directors on the first Monday in March and the date of such regular meeting, and inasmuch as a date between March and July would be *after* the previous regular July meeting, such boundaries could legally be changed between such dates the same as at any other time between the dates of the regular meetings, provided "a special meeting is called for that purpose between such dates."

While it might be deemed inadvisable to make such a change so near the date of the regular meeting, when the boundaries might again be changed, yet the power exists to make such change. Hence, it follows that your inquiry must be answered in the affirmative.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

TAXATION—VOLUNTARILY PAID CANNOT BE RECOVERED BACK.—Where one voluntarily pays a tax without taking necessary steps to ascertain whether or not it could lawfully be exacted of him it amounts to a voluntary payment under mistake of law and cannot be recovered back.

November 20, 1911.

T. M. DOUGHERTY, *County Attorney,*
New Market, Iowa.

DEAR SIR: Yours of the 15th inst. addressed to the attorney general in which you enclose a letter from Attorneys Henry & Henry bearing on the question of assessment of bank stock, has been referred to me for reply.

This department has given this matter some previous investigation and our advice has been against any cancellation of any unpaid tax and against refunding any tax collected under the old law, and there are several cases already pending in the various counties of the state, and doubtless some of these will go to the supreme court, and thus the matter will be finally determined.

I take it for granted in the case that is referred to in the letter of Henry & Henry that there was no objection made to the assessment, and in fact, the same shares of stock had been assessed under the same law and taxes paid without question for a number of years. This being true, I think the case of *Slimmer vs. Chickasaw County,* 140 Iowa, 448, would preclude the bank from setting up the illegality of this law. There is a clear distinction between such case and the Estherville case, for in the Estherville case the parties resisted the assessment at all times,—before the board of review and ever afterwards, and hence, there could be no estoppel arise under such circumstances. In other words, our position is, that even though this law were void, the tax payers, by their acquiescence in taxation made under this law for so many years, are now estopped from setting up its invalidity. By the previous assessment and payment of tax by the tax payers under this law, the officers were led to believe that all parties regarded it as legal, and the county and other subdivisions of the state had doubtless incurred expenses based in part upon such belief, just as was said in the Slimmer case.

When one voluntarily pays a tax without taking the necessary steps to ascertain whether or not it could lawfully be exacted

of him, it amounts to the payment of money under mistake of law and cannot be recovered back.

Ahlers vs. City of Estherville, 130 Iowa, 272, and cases cited.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

TOWNS—HOW INCORPORATED.—The first step necessary to incorporation of a city or town is the presentation of a petition signed by twenty-five qualified electors residing within the territory proposed to be embraced in the town.

November 20, 1911.

MR. ADAM HOERNER,
R. No. 2, Box 3, Dubuque, Iowa.

DEAR SIR: Your letter of the 18th instant addressed to the attorney general has been referred to me for reply.

You mention the fact of the desire of some people to incorporate a small town of about 25 inhabitants, and inquire whether the non-tax payer can incorporate without the aid of the tax payer.

The first step necessary to the incorporation of a city or town is a petition signed by not less than 25 of the qualified electors of the territory proposed to be embraced in such town. Hence, it follows that a village containing only 25 people could not be incorporated unless all of said people were qualified electors,—that is, male citizens of the United States, 21 years of age or over, unless they would take in enough of the surrounding territory to enable them to get a sufficient number of signers to the petition.

Qualified electors who are not tax payers have the same right to vote on this question as does the tax payer.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

INSANE PERSONS—WHERE KEPT PENDING INVESTIGATION OF SANITY. —Persons charged with being insane may be kept in the custody of the sheriff in the jail or poor house or other place provided by the board of supervisors or selected by the sheriff.

November 22, 1911.

P. J. NELSON, *County Attorney*,
Dubuque, Iowa.

DEAR SIR: Your letter of the 16th instant addressed to the attorney general has been referred to me for reply. Your questions are:

> "1st. If when the arrest is made the commissioners be not in session where must the sheriff keep the person charged with insanity until he can be brought before the commission as ordered by the warrant of arrest?
>
> "2nd. If the commissioners of insanity do not determine the case upon first hearing, but continue it for a later day, where shall the sheriff keep the patient awaiting final action of the commissioners?"

The weight of authority is to the effect that an adjudication of insanity is a prerequisite to commitment to an asylum.

22 Cyc., 1158, Note 85.

However, our statute, code section 2265, provides with reference to the authority of the commissioners as follows:

> "And may require that the person for whom such admission is sought be brought before them, * * * They may issue their warrant therefor, and *provide for the custody* of such person until their investigation shall be concluded, which warrant may be executed by the sheriff or any constable of the county."

Section 2271 provides:

> "In the case of public patients the commissioners shall require that they be in like manner restrained and protected and cared for by the board of supervisors at the expense of the county, and they may accordingly issue their warrant to such board, who shall forthwith comply with the same. If there is no poor house for the reception of such patients, or if no more suitable place can be found, they may be confined in the jail of the county in charge of the sheriff."

Hence, the answer to both of your inquiries would be, in the jail or poor house or other place provided by the board of supervisors or selected by the sheriff.

Yours respectfully,

C. A. ROBBINS,
Assistant Attorney General.

CITIES AND TOWNS--FUNDS OF.—There is no recognized cemetery fund provided for by law. Where general funds of the town have been used to purchase grounds for use as a cemetery the proceeds from sale of cemetery lots should be returned to the general fund.

November 22, 1911.

MR. S. CALLISON,
Dexter, Iowa.

DEAR SIR: Yours of the 16th instant addressed to the attorney general has been referred to me for reply. Your question is:

> "Where a town buys land for a cemetery from its general fund and sells the lots for burial purposes, would that money be classed as cemetery funds or could it be put back into the general fund from which it was taken? In other words, is that money general fund money after it has been taken out of that fund and invested in a cemetery?"

By code section 697, it is provided that cities and towns "shall have power * * * * to provide, without the limits of the corporation, places for the interment of the dead; * * * * to exercise over all cemeteries within their limits and those without their limits established by their authority, the powers conferred upon township trustees with reference to cemeteries."

By code section 585 it is provided: "The township trustees are hereby empowered to condemn or purchase and pay for *out of the general fund,* and enter upon and take any lands within the territorial limits of such township for the use of cemeteries, in the same manner as is now provided for cities and towns."

Code section 880 provides: "Cities and towns shall have power to purchase, or provide for the condemnation of, pay for *out of the general fund,* enter upon and take any lands within or without the territorial limits of such city or town, for the following purposes:

"For parks, commons, cemeteries," etc.

By subdivision 11 of code section 894, it is provided: "A tax not exceeding one-half of one mill on the dollar of the assessed valuation of the property within the corporate limits for the care, preservation and adornment of any cemetery owned or controlled by the city."

It seems reasonably clear, when construing all of these provisions together, that the cemetery, when purchased, is to be paid for from the general fund, and inasmuch as there is no law creating any fund known as the cemetery fund and no provision that the proceeds of the sale of lots should constitute a cemetery fund, and in view of the fact that the only cemetery fund known to law is the one mentioned in the last section cited and is derived from a tax and not from the sale of lots, and it is to be used, not for the purchase of a cemetery, but only for its "care, preservation and adornment," it would, therefore, follow, that the proceeds of cemetery lots sold should be covered into the general fund, and your inquiry should, therefore, be answered in the affirmative.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

ROAD FUNDS—MAY NOT BE USED ON PRIVATE WAYS.—The township road authorities are not authorized to expend funds of the township in the construction of culverts or bridges in private ways or roads.

November 22, 1911.

MR. HANS TEIGEN,
Lake Mills, Iowa.

DEAR SIR: Your letter of the 20th inst. addressed to the attorney general was referred to me for reply.

You inquire whether it is the duty of the township road authorities and if they have the authority to construct bridges or culverts in private ways.

The township road authorities are not authorized to expend the funds of the township in the construction of culverts or bridges in private ways or roads.

Respectfully yours,

N. J. LEE,
Special Counsel.

STATE OFFICIALS—MAY NOT BE GARNISHED.—There is no statute authorizing the garnishment of a public official. The effect of a judgment against a garnishee in such case would be a judgment against the state and as the state may not be sued without its consent state officials cannot be garnished.

November 22, 1911.

MR. M. M. O'BRYON,
Marshalltown, Iowa.

DEAR SIR: Your letter of the 15th inst. addressed to the attorney general was referred to me for reply.

You request an opinion from this department as to whether the treasurer of state can be garnished.

It is my opinion that said officer cannot be garnished. In the first place there is no provision in the statute permitting the garnishment of such officer and in the next place it is, in my view, in legal effect a suit against the state because the necessary legal effect of a judgment against the garnishee would be to require the payment of funds of the state and the state would be the real party in interest and the real defendant. It is fundamental that the state cannot be sued in its own courts without its consent.

Respectfully yours,

N. J. LEE,
Special Counsel.

PRACTICE OF MEDICINE—SALE OF PATENT OR PROPRIETARY MEDICINE.—Code section 2579 defines who shall be admitted a practitioner and further provides that this section shall not be construed to apply to one advertising and selling patent or proprietary medicines.

November 22, 1911.

T. S. STEVENS, *Attorney,*
Hamburg, Iowa.

DEAR SIR: Your letter of the 17th inst. addressed to the attorney general has been referred to me for reply.

Your question briefly stated is, whether or not a person who travels about the country, reads to her prospective customers the questions on the symptom blank and fills in the answers thereto,

forwards the blank to the Des Moines office and is advised by a physician what remedies to deliver from her stock kept on hand, and delivers the same as directed, receives the pay therefor from the customer, her profits consisting of the difference between the wholesale and the retail or selling price of the remedies, is violating the statute regulating the practice of medicine, and also the statute requiring peddlers to procure a license.

It would seem to be clear that a person so operating would not be a peddler within the meaning of our statute. Code section 2579 undertakes to define who shall be deemed a practitioner, and the last part of the section provides that it shall not be construed to apply to the advertising and selling of patent or proprietary medicines. It is not clear from your statement whether medicines delivered are patent or proprietary. As to such medicines, it would seem to be clear that she would have the right to sell them in the manner suggested, but if they are not patent or proprietary, then it would occur to me that she would be "making the practice of prescribing or of prescribing and furnishing medicine for the sick," within the meaning of the language of lines 3 and 4 of said section, unless in each instance she acts in conjunction with a physician who has a license to practice, and hence, would only be acting as an agent in *furnishing and delivering the medicines prescribed by him.* If the person in Des Moines who prescribed the medicine is not a licensed physician, then each is assisting the other in prescribing and furnishing the medicines and neither would have the right to do either.

You will understand that this department is not authorized to render official opinions to other than state officers, and the above is given simply as the personal views of the writer, out of courtesy to you.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

ROAD DRAG LAW FURTHER DISCUSSED.—

November 23, 1911.

HON. FRANK A. NIMOCKS,
Ottumwa, Iowa.

MY DEAR MR. NIMOCKS: I am just in receipt of your letter of the 22nd inst. acknowledging receipt of my letter of the 20th to you in relation to the new road drag law.

I note your criticism of that part of my opinion which relates to the compensation that may be made for the dragging of roads and that you dissent from the views I expressed.

From a reading of your "dissenting opinion" it is very apparent that you have wholly misapprehended the meaning of what I said on this subject. I think the interpretation that I placed upon the provision of the new road drag law relating to compensation for dragging is the only one that is tenable and consistent and which gives effect to the intent of the legislature and I am unable to reach any other conclusion.

You cite various illustrations to demonstrate that the compensation to be paid for dragging under the interpretation of the law as you conceive I made is exorbitant. For instance, you say that under my interpretation of the law a person in making a round trip with the drag on a six mile stretch of road would be entitled to $6.00 and that under average conditions a man with a team of two or three horses could accomplish this in half a day and could drag another stretch of road equally long in the afternoon and thus earn another $6.00, making $12.00 in all. I might agree with you that this much compensation for this much work is too high but under the law as I have interpreted it it is absolutely unnecessary to pay the amount mentioned for that amount of work. As I said at the outset, you have mis-read what I said on the subject. I think you have assumed that I held that the trustees were compelled to pay 50c for every mile traveled with a drag in the act of dragging the road. I quote this much from the first paragraph of my letter relating to this subject which I think succinctly states the rule correctly:

"The amount that can be paid for dragging the roads is NOT TO EXCEED 50c per mile for every mile necessarily and actually traveled upon the highway while in the act of dragging the same in accordance with the contract therefor."

You will note that the 50c per mile for every mile of travel with the drag is the highest rate that the trustees are authorized to pay for such work but they may fix it at any sum or rate per mile less than 50c. There is nothing in the law under my interpretation of it that will prevent the township trustees from fixing the compensation that may be made for dragging the roads at 10c, or any other rate less than 50c per mile for every mile traveled with the drag upon the highway while dragging the road,

etc. With this elastic rule as to compensation that may be made by the trustees the compensation to be made for dragging may be fixed to meet or fit the conditions in the various localities of the state. And there is nothing to prevent the trustees from fixing different rates of compensation for dragging the roads in the same township. Under certain conditions 25c per mile of travel might be very liberal compensation. Under other conditions in the same township 40c per mile of travel would not be too much.

I think the error you fall in, Mr. Nimocks, is that you assume that the law arbitrarily fixes the compensation whereas the law merely fixes the maximum amount that the trustees are authorized to pay leaving the exact amount to be determined by the trustees in the exercise of their sound discretion. It is my idea that the law does not fix the compensation at all until the trustees take some action under the law.

With this further explanation of my views I will ask you to read again what I said in my letter of the 20th and you will find nothing therein which is in any way inconsistent with what I now say nor anything that will necessarily have the effect that you suggest in your letter.

I am very glad, indeed, if anything I have done or said will tend to aid you in your most laudable efforts and I appreciate very much your kind words.

Respectfully yours,

N. J. LEE,
Special Counsel.

COUNTY SUPERINTENDENT—DUTIES OF.—It is the duty of the county superintendent to sign the certificates of proficiency referred to in section 2, chapter 146, acts of the thirty-fourth general assembly.

November 23, 1911.

MYRTLE A. DUNGAN,
Chariton, Iowa.

DEAR MADAM: I beg to acknowledge receipt of your letter of the 22nd inst. addressed to the attorney general.

You inquire whether it is your duty as county superintendent to sign the certificates of proficiency referred to in section 2, chap-

ter 146, laws of the thirty-fourth general assembly, based upon examination under city superintendent of schools.

The attorney general cannot officially advise you in a matter of this kind but in this instance I may say in a personal and unofficial way as a courtesy to you that it is my opinion that it is not your duty to sign the certificates referred to. A pupil may be admitted to a high school in a school corporation other than that of his residence upon passing a satisfactory examination before the officers of such high school without having a certificate of proficiency from the county superintendent, providing he comply with the other requirements of the statute.

Respectfully yours,

N. J. LEE,
Special Counsel.

SCHOOL DISTRICTS.—The secretary of a school board is not prohibited from acting as agent of an insurance company and taking risks upon school property, but where the power to insure the property is delegated by the board to the secretary he would be prohibited from placing the insurance with the company of which he is the agent.

November 25, 1911.

MR. J. L. CILLEY,
Independence, Iowa.

DEAR SIR: Your letter of the 23rd inst. to the attorney general was referred to me for reply.

You request an opinion from this department as to whether the law of this state prohibits secretaries and members of school boards from writing fire insurance on property belonging to the school district.

It is my opinion that a member of a school board is prohibited from writing insurance upon the property of the school district which he represents. It is contrary to public policy to permit an officer of this kind to represent more than one interest in transactions where the public is affected. This doctrine has been recognized and upheld by the supreme court of this state in the case of *Bay vs. Davidson,* 133 Iowa, 688.

In the case of a secretary to a school board or of a school corporation it would be my opinion that this prohibition would not apply if he did not have any voice or part in the acceptance of a bid for insurance or in making the contract for insurance. But if the board had delegated the duty and authority to the secretary to provide insurance upon school property I would think under such circumstances the secretary would be prohibited from placing the insurance with a company of which he was the agent.

Yours very truly,

N. J. LEE,
Special Counsel.

REGISTRATION OF BREEDING CATTLE.—An animal once registered under chapter 100, acts of the thirty-fourth general assembly, need not be re-registered but subsequent certificates of soundness may be required.

November 25, 1911.

A. R. COREY, ACTING SECRETARY,
Department of Agriculture,
Des Moines, Iowa.

DEAR SIR: Your letter of the 21st instant addressed to the attorney general has been referred to me for reply.

You call attention to chapter 100 of the acts of the thirty-fourth general assembly, and quote from section 4 thereof, as follows:

> "Where certificates of registration have heretofore been issued by the state board of agriculture an additional certificate of registration shall not be required, but application for certificate of soundness shall be made as hereinbefore provided."

Also from section 2 thereof, as follows:

> "The owner and keeper of each and every stallion or jack over two years old kept for public service or for sale, exchange or transfer shall between the dates of January first and April first of each year after their first registration make application for the renewal of the certificate in the form and manner as above described."

And then say:

> "The point I wish to raise is whether we will be obliged to issue state certificates to stallions that already have a state

certificate issued under the old law on one of the registry certificates from the above named Percheron company."

I am of the opinion that the language quoted from section 4 renders it unnecessary for the owner of a stallion registered under the old law to procure another certificate of enrollment under the new law, and that the renewal certificate referred to in section 2 of the act is the annual certificate of soundness mentioned in section 1 of the act, and not the original certificate of enrollment.

Hence, it follows that all that is required is, that the animal be once properly enrolled, under either the old or new law, and that annual certificates of soundness are thereafter required in either case.

Yours respectfully,
C. A. ROBBINS,
Assistant Attorney General.

AUTOMOBILES—PROVISIONS CONCERNING THE OPERATION OF DISCUSSED.

November 25, 1911.

HON. JOHN F. READY,
Fairfield, Iowa.

DEAR SIR: This will acknowledge the receipt of your letter of the 23d inst. to the attorney general, which is referred to me for reply.

You request the opinion of the attorney general upon a number of questions arising under chapter 72, acts of the thirty-fourth general assembly, in relation to motor vehicles, which I note as follows:

1. Does the law as contained in this section (20) impose upon the operator of a motor vehicle any duty other than the duties imposed upon all users of the highway?

2. Can an operator of a motor vehicle on the public highway under this section be guilty of operating in a careless and imprudent manner if he does not attain a rate of speed in excess of twenty five miles an hour?

3. Is it incumbent on the state to prove that a person has operated a motor vehicle at a rate of speed in excess of twenty-five

miles an hour before the operator of a motor vehicle can be found guilty of operating his vehicle on the public highway in a careless and imprudent manner?

4. If a person operating a motor vehicle attain a rate of fifteen miles per hour upon a business street in a city and upon which street at said time and place there were several vehicles drawn by horses and said motor vehicle pass within two feet of a team which team became frightened upon the approach of such motor vehicle and before the same had passed and before the said motor vehicle had arrived opposite to the team the operator of said motor vehicle claiming that he did not see any other such vehicles on the public highway, not even the team which became frightened at his automobile, and the driver of said team gave no signal and the automobile did not stop nor slow down and one of the horses frightened by the automobile in its endeavor to escape was killed, would such state of facts be a violation of the provisions of section 20 of chapter 72, acts of the thirty-fourth general assembly?

5. Do the provisions of section 20, chapter 72, acts of the thirty-fourth general assembly, make it the duty of the operator to exercise vigilance and attention and that he is bound to know and see other users of the public highway who are traveling upon the said highway at the same time and place as is the automobile?

6. Is it your opinion that under the provisions of said section 20 and viewing it from a criminal standpoint that it is within the province of a jury to determine whether the person operating a motor vehicle has been guilty of not carefully and prudently operating the same and is therefore guilty of carelessness and negligence and imprudence in operating a motor vehicle?

7. Can a person under section 20 be guilty in operating a motor vehicle on a public highway carelessly and imprudently in any manner other than the rate of speed at which the automobile is operated?

8. What in your opinion, is meant by the clause "at a rate of speed so as not to injure the property of another," etc.? Does it mean that a rate of speed less than twenty-five miles per hour is not such a rate of speed as to injure the property of another or the life or limb of any person or does it mean that any rate of speed depending upon the time and place and other circumstances taken in connection with said rate of speed may determine the fact as to whether the speed is so as to injure the property or the life or limb of another person and this regardless of whether

the rate of speed is under or over twenty-five miles an hour. It is understood that in all of these cases injury to a person or property of another is supposed to have taken place.

It is my opinion that your first question should be answered in the negative, with this qualification of the general rule which would apply, that if one operates a motor vehicle at a greater rate of speed than twenty-five miles an hour this statute makes it presumptive evidence of negligence. Such presumption would not apply to users of other vehicles and if some other vehicle were driven upon the highway at a greater rate of speed than twenty-five miles an hour and such speed as to that vehicle under all the facts bearing upon the transaction were negligent, that fact would have to be proved by the person pleading the negligence, whereas in the case of a motor vehicle the fact that such rate of speed did not amount to negligence under all the circumstances would have to be pleaded and proved as a defense. Otherwise, I do not see that any different rule as to care and prudence is laid down in any section of this act as to motor vehicles than obtains generally as to other vehicles and users of the public highway.

Your second question should, in my opinion, be answered in the affirmative. Negligence in operating a motor vehicle does not necessarily consist in driving a motor vehicle at an excessive rate of speed. A great many things might have to be considered in determining whether a person is guilty of negligence under this section. Other provisions of this law require the operators of such vehicles to observe certain precautions which I need not point out here. Section 20 of the act enjoins upon the operator of a motor vehicle to drive the same in a careful and prudent manner on the public highways. A failure to exercise such care and prudence would amount to negligence. The rate of speed might be very low and yet if the driver exercises no care or prudence as to stopping when requested or in passing or attempting to pass other vehicles, or in crowding in between vehicles, or in doing a number of other things, he might still be guilty of negligence under section 20.

What has been said in answer to the first two questions serves as an answer to your third question.

Upon the state of facts set forth in your fourth question I cannot express an unqualified opinion. The facts you recite do not raise a legal question but rather one of fact which, under the law, would come within the province of the jury to pass upon. Moreover, the

statement makes no reference to a number of other things which the law either requires or prohibits in the use of such vehicles. Certain requirements are made as to breaks, signals, bells, lamps, etc.

I answer your fifth question both yes and no. It is the duty of the operator of a motor vehicle to excerise a certain degree of vigilance and attention. But on the other hand I do not understand the law to mean that he is bound at his peril to know and see other users of the public highway who are traveling upon the same at the time and place he is using it. In other words, I do not understand that one who drives a motor vehicle upon the highway insures others against injury or damages that may be caused by him or his vehicle.

I answer your sixth question in the affirmative. As to whether a person is negligent is, as I have suggested, very largely a question of fact.

Your seventh question I have already answered by what I have said in answer to some of the foregoing questions. It should be answered in the affirmative.

In view of what I have said above it makes it unnecessary to say anything further in answer to your eighth interrogatory.

Your friend,

N. J. LEE,
Special Counsel.

ROAD DRAGGING—COMPENSATION FOR.—Compensation for dragging the roads is to be fixed by the trustees but not to exceed fifty cents per mile necessarily and actually traveled while dragging the roads.

November 27, 1911.

MR. S. U. MUSSETTER,
Victor, Iowa.

DEAR SIR: Your letter of the 25th inst. addressed to the attorney general was referred to me for reply.

You request an opinion from this department as to what compensation is to be made for dragging the roads under the new road drag law. You say some townships have been paying 25c per mile

each way or 50c for a round trip, while the township you live in has paid 50c each way or $1.00 for the round trip and you inquire which is right.

The attorney general cannot officially advise you in this matter but in this instance I may say in a personal way, because of the great importance of the subject you write about, that this question has been propounded to this department a number of times and I have uniformly held that the compensation to be made for dragging is to be fixed by the township trustees at a rate not in excess of 50c per mile for each mile necessarily and actually traveled with the drag upon the public highway while dragging the same in accordance with the contract therefor, which will not include travel in going to or from the place where the work is done. It is entirely discretionary with the trustees, therefore, whether the compensation is 50c a mile or any other sum less than that rate or figure. The law does not fix the compensation at all except that it fixes a limit above which the trustees may not go.

Applying this interpretation of the law to the facts you set forth I would say that the township in your county which paid 25c per mile each way, or 50c for a round trip, and your own township which paid 50c per mile each way or $1.00 for the round trip, are both within the law if such compensation in each case was determined by the township trustees.

Respectfully yours,

N. J. LEE,
Special Counsel.

MOTOR VEHICLE ROAD FUND—HOW USED.—The county motor vehicle road fund created by section 33 of chapter 72 of the acts of the thirty-fourth general assembly may not be used for cutting down hills and making fills, but may be used for crowning, draining, dragging, graveling or macadamizing and for building permanent culverts.

November 29, 1911.

DR. J. W. LAUDER,
Afton, Iowa.

DEAR SIR: Hon. W. W. Morrow, Treasurer of State, referred your letter of the 27th inst. to him to this department with request that the question you submit be answered.

The matter you want determined is whether any part of the county motor vehicle road fund created by chapter 72, laws of the thirty-fourth general assembly, may be used by the board of supervisors for grading public highways by cutting down elevations and hills and moving the dirt and filling in any other places in the road.

Section 33 of the act referred to provides that the county motor vehicle road fund shall be expended for the following purposes only: The crowning, draining, dragging, graveling or macadamizing of public highways outside of the limits of cities and towns and for building permanent culverts on such highways.

It seems to me from the statement you make that the work or improvement described in your question is not embraced within any of the things or improvements that are authorized to be done with this road fund. Of course, in crowning or draining a public highway it may be necessary to do some cutting and filling but that is merely incidental and not the chief object. In draining a low stretch of road it might be necessary to go through an elevation for a proper outlet and if the draining is done by open ditches there would be no objection to removing the dirt and depositing the same at proper places in the highway, and so in constructing open drains along the highway outside of the traveled portion the earth excavated could be scraped or dragged along the highway without being in violation of the provision of the statute quoted. Likewise in crowning a highway it may be necessary to do some cutting and filling but as suggested the cutting and filling is incidental to the main thing to be accomplished. I do not think the legislature intended that any part of the county motor vehicle road fund should be devoted to the purpose of grading the road. I think the county road fund is designed for such purposes very largely.

Respectfully yours,

N. J. LEE,
Special Counsel.

IMPROVEMENT BONDS—CONSTITUTIONAL LIMIT OF INDEBTEDNESS.—Where improvement bonds are issued pledging the funds diverted from certain sources rather than the general credit of the state the same are not to be taken into account as an indebtedness of the state in determining when the constitutional limit of indebtedness has been reached.

November 29, 1911.

HON. JOHN L. BLEAKLY,
Auditor of State,
State House.

DEAR SIR: Your communication of recent date addressed to the attorney general requesting his opinion as to whether or not municipal improvement bonds issued under the provisions of sections 830, 894 and 912 of the code should be taken into account in determining the constitutional limit of indebtedness as fixed in section 741-v, supplement to the code, 1907, was referred to me for reply.

I have examined the provisions of the statute you refer to and it is my opinion that bonds of the character you describe should not be taken into account in determining the constitutional limit of indebtedness as fixed by section 741-v of the supplement to the code, 1907.

Section 912 of the code provides that any city may anticipate the collection of the taxes authorized to be levied under sections 830 and 894 of the code and to that end may issue certificates or bonds and that such certificates or bonds and the interest thereon shall be secured by said assessments and levies and shall be payable only out of the funds pledged to the payment of the same, to-wit, the taxes that may be levied under the sections just referred to. It is clear from this language that the city in issuing such bonds is not authorized to pledge the credit of the municipality, nor is a debt created against the municipality when such bonds are issued in accordance with said provisions of the statute within the meaning of the constitutional provision limiting the amount of indebtedness which municipalities may incur or within the meaning of said section 741-v of the supplement to the code, 1907.

These views are supported by our supreme court in the opinion rendered in the case of *Corey vs. City of Ft. Dodge,* reported in the 133 Iowa, page 666.

Respectfully yours,

N. J. LEE,
Special Counsel.

CONSTABLES—DUTIES OF.—It is the duty of a constable to serve all warrants or notices directed to him by or from any lawful authority and he may not select the profitable items and refuse the unprofitable.

November 29, 1911.

C. H. JOHNSON, *Constable*,
Burlington, Iowa.

DEAR SIR: Yours of yesterday addressed to the attorney general has been referred to me for reply.

Your question briefly stated is whether or not you are obliged to serve original notices placed in your hands as constable when the cost of transportation to the place of service exceeds your compensation for the service to be rendered.

Code section 579 provides:

> "Constables shall serve all warrants, notices, etc., directed to them, by or from any lawful authority and perform all other duties now or hereafter required of them by law."

As I view it, the law would not permit you to select the items of business which were profitable and turn down those which were unprofitable and that you should either perform the duties of the office as a whole or if unwilling to perform them for the compensation provided by law then your remedy would be to resign the office.

Hence, it follows that your inquiry must be answered in the affirmative.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

DRAINAGE DISTRICTS—ASSESSMENTS PAYABLE IN INSTALLMENTS.—Where a drainage district is established under chapter 68 of the acts of the thirtieth general assembly as amended, the property owners assessed for benefits are entitled to the privilege of paying their assessments in ten equal annual installments.

December 1, 1911.

HON. W. T. OAKES,
Clinton, Iowa.

DEAR SIR: Your communication of the 27th ult. to the attorney general was referred to me for reply. You request an opinion

from this department upon the following state of facts as I gather them from your letter:

A drainage district was established in your county some time prior to the present year under what is known as the new drainage law, being chapter 68 of the acts of the thirtieth general assembly, together with amendments thereto, but that no assessment has been levied as yet for the cost of constructing the drainage improvements therein and to defray all other costs and expenses connected with said proceeding. Some of the owners of property within said drainage district are desirous of availing themselves of the privilege of paying their assessments in ten equal annual installments and to that end are willing to sign a written waiver and agreement as provided in section 1989-a-26 of the supplement to the code, 1907.

The question you propound upon the foregoing facts is whether the owners of property within said drainage district whose lands are assessed for benefits are entitled to the privilege of paying their assessments in ten equal annual installments as set forth in said section 1989-a-26 of the supplement to the code, 1907, upon their signing the written waiver and agreement mentioned in said section, or whether they are required to pay the whole of their assessments at one time as soon as they are levied and are due and payable, or at best pay the same in three equal installments in the manner specified in section 1989-a-12 of the supplement to the code, 1907, as amended by section 11 of chapter 118, acts of the thirty-third general assembly, and as further amended by section 5 of chapter 87, acts of the thirty-fourth general assembly, the board of supervisors being willing to provide for the issuance of the drainage improvement certificates as provided in said section 1989-a-26 of the supplement to the code, 1907, and to grant to said property owners the privileges mentioned in said section if the same are lawful under the circumstances and facts set forth.

From a reading of your letter it appears to me that you assume that section 5 of chapter 87, laws of the thirty-fourth general assembly, in so far as it relates to the payment of drainage assessments in installments repeals and supersedes the provisions and privileges contained in section 1989-a-26 of the supplement to the code, 1907, with reference to the signing of waivers as to illegalities in relation to drainage proceedings by property owners and paying drainage assessments in installments, and further that if

the owners of property within the drainage district in your county, with reference to which your inquiry is made are entitled to the privileges and benefits mentioned in said section 1989-a-26 of the supplement to the code, 1907, it would be solely because of the fact that the said drainage proceedings were instituted and said drainage district established and the contract for the improvements therein let prior to the adoption of said section 5, chapter 87, by the thirty-fourth general assembly. If this were the only theory upon which it could be claimed that such property owners were entitled to the privileges and benefits contained in section 1989-a-26 of the supplement to the code, 1907, I could not agree with your conclusion. I think, however, there is no question but what the owners of property within the drainage district in question who have been assessed for benefits on account of the construction of drainage improvements therein are entitled to pay their assessments in ten equal annual installments, providing they execute the written waiver and agreement within the time and in the manner specified in said section 1989-a-26 of the supplement to the code, 1907, and provided further the board of supervisors authorize the issuance of improvement certificates as authorized in the section of the statute last mentioned.

I reach this conclusion because in my view said section 5, chapter 87, laws of the thirty-fourth general assembly, does not repeal or supersede the provisions of section 1989-a-26 of the supplement to the code, 1907, authorizing the board of supervisors to provide for the issuance of improvement certificates and giving to property owners the privilege of paying their drainage assessments in ten equal annual installments upon the signing of the waivers and agreements mentioned therein. I see no inconsistency or conflict in the provisions in the respective sections of the statute just referred to but, on the other hand, they appear to me to be entirely consistent and reconcilable. There is no language in chapter 87, laws of the thirty-fourth general assembly, which expressly repeals any portion of section 1989-a-26 of the supplement to the code, 1907, and if any part thereof should be held to be repealed it would be by implication. But as I have suggested, I can see no conflict between the provisions of that section and any language in chapter 87, acts of the thirty-fourth general assembly. It is one of the cardinal rules of statutory construction that repeal of statutes by implication is not favored by the courts. It is another familiar rule that all statutes and parts of statutes relating to the

same subject matter must be read and construed together and all given equal force and effect, if that is possible.

Section 5, chapter 87, acts of the thirty-fourth general assembly, provides that if the owner of any land within the drainage district which has been assessed for benefits shall, within twenty days from the date of the assessment, waive all the irregularities and illegalities in connection with the making of the assessment upon his property and shall promise and agree in writing to pay his assessment in consideration of the right to pay his assessment in installments, that he shall have the right to pay his assessment in three equal installments at certain stated times. There is no provision made for the issuance of improvement certificates when such a waiver and promise are made and if we look to the language of said section 5 alone the board of supervisors would be without authority to issue such certificates. It seems that if it was the intention of the legislature to take away the authority to issue improvement certificates in connection with drainage improvements it would have adopted a more direct and certain method of repealing the provisions in the law which theretofore authorized the issuance of such securities.

The general theory and rule of the law relating to the establishing of drainage districts is that all assessments are due and payable at the time they are levied and the provisions giving to the property owners the privilege of paying in installments are exceptions to the general rule. The thought upon which is based the provision in section 5, chapter 87, laws of the thirty-fourth general assembly, as to paying drainage assessments in three installments is that the property owner ought not to be required to pay the entire amount of his assessment until the drainage improvement has been constructed, because the times of payment are fixed with reference to the different stages in the building of the improvement. Until the drainage improvement is completed he derives no benefit from the same and actual experience has shown that oftentimes land owners have been required to pay the full amount of their assessments in cash for a considerable time before the improvements upon which they are based are completed.

The legislature saw fit, however, to impose upon the land owner the signing of a waiver as to illegalities in connection with the drainage proceedings as a condition upon which he might have this privilege. I presume the thought was that those who contest

such proceedings in court ought not to have the privilege and further, that imposing such conditions would tend to discourage litigation. As to whether this is a sound policy I express no opinion. But the privilege of paying such assessments in ten equal installments is quite another thing and it seems to me is a much more valuable right and privilege than the one just discussed and, as I have already suggested, I can see no conflict or inconsistency between the two provisions. That the legislature did not intend by any language in said section 5, chapter 87, laws of the thirty-fourth general assembly, to repeal the provision in section 1989-a-26 of the supplement to the code, 1907, with reference to payment of drainage assessments in installments, is further supported by the fact that the legislature retained the clause in section 1989-a-26 of the supplement to the code, 1907, as amended by section 11, chapter 118, laws of the thirty-third general assembly, which provides for the reduction of rate of interest upon drainage assessments to correspond to the rate of interest which drainage improvement certificates or bonds bear. This language contemplates that such drainage securities may be issued but, as we have seen, no authority for their issuance is found in section 5, chapter 87, laws of the thirty-fourth general assembly. We must look then to section 1989-a-26 of the supplement to the code, 1907, for authority to issue such securities.

Respectfully yours,

N. J. LEE,
Special Counsel.

MINE FOREMEN--NUMBER REQUIRED.—One mine foreman is required for each mine where five or more persons are employed underground.

December 4, 1911.

HON. R. T. RHYS,
Ottumwa, Iowa.

DEAR SIR: Your communication of the 25th ult. to the attorney general requesting his opinion on the question propounded by you was referred to me for reply.

I quote from your letter as follows:

> "Two certain coal mines in this district are situated about one mile apart. Owned and operated by the same company.

About thirty-five men are employed in one and about twenty-five in the other. One certified mine foreman is employed to look after both mines. The said mine foreman makes an inspection of both of the mines at least once each day. In a case like the above or, in mines where five or more persons are employed underground do not our mining laws require the operator to employ a certified mine foreman for each such mine?''

In my opinion the question you submit, upon the facts set forth, ought to be answered in the affirmative. While there is no statement or language in the law bearing upon the subject of mines and mining which expressly says in so many words that each mine employing five or more persons shall have a foreman yet it seems to me that all the laws upon our statute books relating to this subject are predicated upon the assumption that not only is it essential for the safety and welfare of persons working in mines that a foreman be employed but that a mine foreman having the qualifications prescribed by law shall be employed in every mine where five or more persons are employed. Section 42, chapter 106, acts of the thirty-fourth general assembly, defines the term ''mine foreman'' as used in that chapter and in the law of this state to mean one who is in charge of the underground workings or department of the mine, or any part thereof, either by day or night. Section 41 of the same chapter enumerates some of the duties of a mine foreman. Section 2489-a of the supplement to the code, 1907, as amended by chapter 146 of the thirty-third general assembly and by chapter 106 of the thirty-fourth general assembly, prohibits any person from discharging the duties of mine foreman without holding a certificate of competency. These provisions in the law all support the conclusion announced.

It is my understanding that one of the chief purposes in employing a mine foreman is to afford safety and protection to those employed in mines. It is the duty of the mine foreman to examine and inspect the mine and all the machinery and apparatus therein; he is required to keep constant watch against dangers to those employed in the mine and to provide against them. In order that this duty be performed properly it would seem that he should devote all of his time in one mine. If a person were permitted to discharge the duties of mine foreman for two or more mines it would lessen the precautions and safeguards designed by law for the miners. It is well known to those who are familiar with the operation of

mines that conditions as to safety may change very suddenly. A mine may be in the best of condition at one moment and in the next be unsafe. A fire might break out unexpectedly; passageways may be suddenly blocked and a number of other things might happen unexpectedly which would subject those working in the mines to great hazards. It is in such emergencies that a mine foreman is needed most. It is not to be expected that all those who work in the mines are familiar with all the conditions that obtain nor would they know what to do in cases of emergency but would rely upon the knowledge and judgment of the foreman, who is authorized to hold his position because of the superior knowledge and experience he has in such matters.

While I think there can be no question as to the correctness of the views expressed, I might suggest that if there should be any doubt in the matter the law of this state gives ample authority and discretion to the state mine inspectors to give such directions and orders looking to the safety of mines and for the protection of those working in mines as they deem proper and if the fact that the owner of a mine or person operating the same did not provide a mine foreman at all times should enhance the danger to those working in a mine or make a mine more unsafe the mine inspector would have the authority and power to make the proper orders and rulings to insure the safety of those employed in the mine.

Respectfully yours,

N. J. LEE,
Special Counsel.

MARRIAGES—WHO MAY SOLEMNIZE.—A minister of the Methodist Episcopal Church who has severed his relation with that church and united with the Presbyterian Church may perform a marriage ceremony in accordance with the usages of the Presbyterian Church.

December 5, 1911.

REV. HARRY N. POSTON,
Nodaway, Iowa.

DEAR SIR: Your letter of the 4th instant addressed to Attorney General Cosson has been referred to me for reply.

You state that you were previously an ordained minister of the Methodist Episcopal Church for four years, that you withdrew

from that church and united with the Presbyterian Church, and that you are at this time a regular pastor stationed at Nodaway, but that you will not be received into full relation until the regular session of the Corning Presbytery, April next, and propound the following inquiry:

> "In the meantime, will my former ordination give me the legal right to perform a marriage ceremony?"

Code section 3145 provides:

> "Marriages must be solemnized (paragraphs 1 and 2 omitted) by some minister of the gospel, *ordained or licensed*, according to the usages of his denomination."

The words "his denomination" used in this section doubtless refer to the denomination to which the minister holds at the time he performs the marriage ceremony, and having renounced your allegiance to the Methodist Episcopal Church, you would no longer have the right to perform the marriage ceremony as a minister of the gospel of such church or denomination. However, I take it from your statement that you have at least been *licensed* to preach the gospel according to the usages of the Presbyterian Church, and even though you may not have been fully ordained as a minister of such church, yet the statute only requires that you be either ordained or licensed, and that if licensed, even though not ordained, I think you would be authorized to solemnize the marriage ceremony in accordance with the usages of the Presbyterian Church.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

SUPERINTENDENT OF DRAGGING—WHO ELIGIBLE.—A superintendent of dragging must be a resident of the township or of a city or town within the sub-township.

December 6, 1911.

L. W. COLEMAN, *Township Clerk,*
Iowa Falls, Iowa.

DEAR SIR: Your letter of the 4th inst. addressed to the attorney general was referred to me for reply. You propound two questions upon which you request an opinion from this department:

"1. As to whether the township trustees may appoint a person as superintendent of dragging who resides in a township which is wholly surrounded by the township for which it is proposed to appoint him as such superintendent.

"2. Are the township trustees required to appoint a person as superintendent of dragging who in their judgment is not fit for the position, if they are unable to induce a person who in their judgment is suitable for the position to accept the same."

The township trustees would not have the authority to appoint a person as road superintendent who resides in another township. The statute provides that the superintendent of dragging shall be a resident of the township or any city or town within said township. The term "town" as here used means incorporated town and does not have reference to nor would it include township.

With reference to your second question it is my opinion that the trustees are not required to appoint a man as superintendent of dragging unless he is a suitable person for that position. Or, putting it in another way, they would not be justified in selecting one who is in their opinion unfit. Such disqualification, however, must exist in fact and could not be resorted to as a mere subterfuge to avoid complying with the law in respect of selecting such officers. The law does not say just what the qualifications of a road superintendent shall be and when we say that the trustees need not select a man who is unfit it must be understood that it has reference to such a person as would not perform the duties pertaining to the office of superintendent of dragging and that this would be apparent to the trustees.

Respectfully yours,

N. J. LEE,
Special Counsel.

INCOMPATIBLE OFFICES.—The offices of city councilman and county supervisor are incompatible and both may not be held by the same person at the same time.

December 6, 1911.

MR. J. S. FISK,
Guthrie Center, Iowa.

DEAR SIR: Your letter of the 5th inst. addressed to the attorney general was referred to me for reply.

You request an opinion from this department, first, whether the same person at the same time may hold the office of city councilman of a city and that of a member of the board of supervisors and, second, whether the rules of the state board of health apply to your city.

It is my opinion that your first question should be answered in the negative and your second in the affirmative.

In my view the offices of city councilman and county supervisor are incompatible under the rules of the common law and may not be held by the same person at the same time and the acceptance of one of said offices while holding the other has the effect of at once creating a vacancy in the first office.

If I had the time I believe I could cite a number of instances where the duties of the two offices would conflict or where one of the offices would be subordinate to the other.

Respectfully yours,

N. J. LEE,
Special Counsel.

CO-INSURANCE.—Each separate building insured is a separate risk within the meaning of chapter 79, acts of the thirty-fourth general assembly, providing for co-insurance on risks of $25,000 or over.

December 7, 1911.

FT. MADISON REALTY CO.,
Ft. Madison, Iowa.

GENTLEMEN: Yours of the 5th instant addressed to the attorney general has been referred to me for reply.

Your question, briefly stated, is, whether or not several school buildings may be insured in one policy in order to make the amount sufficient to have co-insurance applied.

Chapter 79, acts of the thirty-fourth general assembly, provides:

> "That upon the written request of any person desiring insurance, a rider providing for co-insurance may be attached to and become a part of the policy, but in no case shall such rider apply to dwellings or farm property, nor to any *risk* where the total value of the property to be insured is less than twenty-five thousand dollars."

Each separate building is a separate "*risk,*" within the meaning of this section, and hence, it follows that co-insurance cannot be applied to any building or risk where the total value of the same is less than twenty-five thousand dollars, and that the values of several buildings, even though belonging to the same owner, cannot be added together and all treated as one risk for the purpose of obtaining co-insurance.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

TAXATION.—Omitted property may be assessed for taxation by the county treasurer.

December 7, 1911.

MR. LOUIS E. FAY,
Clinton, Iowa.

DEAR SIR: Your letter of November 17th addressed to the attorney general has been referred to me for reply, and I have been unable to give the same sufficient investigation to enable me to answer until this time.

You refer to the suggestion that the treasurer should assess the bank stock to the individual owners of the property as omitted property, and ask, "Can you see any harm in the assessment by the treasurer?"

As a general proposition, I think that in view of all the circumstances, the treasurer might list the property as having been omitted.

Our supreme court has held that the taxing officers may use any means at their command in assessing national bank stock to arrive at its actual market value, and they are not bound by the book value, but may ascertain its actual value the same as any other tangible property.

First National Bank vs. Estherville, 136 Ia., 203.

An assessment of such stock as omitted property was upheld by our supreme court in the case of *Judy vs. Beckwith,* 133 Iowa, 252.

As I understand it, the only question involved is, with reference to the tax for the year 1910, and if this be true, then there is ample time to assess the property as having been omitted after the deter-

mination of the suit now pending, and it may be determined that the assessment already made is legal, or at least that the parties are estopped from setting up its illegality.

I am enclosing a copy of this letter to Mr. Oakes.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

CITIES AND TOWNS.—Cities of the first class may not levy the five mill tax for fire fund provided for by code supplement section 716-a as amended by chapter 43 of the thirty-third general assembly.

December 7, 1911.

M. J. MITCHELL, *City Solicitor,*
Ft. Dodge, Iowa.

DEAR SIR: Your letter of the 6th instant addressed to the attorney general has been referred to me for reply.

Your question, briefly stated, is: Whether or not the city of Ft. Dodge (a commission plan city with a population exceeding 15,000) is authorized to levy a tax for a fire fund under the provisions of code supplement section 716-a, as amended by chapter 43 of the acts of the thirty-third general assembly. The code supplement section above referred to provides:

> "That any city of the *second class* may levy a tax in any one year of not more than one mill on the dollar of the assessed valuation of the taxable property within the corporate limits, for the purpose of maintaining a fire department; and the money so raised shall constitute a fire fund, and shall be applied to no other purpose."

As suggested by you, it was perfectly clear that the right of a first class city to levy such tax was not conferred by this section, but your thought is, that such power was conferred by the language injected into the section by the amendatory act, chapter 43 of the thirty-third general assembly, the language stricken out being "one mill," and that inserted in lieu thereof being "three mills, and in cities with a population in excess of 10,000, five mills."

Even with this language imported into the section, the section as amended only purports to apply to cities of the second class,

as indicated by the first line of the original section, as well as by the title of the amendatory act, and I am inclined to believe that the language imported by the amendatory act should be construed as though it read: "Three mills, and in cities of the *second class* with a population in excess of 10,000, five mills." In other words, the provision for a five mill levy was not intended to apply to cities of the first class, but to cities of the second class having a population in excess of 10,000 and less than 15,000, the word "cities" in the language imported into the section being modified and limited by the term "city of the second class" contained in the original section.

If this section as amended should be construed to apply to cities of the first class, it would be a serious question whether or not the act would be constitutional, because there is no reference to cities of the first class in the title to either the original section or the amendatory act, and this is an additional reason in favor of the construction heretofore given.

I have not undertaken to determine what right your city may have, by virtue of the fact that it is a commission city of the first class, to levy a fire fund under some other provision of the law, but I only hold that this power is not conferred by the sections referred to, which holding you will consider as the personal views of the writer only.

With my kindest personal regards, I remain,

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

STATE BOARD OF HEALTH.—Provisions for compensation of officials and appointees discussed.

December 8, 1911.

HON. G. A. SMITH,
Clinton, Iowa.

DEAR SIR: Your communication of the 6th inst. to the attorney general was referred to me for reply.

You request an opinion from this department upon two questions arising upon the facts set forth in your letter, which I quote:

"The special committee from the Iowa state board of health, appointed to investigate and report upon the recommendations made by the state bacteriologist in his annual report, and also upon the feasibility and advisability of employing an assistant bacteriologist, who shall do the work of investigation in epidemiology for the state board of health, which heretofore has been done by the state bacteriologist—Dr. Henry Albert, but which, on account of his increased duties, he is now unable to do, and in consequence, has released the ($1,200.00) salary formerly paid him out of the laboratory appropriation, by the state board of health, desires your opinion to guide them in making their report. The idea of the committee is, that the board of health select an assistant bacteriologist jointly, with the State University who would render services to both—act as epidemiologist for the state board of health in investigating the cause and origin of epidemics within the state, and deliver a course of lectures, and give instructions in the State University, and that from the released salary of the state bacteriologist, the board of health shall pay a part of the salary of this assistant, the State University to pay the balance. Can this be done? The state bacteriologist reports, regarding the expenditures of the bacteriological laboratory, that 'the janitor's services of the laboratory, which heretofore were paid by the State University, will need to be paid, hereafter, from the laboratory appropriation.' We, the committee, contend that the laboratory, being a part and a department of the State University, its janitor services should continue to be paid by the university, and that the appropriation for laboratory expenditures, under the control of the state board of health, is for the purpose of providing necessary assistance in carrying out the work of the state board of health, that this laboratory and department was already established and in full operation, as a part of the State University, with janitor services provided, when the law, designating it the laboratory of the state board of health, was enacted, and that this law, making this appropriation for board of health purposes, does not contemplate the payment of either rent or janitor's services. Are we right, and should we decline to report to approve the payment of the janitor's services, out of the ($6,000.00) annual appropriation for the state bacteriological laboratory under the control of the state board of health?

"Is it not the province of the state board of health to direct the expenditure of the ($6,000.00) annual appropriation for bacteriological purposes, and to fix all salaries of those employed under it?"

It is my opinion the state board of health has ample authority under the provisions of chapter 16-a, title XII of the supplement to the code, 1907, to devote a sufficient portion of the annual appropriation provided by said chapter to the employment of an assistant bacteriologist in the bacteriological laboratory of the medical department of the State University for purposes and under the circumstances set forth in your communication.

I assume from your letter that it is the purpose and desire of the board of health to pay for only such services of such assistant bacteriologist as are rendered under the directions of the state board of health and that it is the plan that all services rendered by such assistant bacteriologist to the medical department of the State University shall be paid out of the university funds and my answer to your question is made upon this assumption.

With reference to your second question I will say that in my judgment the language of the act in question making appropriation for the bacteriological laboratory is broad enough to authorize the state board of health to devote a portion of the same to the employment of necessary janitor service for the laboratory rooms, yet I would not care to go so far as to say that the university could be compelled to furnish such janitor service. I think it is entirely discretionary with the state board of health whether it will devote any part of said appropriation to this purpose. Possibly a fair and equitable apportionment of the expense of janitor service between the State University and the state board of health would be the most satisfactory solution.

Respectfully yours,

N. J. LEE,
Special Counsel.

OFFICIAL SHORTHAND REPORTER—COMPENSATION OF.—Money earned by a reporter outside of his official duties and in another judicial district should not be taken into account in fixing his salary.

December 8, 1911.

MR. J. M. MCLAUGHLIN,
Burlington, Iowa.

DEAR SIR: Replying to your letter of the 7th inst. more fully stating your situation with reference to the reporter's salary, will say that code supplement section 254-a2, from which I quoted in my letter of the 4th inst., further provides:

> "And in case the total per diem of each reporter shall not amount to the sum of one thousand six hundred dollars per year, the judge appointing him shall, at the end of the year, apportion the deficiency so remaining unpaid among the *several counties of the district,* * * * * in proportion to the number of days of court actually held by said judge in *such counties.*"

In my judgment, the term "such counties" refers to the several counties of the district, and that in making the apportionment provided for in this section, the judge was limited to the counties of his own district, and would have no right to take into account any services rendered or compensation received by his reporter while attending court in any other district between terms of court in his own district. In other words, the $1,600.00 salary is intended as compensation for the service to be rendered in his own district, and where, as in your case, the entire service of the district has been performed by you, there is no authority for adding to your per diem the number of days served in your vacation in another county for the purpose of reducing the amount of your deficient salary. There would be no more reason for taking this into account than there would be for taking into account compensation which you might have received for doing private work during vacation and deducting that from the amount of your salary.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

COUNTY—LIABLE FOR FUMIGATION.—The county is not liable for the expense of fumigation of a church or school building occasioned by an epidemic of cerebro-spinal meningitis or infantile paralysis.

December 8, 1911.

HON. FRANK L. MAY,
Lansing, Iowa.

DEAR SIR: Your communication of the 3d ult. to the attorney general has been referred to me for reply. You request an opinion from this department upon the questions arising upon the state of facts you set forth in your letter which, in so far as they are material, are as follows:

> "A certain person, a pauper, was in the employ of a well-to-do farmer of this county as a servant girl and while so employed became afflicted with infantile paralysis. The house of the employer was disinfected by a physician who presented his claim to the board of supervisors in the sum of $7.50. Pupils while sick with epidemic cerebro-spinal meningitis had been at school and in a church. Both the school house and church were fumigated by a physician and a claim filed with the board of supervisors for the sum of $5.00."

The question you propound is, "Is the county liable for either or both of these claims?"

In my opinion your question ought to be answered in the negative. I do not think the county is liable for either of these claims under the circumstances and facts set forth. I am assuming, of course, that the services in question were authorized in the proper way. I think as between the owner of the house where the servant girl stayed and made her home and the public it was the duty of such owner to fumigate his premises.

In the case of the fumigation of the church and school house I do not think the statute contemplates that the expenses thereof are to be paid by the public.

Respectfully yours,

N. J. LEE,
Special Counsel.

SPECIAL ASSESSMENTS.—Where special assessments are made payable in installments they may be paid in advance of maturity with interest to date of payment.

December 11, 1911.

F. D. HAMILTON, *Treasurer,*
Webster City, Iowa.

DEAR SIR: Yours of the 8th inst. addressed to the attorney general has been referred to me for reply.

The question, as stated by you, is as follows:

> "I would like you to give me an opinion in connection with section 825 of the code of Iowa in regard to paving and sewer assessments on property, where waivers have been signed and the tax has been spread over a period of seven years and the interest figured accordingly. Now if the owner sells this property and wishes to pay off the whole of the assessment, must he pay the interest on same for seven years or can he settle legally by paying the interest to date?"

Section 828 of the code provides:

> "The owner of any property against which a street improvement or sewer assessment has been levied shall have the right to pay the same, *or the unpaid installments thereof,* with all interest, as the case may be, *up to the time of said payment,* with any penalties and the cost of any proceeding for the sale of the property for such special assessments or installments."

Hence, I am of the opinion that a party desiring to pay unpaid installments would not be required to pay interest until the end of the seven years' period, nor until the end of the period on which the assessment is to mature, but that he may lawfully pay the same at any time by paying interest to the date of payment.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

LOTTERIES—GIFT ENTERPRISE.—It would be a violation of law to give a number with each ticket of admission to an entertainment with the understanding that a drawing shall take place and the last number drawn entitle the holder to a prize.

December 11, 1911.

V. P. MCMANUS, *Attorney,*
Manson, Iowa.

DEAR SIR: Yours of the 9th instant addressed to the attorney general has been referred to me for reply.

Your question is: "In your opinion would it be a violation of the law to give, with each ticket of admission to an entertainment, a number, which numbers are to be later drawn, the last number drawn entitling the holder of same to any certain article?"

Section 2 of chapter 226 of the acts of the thirty-third general assembly defines gift enterprises which are prohibited:

> "Unless the articles or things so promised to be given as gifts or premiums with or on account of such purchases shall be definitely described on such stamp or ticket, and the character and value of such promised gift or prize fully made known to the purchaser of such merchandise or other property at the time of the sale thereof, and unless the right of the holder of such stamp or ticket to the gift or premium so promised becomes absolute upon the completion upon the delivery thereof without the holder being required to collect any specified number of other similar stamps or tickets and to present them for redemption together, and the right of the holder of such stamp or ticket to the prize or gift so offered is absolute and does not *depend on any chance, uncertainty or contingency* whatever."

It is clear from your statement of the situation that the premium is not to be given with each ticket of admission, and that the right of the holder of the winning ticket is to be determined by chance—that is, the last number to be drawn out. Hence, it is clearly a case where the right depends on chance, within the meaning of this section, and is, therefore, in my judgment, prohibited by section 1 of this chapter.

With kindest personal regards, I remain,

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

JURORS—FEES OF.—Persons summoned before a justice of the peace as jurors who are not used as such are not entitled to compensation.

December 16, 1911.

O. W. WITHAM, *County Attorney,*
Greenfield, Iowa.

DEAR SIR: Yours of the 15th inst. addressed to the attorney general has, on account of his absence, been referred to me for reply.

Your question, briefly stated, is, whether or not persons who do not sit in the trial before a justice of the peace, but who are called there as persons from whom to select the jury, are entitled to compensation for one day as jurors.

The present law fixing the compensation of jurymen, both in district and in justice court, is found in chapter 23 of the acts of the thirty-third general assembly, and provides as follows:

> "Jurors shall receive the following fees: For each day's *service or attendance* in courts of record including jurors summoned on special venire, two dollars and fifty cents ($2.50), and for each mile traveled from his residence to the place of trial, ten cents;
>
> "For each day's service before a justice of the peace, one dollar.
>
> "No mileage shall be allowed talesmen or jurors before justices."

As I understand it, this section has been quite generally, if not universally, construed to allow jury fees only to those who *serve* as jurymen in the justice court, and I think this is the true meaning of the law, for you will notice that in district court the juror is entitled, by the words of the statute, to his compensation for *service or attendance,* and if it had been the intention of the legislature to allow for attendance in the justice court as well as for service, the word "attendance" would have appeared following the word "service" in the clause fixing the compensation for justice court, and the fact that the word "attendance" is omitted clearly indicates that no compensation was intended to be allowed for attendance merely.

While, as you suggest, it may be that they should receive compensation, yet as none is provided for, it could not be allowed until the law is changed in such a way as to authorize its allowance. There are many official acts for which no compensation is provided.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

TAXATION—EXEMPTIONS.—Where the upper story of a building is used for lodge purposes or other purposes rendering it exempt it may be exempted even though the lower story be taxed.

December 18, 1911.

POWER & POWER, *Attorneys,*
Burlington, Iowa.

GENTLEMEN: Yours of the 14th instant addressed to the attorney general has been, on account of his absence, referred to me for reply.

You ask for a copy of an opinion thought to have been rendered by this department to the effect that that portion of a building used exclusively for lodge purposes was not subject to taxation. I am unable to find that this question has been passed upon by this department, and while the question is one upon which the department would not be authorized to render an opinion, yet it occurs to the writer, in view of the decisions of our supreme court to the effect that there may be double ownership of buildings,—that is, that the title to the lower story may belong to one owner, while that of the upper story is in a different person, that the upper story so used exclusively for benevolent purposes might properly be exempt from taxation, under subdivision 2 of section 1304 of the code, as amended.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

BANKS—BANK STOCK—TAXATION OF.—The only deduction allowed in arriving at the value of bank stock is the amount of the bank's capital actually invested in real estate.

December 18, 1911.

T. M. EARLY, *County Auditor,*
Allison, Iowa.

DEAR SIR: Yours of December 11th addressed to the attorney general has been referred to me for reply. Your question as stated by you is as follows:

> "A number of banks in this county claim certain and numerous exemptions from their capital invested in their business beyond their real estate and the 20 per cent. Please let me hear from you at once in regard to the matter."

The only deduction provided for under the new law is found in the latter part of section 4, chapter 63, acts of the thirty-fourth general assembly, which reads as follows:

> "In arriving at the total value of the shares of stock of such corporations, the amount of their capital actually invested in real estate owned by them * * * * shall be deducted from the real value of such shares, and such real estate shall be assessed as other real estate."

They are not entitled to any reduction of 20 per cent as mentioned by you, but it is provided in the last part of section 5 of the chapter above referred to, "that such shares and moneyed capital shall be assessed and taxed upon the taxable value of 20 per cent of the actual value thereof," and as other property is taxed at 25 per cent of its actual value, this amounts to the same thing in effect as a reduction of 20 per cent.

Yours very truly,
C. A. ROBBINS,
Assistant Attorney General.

MINIMUM RATES DEFINED.—The minimum rate applied to rates for gas or electricity is that rate charged by the producer and paid by the consumer whether any gas or electricity is used during the period or not, and this rate permits the use of a specified amount of gas or electricity.

December 18, 1911.

MR. S. D. HENRY,
Coon Rapids, Iowa.

DEAR SIR: Your letter of December 13th addressed to the attorney general has been referred to me for reply. The questions propounded by you are as follows:

"First. Does it mean, for instance, that if the minimum rate is $1.00 a month that this sum can lawfully be charged during any month in the year that the meter may not show such amount used when figured at regular rates, or does it merely mean that a $1.00 minimum rate permits $1.00 to be charged on an *average* for the year and that not more than $12.00 a year can be charged unless more than this amount is used on basis of regular rates?

"Second. Also if the law permits both a meter rental charge and a minimum charge."

While the matters inquired about relate to private affairs such as this department is not authorized to render an opinion upon, yet the personal views of the writer are as follows:

First, that the minimum rate provided should apply irrespective of the amount of gas or electricity used, and that each month, if the rates are fixed by the month, should apply independently of each other, and there would be no averaging up at the end of the year, and that in any month where the amount consumed was more than the minimum rate provided for by the ordinance or contract, that such excess should be paid, even though there might be months where the amount consumed was much less than an amount equal to the minimum rate.

Your second question should be answered in the affirmative.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

INTOXICATING LIQUORS.—A beverage containing .49% of 1% of alcohol by volume is intoxicating liquor within the meaning of code section 2382.

December 19, 1911.

E. P. SHEA, *Attorney,*
Decorah, Iowa.

DEAR SIR: Your letter of November 27th addressed to the attorney general has been referred to me for reply.

Your question, briefly stated, is, whether or not a beverage composed of a mixture containing beer and other articles, including .49% by volume of alcohol, is intoxicating liquor, within the meaning of code section 2382.

Our supreme court has frequently construed this section to mean that any mixture, however much diluted or disguised, if it contains alcohol, it is, as a matter of law, intoxicating liquor.

State vs. Yeager, 72 Iowa, 421;

State vs. Intoxicating Liquors, 76 Iowa, at 245;

State vs. Colvin, 127 Iowa, 632.

Hence, it follows that your inquiry must be answered in the affirmative.

Yours very truly,
C. A. ROBBINS,
Assistant Attorney General.

HOGS—DEAD AND DISEASED—DISPOSITION OF—PENALTY.—The sale of dead hogs dying or killed on account of disease is prohibited and the owner or person in charge is required to immediately burn the same. Such dead animals are prohibited from being hauled along any public highway or any public ground. Diseased animals should not be suffered to escape or run at large.

December 19, 1911.

MR. E. C. CARSON,
Woodburn, Iowa.

DEAR SIR: Yours of the 16th inst. addressed to the attorney general has been referred to me for reply.

Your question calls for the laws and penalties in regard to the transportation of diseased hogs, the disposition of the carcasses

when dying of disease, and whether or not it is a crime to buy and sell diseased hogs and the penalty for the same.

Code supplement section 5016-a provides: "No person shall buy, sell, deal in or give away, or offer to buy, sell or deal in, any swine that have died of any disease or that have been killed on account of any disease."

Code section 5015 provides: "The owner or person having charge of any swine, any of which die or are killed on account of any disease, shall, upon such fact coming to his knowledge, immediately burn the same."

Code section 5017 provides: "No person shall convey upon or along any public highway or other public ground or any private land except that owned or leased by him, any diseased swine, or swine that have died of or have been killed on account of any disease."

Section 5018 provides: "It shall be unlawful for any person negligently or wilfully to allow his hogs or those under his control infested with any disease to escape his control or run at large."

Code section 5019 provides: "Any person violating or failing to comply with any provision of the four preceding sections shall be fined not less than five nor more than one hundred dollars, or imprisonment in the county jail not to exceed thirty days, or both."

Yours truly,

C. A. ROBBINS,

Assistant Attorney General.

CITY AND COUNTY WARRANTS—ORDER OF PAYMENT.—City and county warrants should be registered and paid in the order of their presentation.

December 19, 1911.

W. S. NOTT COMPANY,
Minneapolis, Minn.

GENTLEMEN: Your letter of the 2d inst. addressed to the attorney general has been referred to me for reply. Your inquiries are as follows:

> "We are engaged in selling fire department apparatus and supplies to cities and villages throughout the state, as settlement for which we are frequently given warrants, which when

duly registered by the treasurer draw interest at the legal rate until paid.

"We are also having warrants given us bearing a specific due date, with the rate of interest inserted in the body of the warrant, and the question which we wish to have settled at this time is: Is it necessary to have these warrants registered by the treasurer?"

Subdivision 4 of section 442 of our code provides that the board of supervisors shall keep, among other books, "a book to be known as the warrant book in which shall be entered in the order of its issuance the number, date, amount and name of drawee of each warrant drawn on the treasurer and the number of warrants."

Code supplement section 483 provides: "When a warrant drawn by the auditor on the treasurer is presented for payment and not paid for want of money, the treasurer shall endorse thereon a note of that fact and the date of presentation and sign it, and thenceforth it shall draw interest at the rate of five per cent. He shall keep a record of the number and amount of warrants presented and endorsed for non-payment, which shall be paid in the order of such presentation."

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

TELEPHONES—CONNECTING LINES.—There is no law requiring one telephone company to make connections or transfer messages with another like company.

December 19, 1911.

MR. N. L. COTTON,
Lone Rock, Iowa.

DEAR SIR: This will acknowledge receipt of your letter of the 14th instant to the attorney general and in his absence I will reply thereto.

You complain that the Western Electric Telephone System refuses to connect or transfer messages from the lines of the Farmers and Business Men's Telephone System at Lone Rock and you inquire if there is any law compelling telephone companies to make such connections or transfer of messages.

I have not had time to investigate this question thoroughly but it is my impression from my knowledge of the subject that there is no law in this state under which telephone companies can be compelled to make physical connections or transfer of messages from one line to another. There were several attempts in the last two general assemblies to secure suitable legislation along these lines but nothing tangible was accomplished. The only provision in the law which has any bearing on this precise question is found in section 2161 of the code, which imposes a certain penalty upon any telephone company or person having the control or management thereof for refusing to furnish equal facilities to the public and to all connecting lines for the transmission of communications in accordance with the nature of the business which it undertakes to carry on. I do not think, however, that this provision or regulation is adequate to meet the condition that you complain of. The situation in this state is that there is practically no regulation of telephone companies.

Respectfully yours,

N. J. LEE,
Special Counsel.

MILK LICENSE—WHEN REQUIRED.—A license for the sale of milk is only required where the person sells milk or cream from a store or vehicle within or to be used in an incorporated town.

December 19, 1911.

MR. J. H. BURLINGAME,
Cherokee, Iowa.

DEAR SIR: Your letter of the 28th instant to the attorney general has been referred to me for reply.

You request an opinion from this department as to whether the provisions of section 3, chapter 113, acts of the thirty-fourth general assembly, in so far as it relates to license fees mentioned therein, apply to those persons living in cities and towns having one or two cows and producing a few quarts more milk than they consume and who sell such surplus to their neighbors.

The attorney general is not authorized to render official opinions on questions of this kind except to certain state officers and state departments. In this instance, however, I may say in a personal way as a courtesy to you that the license fees mentioned in said section may not be exacted from any person unless he shall sell

milk or cream from a store or vehicle. I assume from your statement that the persons you refer to deliver their milk to the neighbors on foot or that the neighbors call for it, and persons selling milk under such circumstances would not be required to pay a fee or hold a license.

Respectfully yours,

N. J. LEE,
Special Counsel.

COMMERCIAL CLUBS—INCORPORATION OF.—Commercial clubs if incorporated must be incorporated under chapter 1 of title IX rather than chapter 2 where the incorporation is not for profit.

December 20, 1911.

THE COMMERCIAL EXCHANGE,
Burlington, Iowa.

GENTLEMEN: Your letter of the 19th instant addressed to the attorney general has been referred to me for reply.

Your inquiry is, as to whether or not a proposed corporation where the articles provide "The general purpose of this association shall be to promote the business interests and general welfare of said city and to adopt such measures as will best secure this result," and "The association shall be composed of persons who are interested in commerce and professional and business pursuits in the city of Burlington, Iowa," may properly be incorporated under chapter 2, title IX of the code, having reference to corporations organized not for pecuniary profit, or whether such corporation, to be legal, should come under chapter 1 of title IX, as a corporation for pecuniary profit.

A careful reading of section 1642, being the first section of chapter 2, reveals the fact that the right to incorporate as a corporation not for pecuniary profit is limited to the purposes enumerated in said section, and they are as follows: Churches, colleges, seminaries, lyceums, libraries, fraternal lodges or societies, temperance societies, trades unions or other *labor* organizations, agricultural societies, farmers' granges, or organizations of a benevolent, charitable, scientific, political, athletic, military or religious character.

With this proposition conceded, our next inquiry would be, whether or not your proposed corporation would fall within any of the purposes mentioned, and while I would not want to say

positively that none of these terms would be sufficiently elastic to permit the incorporation of a company such as you suggest, yet it is extremely doubtful whether any of these purposes would be deemed broad enough to authorize such an incorporation, and if this be true, it would necessarily follow that the corporation, in order to be legal, should be under chapter 1 instead of chapter 2.

While your city may not care to avail itself of the provisions of chapter 57 of the acts of the thirty-fourth general assembly providing for the establishment of a department of publicity, development and general welfare, and while this department might not answer all the purposes of your proposed corporation, yet I take the liberty at this time of calling your attention to the provisions of this chapter in order that it may be considered by you along with your proposition to incorporate.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

CONVICTS—SOLITARY CONFINEMENT.—Where a prisoner spends time in solitary confinement it should be added to the length of his sentence.

December 20, 1911.

J. C. SANDERS, *Warden,*
Fort Madison, Iowa.

DEAR SIR: Replying to your letter of recent date addressed to the attorney general, which calls for a construction of code section 5682 with reference to the computation of the term of sentence of a prisoner who is required to spend time in solitary confinement for any violation of the rules and regulations of the prison, will say that I find on August 9th, 1900, former Attorney General Milton Remley rendered to Warden Hunter an opinion construing this section, which is as follows:

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

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

The section then construed remains unchanged, and I see no reason for any change of view in the opinion then given.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

AGRICULTURAL SOCIETIES—AID OF.—Agricultural societies may be aided under chapter 109 of the acts of the thirty-third general assembly where the premiums paid out by such societies are paid in property rather than cash.

December 20, 1911.

A. R. COREY, Secretary,
Department of Agriculture.

DEAR SIR: Your letter of the 19th instant addressed to the attorney general has been referred to me for reply.

You quote from section 1 of chapter 109, acts of the thirty-third general assembly, as follows:

* * * * "upon filing with the auditor of state by its president, secretary and treasurer a statement showing what sums it has actually *paid out in value* for premiums during the period of the short course of that year, together with the certificate of the secretary of the state board of agriculture, showing that it has reported according to law as provided in cases of county and district agricultural societies shall be entitled to receive from the state treasurer a sum equal to forty per cent of the amount paid in premiums, but in no case shall the amount so received in any county exceed two hundred dollars,"

and then say, "The question has come up whether they are entitled to state aid on account of premiums offered other than cash premiums."

The word "value" means the exchange power which one commodity or service has in relation to one another.

State vs. Yates, 10 Ohio Dec., 150.

The word "value" in its commonly received significance means the sum of money a thing will produce to the seller when it is sold.

Rochester vs. Town of Chester, 3 N. H., 343.

The term "value" as used in revenue law means the amount at which the property would be taken in payment of a just debt due from a solvent debtor.

Words and Phrases, Vol. 8, page 7276.

The words used in the section quoted, "has actually paid out in value for premiums," clearly indicate that the legislature did not intend to require that these premiums should be cash premiums, but only that the value of the property actually paid out as premiums should be shown in the statement as a condition precedent to receiving the state aid provided for in the section.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

DEER—RUNNING AT LARGE—RESTRAINT.—Deer running at large may be restrained by the state fish and game warden.

December 21, 1911.

MR. GEORGE A. LINCOLN,
State Fish and Game Warden,
Cedar Rapids, Iowa.

DEAR SIR: Your letter of the 19th instant making inquiry as to the authority of your deputies to enter upon the farms and woodlands of private persons for the purpose of distraining deer that are running at large, under the provisions of chapter 118, thirty-fourth general assembly.

While this chapter is not very specific in its provisions, yet section 3 provides:

> "When it shall become necessary to distrain any deer now running at large within this state, it shall be done under the authority and direction of the state fish and game warden,"

and inasmuch as all the lands in Iowa practically are owned by private parties, it would seem to me that this section gives at least implied authority to enter upon such lands for the purpose

of making such distraint. At any rate, it would seem that the question is one that should be tested out, and under these circumstances, it would doubtless be up to your department to proceed according to your view of the necessity for distraining the deer, and if any action is brought, we can test the matter out in court and thus learn the extent of your authority under this chapter.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

CITIZENSHIP.—An alien who has declared his intention to become a citizen of the United States but has not been admitted to citizenship is not entitled to vote for presidential electors.

December 21, 1911.

MR. ANDREW JOHNSON,
Aurelia, Iowa.

DEAR SIR: Yours of the 20th instant addressed to the attorney general has been referred to me for reply.

You propound the following question:

> "Where an alien has declared his intention to become a citizen of the United States but has not been admitted to full citizenship in United States, is he a qualified elector to vote for electors for president of the United States in any state of the United States?"

This question should be answered in the negative.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

SHOOTING MATCHES—GAMBLING BY MEANS OF—WHAT IS.—Where parties engage in a shooting match and pay a certain price for a given number of shots, the prize for the best shot to consist of a turkey the transaction amounts to gambling.

December 21, 1911.

C. B. CLOVIS, *County Attorney,*
Atlantic, Iowa.

DEAR SIR: In accordance with your request over the phone in which you ask to be advised as to whether or not a scheme whereby several parties desiring to shoot at a shooting match pay 10 cents each for a given number of shots, the prize to be given for the best shot consisting of a turkey purchased or given in return for the money paid in for the chances to shoot, would constitute gambling, within the meaning of our statute, in code section 4964.

This department has frequently passed upon this sort of a proposition and held it to be gambling, the ruling being based upon the decisions of our supreme court in the cases of *State vs. Book,* 41 Iowa, 550, and *State vs. Miller,* 53 Iowa, 154, wherein it is held that where pin pool or billiards is played with an agreement or understanding between the players that the losing party shall pay for the game, is gambling within the meaning of this section. Such cases are clearly distinguishable from cases where an agricultural society offers a premium to the winning horse in a race, for in such cases the premium is not wholly made up from the entrance fees in the particular race for which the premium is awarded, and the agricultural society is authorized by statute to offer such premiums, all of which will be revealed by a careful reading of the case of *Delier vs. Plymouth County Agricultural Society,* 57 Iowa, 481.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

SALOONS—PRIORITY OR RIGHT. WHERE NUMBER IS EXCESSIVE.—Where statements of consent have been issued to a number of saloons in excess of the number authorized by law by a separate resolution of consent those first issued up to the limit in number are legal and those thereafter issued invalid.

December 21, 1911.

W. R. HART, *County Attorney*,
Iowa City, Iowa.

DEAR SIR: This will acknowledge receipt of your letter of the 19th instant to the attorney general in relation to the effect of the decision construing the Moon law on the saloons in your city.

Mr. Robbins of the department informs me that he talked with you over the phone yesterday in relation to the same matter and that you supplemented what you say in your letter with the statement that two of the saloons in Iowa City were granted consent on April 22, 1911; that nine additional persons were granted consent to sell liquor on May 13, 1911, and that on June 2nd last five persons in addition to those mentioned were given such consent.

You state in your letter that the population of Iowa City is 10,000. Under these facts you inquire how many and which of such persons are entitled to operate saloons.

It does not appear from your statement whether the resolutions of consent, or any of them, referred to, were granted at said times to any or all of said persons originally or whether any or all of such resolutions of consent were renewals. Neither does it appear from your statement when the statement of general consent filed in the auditor's office, upon which the resolutions of consent granted by the said council, expires. If the statement of general consent under which your saloons are operating was in force prior to April 15, 1909, and a larger number of saloons than one to 1,000 held consents from the city council granted prior to that date, the reduction in number need not take place, if other conditions and requirements of the law were complied with, until the expiration of such statement of general consent.

I assume from what you say, however, that the provisions of the so-called Moon law apply to the saloons in your city; that is, that the number of saloons must be reduced to the number or

ratio of one to every 1,000 people, or not to exceed ten altogether.

In my opinion the two resolutions of consent granted April 22, 1911, are valid. I think also that eight of the nine consents granted on May 13, 1911, are valid if they were granted separately but if nine persons were authorized to sell liquors by one resolution then it seems to me that such resolution would be void and that no legal right to sell liquors would be acquired by any one of the nine persons named therein. Of course, as to the five persons who were given consents on June 2d there can be no controversy because the maximum number had already been exceeded.

Your letter states that eight persons were given consent under the second resolution but as I understand Mr. Robbins you stated to him that it was nine instead of eight who were named in the resolution of May 13, 1911. It seems to me it would be impossible to say which one of the nine persons was given such consent in excess of the maximum number authorized to sell liquors and if so such nine persons are on an equal footing. If the number of saloons in your city is to be reduced to the ratio of one to 1,000 people at this time then what I have said as to the resolutions now held by the saloon keepers being renewals has no application. If these resolutions are renewals of resolutions of consent granted originally prior to April 15, 1909, under a statement of general consent not yet expired, it would be material to inquire whether they are renewals. Any consent granted originally since April 15, 1909, in excess of the ratio of one to 1,000 is void.

It would seem that the proper procedure for the city council of Iowa City would be to cancel the resolutions of consent attempted to be given to the nine men on May 13th, and grant new consents to eight persons if they desire to grant the maximum number. I think the duty and responsibility rests on the council to determine which eight of these nine men shall receive consent to sell intoxicating liquors.

I enclose for your convenience copy of the opinion just rendered construing the Moon law. I have not compared the same with the original but I think you will find it correct.

Respectfully yours,

N. J. LEE,
Special Counsel.

P. S.—After dictating the foregoing another thought occurs to me. If the resolution of consent adopted on May 13th named nine persons and the consents attempted to be given to such nine men were in no sense independent of each other but were granted collectively, I think what I have said to the effect that none of said nine persons acquired any legal right to sell intoxicating liquors is correct and that a resolution of this character is invalid.

Now if such a resolution is wholly void the question suggests itself as to whether the consents given to the five persons thereafter are not perfectly valid. We can readily see that this situation is bristling with perplexing questions. I would think the best policy for the city council to pursue would be to revoke and set aside all the consents as to which there is any question at all and then proceed to grant consents to such persons as it deems proper up to the lawful number.

My suggestion as to revocation of licenses is not made because it may be necessary but to make sure that no person to whom any such consent was attempted to be given continue to have any right whatever thereunder after the council reduces the number of consents.

VEHICLES.—A wheelbarrow is a vehicle within the meaning of the law with reference to the sale of milk or cream.

December 22, 1911.

MR. W. B. BARNEY,
State Dairy and Food Commissioner,
State House.

DEAR SIR: Complying with the request of Mr. Iliff with reference to the investigation of the meaning of the term "vehicle," as used in the law with reference to the sale of milk and cream, I have to say that Webster defines a wheelbarrow as being "a light vehicle for conveying small loads."

> "A vehicle is any carriage moving on land either on wheels or runners which is used as an instrument of conveyance, transportation or communication, and has been held by various courts, including our own supreme court, to include bicycles, tricycles and sleighs, as well as the ordinary carriages."

8th Words and Phrases, pages 7284-7285.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

MINE OPERATORS—WHO ELIGIBLE.—One who has not been engaged in the business as miner or mine operator for some months is not eligible to appointment of mine examiner under code supplement section 2479-a.

December 22, 1911.

HON. B. F. CARROLL, *Governor,*
State House.

SIR: Your communication of the 14th instant to the attorney general requesting his opinion upon the following was referred to me for reply:

> "Will you please favor me with your opinion as to whether in order for a mine operator or a miner to be eligible to election as a member of the board of mine examiners as provided in section 2479-a, supplement to the code, it is necessary for him to be engaged as such mine operator or miner at the time of said election. In other words, is a person who has heretofore been engaged in business as miner or mine operator but has not been so engaged for some months preceding his appointment, eligible to such appointment or election?"

Section 2479-a of the supplement to the code, 1907, provides in part that the executive council shall appoint a board of five examiners consisting of two practical miners and two mine operators, all holding certificates of competency as mine foremen, and one mining engineer, each of whom shall have had at least five years' actual experience in his profession immediately preceding his appointment, who shall hold office for the term of two years.

An answer to the question you propound turns upon the meaning of the language "immediately preceding his appointment" as used in said section of the statute. Webster's International dictionary defines "immediately" to mean "Without interval of time; without delay; promptly; instantly; at once."

In view of these definitions of the word "immediately" I do not believe that any such miner, mine operator or mining engineer

would be eligible to appointment as member of the board of mine examiners unless he were engaged in the work or business of a practical miner, mine operator or mining engineer, as the case might be, at the time of his appointment to such office. The word "immediately" does not necessarily exclude all interval of time when applied to legal proceedings and in some cases the courts have held it to mean within such time as is reasonably sufficient in which to accomplish the act to which it is applied, but the reasoning and principle upon which such interpretation of the word "immediately" is based in connection with legal proceedings has no application in construing the meaning of the language in question and the first part of your question, therefore, must be answered in the affirmative and the latter part in the negative.

Respectfully submitted,

N. J. LEE,
Special Counsel.

PUBLIC DRINKING CUPS.—Are not prohibited in Iowa.

December 26, 1911.

DR. C. A. CHANCE,
Ralston, Iowa.

DEAR SIR: Yours of the 22nd instant addressed to the attorney general has been referred to me for reply.

There is no statute in this state prohibiting the use of the public drinking cup. Such statutes are in force in many states, but not in this state.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

AUTOMOBILES—REGISTRATION OF.—Dealers in automobiles not used upon the public highway have the option of having the same assessed as other vehicles under the general law or paying the annual registration fee on each machine purchased during the year.

December 27, 1911.

MR. H. B. GROVES,
Sioux City, Iowa.

DEAR SIR: Yours of the 21st instant addressed to the attorney general has been referred to me for reply.

Your question, briefly stated, is whether or not, under the new automobile law, machines on hand with dealers on January first, the time of assessment, should be assessed in view of the fact that the machines may soon be sold to the original purchaser and he becomes liable for the tax, and so on, as often as the cars change hands.

This law has been construed by this department in such a way as to give the dealer the option of listing such machines as he has on hands January first and having the same assessed under the general law, or he may pay the annual registration fee on each of his machines and on each machine which he may purchase during the year, instead of paying the dealer's license fee, and in the last mentioned case, where the dealer would sell to the purchaser, a transfer could be made from the dealer to the purchaser upon payment of a transfer fee of $1.00, and the purchaser in such event would not be liable for the annual fee for that year; and this matter could be taken into account by the dealer in the sale of the machine; the purchaser being compelled to have a license before he could operate a machine would be as willing to pay the dealer for the license as he would the state, and thus the dealer would only be out the transfer fee of $1.00 on each machine, assuming that he could collect from the purchaser the full amount of the license fee that the purchaser would otherwise be required to pay to the state. And if the dealer would cause each machine to be registered under a separate number, he would have no occasion to have the dealer's number or registration, and would not be liable for the license fee.

The theory of the law is to collect one license fee for each year, and if the machine is sold a second or third time in a year, only one license fee is required in case the transfer fee of $1.00 is paid at the time of each transfer and the proper return made, as provided by section 10, chapter 72, acts of the thirty-fourth general assembly.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

WEIGHTS AND MEASURES.—The law with reference to weights and measures and the use of false weighing or measuring devices discussed.

December 27, 1911.

MR. W. B. BARNEY,
Dairy and Food Commissioner,
City.

DEAR SIR: Your letter of the 1st instant has just been referred to me for reply.

Your questions, as stated by you, are:

"Does the sale of a jar of butter purporting to contain three pounds net when in fact it only contains 2½ pounds violate the weight and measure law of this state?

"Does the delivery of 42 pounds of apples on an order for one bushel render the seller liable to a criminal prosecution?

"We also have a complaint relative to a local dealer selling a customer 61 pounds of ear corn on an order for one bushel. In your opinion, is it the duty of this department to bring action where complaints of this character are made to our department?

"Inspectors of this department frequently report that they find packages of flour exposed for sale by merchants of this state without the net weight of the flour being stated on the package. Do you advise us to take any action in this question and would you advise that we refer these matters to the county attorney of counties where non-labeled goods are being offered for sale?"

Code section 5044 provides:

"If any person, *with intent to defraud,* use a false balance, weight or measure in the weighing or measuring of anything whatever that is purchased, sold, bartered, shipped or delivered for sale or barter, * * * * shall be fined not exceeding five hundred nor less than five dollars, or be imprisoned in the county jail not more than six months, or both."

Section 3 of chapter 154, acts of the thirty-fourth general assembly, provides:

> "If any person engaged in the purchase or sale of merchandise or other commodities by weight or measurement * * * * be found *having in his place of business* any scales, weights, measures or other apparatus for determining the quantity of any commodity, which does not conform to the standards of weight and measurement of this state, shall be guilty of a misdemeanor, and for the first offense shall be fined not less than ten nor more than one hundred dollars, and for each subsequent offense, not exceeding five hundred dollars, or imprisonment in the county jail not exceeding ninety days."

With reference to the instances mentioned in questions one, two and three of your letter, in order to convict, it would be necessary to show, in addition to the fact that the butter, the apples and the corn were short in weight, either that the parties selling did so "with the intent to defraud," so as to bring it within the section first quoted; or that he had in his place of business "scales, weights, measures or other apparatus not conforming to the standards" in order to bring it within the last section quoted. The mere fact that the goods are short in weight is not sufficient evidence to warrant a conviction without the showing of these additional matters suggested.

Chapter 180 of the acts of the thirty-fourth general assembly makes it a misdemeanor for "any person to sell any package of flour which shall be stamped or labeled with a greater number of pounds net than such package actually contains, or who shall sell flour without each package, containing one pound or more, having affixed thereto in a conspicuous place on the outside of the package, printed in the English language, in legible type of the size specified, a statement certifying the number of net pounds contained in the package." Under this section the intent of the party is immaterial and conviction can be had without proof of the intent. While section 1 of chapter 154 of the acts of the thirty-fourth general assembly authorizes and empowers the food and dairy commissioner and his assistants to inspect the scales, yet it nowhere imposes upon them the duty of prosecution. The purpose doubtless was to furnish a means of obtaining evidence. The injured parties should, in each instance, institute the prosecution, although the food and dairy commissioner might do so if he sees fit.

This department would advise, in all matters referred to in your letter, that the complaining parties be referred to the county attorneys and the prosecutions be instituted and carried on under his direction.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

COUNTY ATTORNEY—COMPENSATION OF.—The county attorney is not entitled to a percentage on fines and foreclosures unless collected by him during his term of office.

December 29, 1911.

E. B. STILES, *County Attorney,*
Manchester, Iowa.

DEAR SIR: Your letter of the 26th instant addressed to the attorney general has been referred to me for reply.

The question upon which you say your county board desires an opinion, briefly stated, is, When a judgment imposing a fine is entered in a cause in which the county attorney appeared for the state, and such fine is not collected until the county attorney retires from office and is succeeded by a new county attorney who succeeds in collecting the fine, whether the county attorney during whose term the judgment was entered, or the county attorney who collects the fines, or either of them, are entitled to any additional compensation on account of the rendition of such judgment or the collection of the fine.

Your question calls for a construction of the latter part of code supplement section 308, which reads as follows:

> "In addition to the salary above provided, he shall receive the fees as now allowed to attorneys for suits upon written instruments where judgment is obtained, for all fines collected *where he appears for the state,* but not otherwise, and school fund mortgages foreclosed, and his necessary and actual expenses incurred in attending upon his official duties at a place other than his residence and the county seat, which shall be audited and allowed by the board of supervisors of the county."

And especially the underscored portion of the language above quoted.

The general provisions of our law with reference to what constitutes an appearance usually have reference to appearance on the part of defendant rather than on the part of plaintiff, but in this case, both the county attorney obtaining the judgment and the one collecting the fine acted as representatives of the state, and doubtless in whatever was done in connection with the case, they appeared for the state within the meaning of this section. However, I am inclined to the view that the language here made use of should be construed to refer to the appearance made for the state at the time the fine was collected. Appearance, when used to designate the act of any person with reference to an action pending, means to come into court as a party to the suit. The actual presence of the party is not required; he may appear by his attorney or his agent.

Wagner vs. Kellogg, 52 N. W., 1017.

There might be many fines collected, or rather, paid in by the defendants without any active participation on the part of the county attorney, and where such is the case, I am inclined to the view that the words, "but not otherwise" would exclude him from the right to claim a percentage on a fine so collected or paid in, and that the percentage should only be allowed in cases where the collection is brought about by some act or proceeding in which the county attorney appears for the state after the rendition of the judgment imposing the fine.

This construction is doubtless the better one from the standpoint of public policy, for the county attorney who is in office at the time the judgment imposing the fine is entered will know that unless he proceeds to collect the same while he is yet in office, he will not be entitled to any percentage on such fine, where, on the other hand, if the county attorney would not be entitled to any percentage on the collection of fines imposed during the administration of his predecessor, there would be no inducement for him to be active in the matter of collecting such fines.

The question is one that is not entirely free from doubt and is one that probably should be determined by the courts.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

COUNTY ENGINEERS—COMPENSATION OF—HOW PAID.—The county engineer should be paid in accordance with the provisions of subdivision 14 of code section 422.

December 29, 1911.

HON. A. W. MILLER, *County Treasurer,*
Mount Pleasant, Iowa.

DEAR SIR: This will acknowledge receipt of your letter of the 20th instant to the attorney general, which has been referred to me for reply.

You request an opinion from this department on two questions:

"1st. Should the engineer appointed by the board of supervisors under section 2, chapter 24, acts of the thirty-fourth general assembly, be paid out of the road and bridge funds in proportion to the work done on each, or should he be paid out of the general county fund?

"2nd. When bonds are issued and sold for the purpose of building a court house and the proceeds of the sale of the bonds turned over to the county treasurer, should the interest received from the banks on that money be turned into the county fund or would it be permissible to turn this interest into the court house fund?"

I think the person appointed by the board of supervisors in pursuance of the authority conferred in section 2, chapter 24, acts of the thirty-fourth general assembly, should be paid under subdivision 14, section 422 of the code, which confers the power upon the board of supervisors to fix the compensation for all services of county and township officers not otherwise provided for by law and to provide for the payment of the same. The statute authorizing the appointment of the officer in question being silent as to how much he is to be paid or how the money for his compensation is to be provided, I think the provision of the statute last referred to would govern and it probably would be proper for the board to make up the compensation of such officer, in part, at least, from some of the funds you mention.

Answering your second question, will say it is my judgment that the interest received from banks on the funds referred to should be turned into the general fund of the county.

Respectfully yours,

N. J. LEE,
Special Counsel.

MOON LAW—METHOD OF REDUCING NUMBER OF SALOONS TO PROPER NUMBER DISCUSSED.

December 29, 1911.

HON. J. R. FRAILEY,
Fort Madison, Iowa.

DEAR SIR: Your letter of the 21st instant addressed to the attorney general was referred to me for reply.

You ask Mr. Cosson's opinion as to what method ought to be pursued in reducing the number of saloons in your city to the number which is permitted under the Moon law. I note you say that you have the impression that Mr. Cosson at one time expressed the opinion or made a recommendation that the saloon keepers who had been longest in business without violation of the law should be the ones to continue in business when such reduction was made or that the selection should be by seniority.

I have not had opportunity of talking with Mr. Cosson since your letter was received and I do not know what his personal views are upon this particular question nor do I know whether he ever expressed such opinion or made such recommendation. I doubt if he ever meant to be understood as saying that the matter of seniority conferred any legal right of preference. He may have expressed the belief that those who had continued in business the longest with good records would naturally appeal to the council as being proper persons to be entrusted with the privilege of selling liquors in the future. I think there is no question but what the whole matter is up to the city council and it may grant the proper number of consents to such persons as it sees fit. It is my understanding that the city council may recall or revoke at any time resolutions of consent that have been granted and under the situation created by the decision in the case involving the Moon law the city council has the power, as I view it, to select the proper number of persons to whom it desires to grant consents, from the entire number now operating or from those who have not had licenses in the past at all. I assume from what you say that the Moon law in all of its provisions is now in force in your city and that the number of saloons must be reduced to the number or ratio of one to one thousand. I do not care to express a positive opinion to that effect but it strikes me that all resolutions of consent granted by the city council up to the lawful ratio or number under the Moon law would be valid and

that those who have been operating thereunder have not been violating the law. I mean, of course, where such consents were granted by separate and independent resolutions of the city council. When the legal ratio or number of consents have been granted by the city council the city council has exercised all of the power and right it has in the premises and it needs no argument to support the statement that all consents granted in excess of the lawful number were in violation of the Moon law and that all persons who operated under the consents so granted in excess of the lawful number had no protection thereunder and violated the law from the beginning. If these views are correct then the problem solves itself. Of course, if such consents were granted collectively and all of the persons were named in one resolution then I think such resolution would be void and no one would be protected under it because it could not be said that any one or more persons had priority in point of time. But if the individual consents were granted by independent resolutions each such consent would be a separate act of the city council and independent of all other resolutions and the proper number of consents which were prior in point of time would seem to be lawful and would continue to be lawful for the period for which they were granted, not exceeding one year, or until revoked by affirmative action of the council, providing the other conditions of the statute have been met.

Respectfully yours,

N. J. LEE,
Special Counsel.

MULCT SALOONS.—The operator of a mulct saloon must be a resident of the county and must be a qualified elector and not a partnership firm.

December 29, 1911.

MR. BERT E. LEYTEM,
Cascade, Iowa.

DEAR SIR: Yours of the 26th instant duly received.

A person operating a saloon must be a resident of the county in which the saloon is operated.

Judge DeGraff of Des Moines has recently ruled that a partnership firm cannot lawfully engage in the sale of intoxicating liquors at retail. I know of no provision in the Moon law that

would prevent one partner from selling his interest in the business to his partner, but it would not necessarily follow that such transfer would legalize the business from then on. Doubtless the resolutions of consent were in favor of the firm and would not be sufficient to protect the remaining member.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

SALOONS—CONSENT OF FREE-HOLDERS.—The consent of a non-resident free-holder owning property within fifty feet of the building where the saloon is conducted is not required, but only resident free-holders within that distance.

December 29, 1911.

MR. A. L. COOK,
Lost Nation, Iowa.

DEAR SIR: Your letter of the 27th inst. addressed to the attorney general has been referred to me for reply.

Your question is, whether or not it is necessary to obtain consent of a non-resident who owns property within fifty feet of a saloon.

Subdivision 2 of code supplement, section 2448, provides in part as follows:

> "The person appearing to pay the tax shall file with the county auditor a certified copy of the resolution regularly adopted by the city council, consenting to such sales by him, and a written statement of consent from all the *resident free-holders* owning property within fifty feet of the building where said business is carried on."

Hence, it would seem to be clear that your question should be answered in the negative.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

CITY COUNCILMEN—MAY NOT CONTRACT WITH CITY.—It is unlawful for a councilman to be interested in any contract or job of work for the city.

December 29, 1911.

MR. HERMAN JOHNSON,
Boone, Iowa.

DEAR SIR: Your letter of the 25th instant to the attorney general was referred to me for reply.

You inquire whether a member of a city council is prohibited from selling goods to the city or town of which he is a councilman and if he does sell merchandise to such town or city can he enforce payment therefor.

This department is not required to render official opinions in matters of this kind to private persons or local officers. In this instance, however, I have no objection to saying in a personal way that a member of a city or town council cannot enforce payment for goods or materials or property of any kind that he may sell to the city or town of which he is a councilman while he is holding that position. This is not made a criminal offense by our statutes but such transaction has been held by our supreme court to be contrary to public policy. Our law does prohibit and make unlawful a councilman being interested in any contract or job for work for the city and a violation of that provision subjects such officer to prosecution and punishment in a criminal action.

Without elaborating I call your attention to subdivision 14 of section 668 of the code and to the case of *Bay vs. Davidson,* 133 Iowa, page 688.

Respectfully yours,

N. J. LEE,
Special Counsel.

TRUSTEES—PENALTY INCURRED FOR FAILURE TO DESTROY WEEDS ON HIGHWAY.—No penalty is provided by chapter 96 of the acts of the thirty-third general assembly for failure of the township trustees to perform their duties under said chapter.

December 30, 1911.

WALLACES' FARMER,
Des Moines, Iowa.

GENTLEMEN: Your letter of yesterday addressed to the attorney general has been referred to me for reply.

You call attention to the fact that by section 8, chapter 96, acts of the thirty-third general assembly, a penalty is imposed upon township trustees for failure to perform their duties under the provisions of that chapter, and further state:

> "We are not able to find, however, that there is any penalty imposed upon the trustees for neglecting their duty in other respects; such, for example, as partition fence matters. We have a case in point submitted by J. M. Hawkins, Ladora, Iowa. He and his neighbor are in a dispute concerning a partition fence. A part of it consists of hedge. The township trustees have been called out in their capacity of fence viewers and have rendered their decision in favor of Mr. Hawkins. The neighbor refuses to abide by the decision or comply with it in any way. Mr. Hawkins insists upon the trustees compelling an observance with their decision but they hesitate to act and ask him to employ an attorney.
>
> "Our purpose in writing you is to ask whether there are any means under the law of compelling the township trustees to exercise the duties which the law imposes upon them."

I am unable to find any statute directly imposing any penalty on the trustees for their failure to perform their general duties. There is no doubt but that they could be compelled by mandamus proceedings to act in any particular matter where it is their duty to act and where they fail so to do, but inasmuch as they have a discretion and judgment to exercise in such matters, that discretion or judgment could not be controlled by such proceeding, but would be sufficient to require them to take action, leaving the nature of the action to be taken to be determined by their judgment. This of course would not be a very satisfactory remedy in many cases. The trustees might also be removed from office under the provisions of code section 1251. First, for habitual or wilful neglect of duty; Seventh, for wilful misconduct or maladministration in office, but this would not afford Mr. Hawkins, in the case you mention, the desired relief.

I assume from your letter that the trustees have ordered Mr. Hawkins' neighbor to erect, maintain, re-build or repair a certain portion of the partition fence, or to trim or cut back a certain portion of that portion of the fence which consists of hedge, under and in accordance with the provisions of sections 2356 and 2357 of the code. If this be the situation, then Mr. Hawkins' remedy is to

follow the provisions of section 2358 of the code by building the fence or cutting back the hedge himself, in accordance with the order of the trustees, if the neighbor fails to comply with the order within thirty days from the time fixed by the trustees, and after he has done the work of erecting, re-building, trimming or cutting back or repairing such fence and had the value of his work fixed by the fence viewers, and the neighbor fails to pay the amount thus fixed, together with the fees of the fence viewers, and permits such amount to remain unpaid for a period of ten days, Mr. Hawkins could recover by an ordinary action in court double the amount.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

ROAD DRAG SUPERINTENDENTS—COMPENSATION OF.—The compensation fixed for the road dragging superintendent is for his individual services without team. He should not contract with himself to furnish a team.

December 30, 1911.

MR. C. D. BEARDMORE,
Ira, Iowa.

DEAR SIR: Yours of the 28th inst. addressed to the attorney general has been referred to me for reply.

Your first question is, whether or not the superintendent of dragging is to be hired single handed, and whether or not he can work a team and furnish more men and teams.

The compensation fixed for the superintendent is for his individual services without team. It is his duty to employ other men and teams to do the dragging, but he could not lawfully contract with himself for the use of his own teams or other hired help in his own employ.

Your second question is, whether or not the drag superintendent is to be paid out of the drag fund.

Chapter 70 of the acts of the thirty-fourth general assembly provides that the township trustees shall, at their regular meeting in November and April of each year, settle with the superintendent of dragging and pay all claims for dragging in each district which have the approval of the superintendent of dragging, out of the

dragging fund of the township. Hence, it follows that your second question should be answered in the affirmative.

Your third question is with reference to the amount of bond required to be given by a township clerk.

Code section 1529 provides that the trustees shall require the township clerk to give bond in such sum as they think proper. This is his ordinary bond, but where a tax is voted for the purpose of building a township hall, section 572 of the code provides that the clerk shall, before drawing any of said tax from the treasury of said county, execute a bond with penalty double the amount of said tax, which bond shall be approved by the board of supervisors.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

PERJURY—WHAT CONSTITUTES.—One might be guilty of perjury in swearing to a bona fide list of newspaper subscribers.

December 30, 1911.

W. B. NEWBOLD, *Attorney,*
Keosauqua, Iowa.

DEAR SIR: Your letter of the 29th instant addressed to the attorney general has been referred to me for reply.

Your question, as stated by you, is:

> "Whether or not a publisher, during the last half of December preceding the filing and swearing to his list the first week in the following month, January, takes from the poll books of his county 700 or 800 or 1000 names, as the case may be, enters them on his list, sends out a circular to each name so entered stating that if they take out said paper after two copies are sent, that they will be counted as bona fide yearly subscribers, and swears to said list as being bona fide subscribers and files it with the board of supervisors in order to be selected as an official paper for the county, would such swearing to such a list amount to perjury?"

and as propounded by you, without a further showing of facts, could not be answered either affirmatively or negatively. It is a fundamental proposition that the false statement sworn to must be with reference to a material matter involved in some issue or

proceedings and while it may be doubtless true that a party might be guilty of perjury in subscribing and swearing to a statement purporting to give the number and names of yearly subscribers to his paper, under code section 441, yet from your statement of the matter it does not appear but that each person named on the list as a bona fide subscriber was in fact such at the time the affidavit was filed. For illustration: We shall assume that the defendant and one other publisher were contestants for the place; that the other contestant had 500 bona fide subscribers; and that the defendant had 600 bona fide subscribers, in addition to those on the list which are questionable. Then it would be wholly immaterial whether the questionable ones were bona fide or not, and a false statement with reference to them could not be successfully made the basis of an assignment for perjury. However, if it became necessary to count any of these questionable names in order to give the defendant the highest number of bona fide subscribers, then their names would be material, and if they were not in fact bona fide subscribers, or if he had no good reason to believe that some of them were bona fide subscribers at the time when he swears they were, he would, in my judgment, be guilty of perjury.

See *30th Cyc.*, page 1404, under the head of rash statements and the enclosed extracts from *State vs. Gage,* 17 N. H., and *State vs. Archibald Knox,* 61 N. C., 312 and 313.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

CITIZENSHIP DEFINED.—Persons born in the United States who are not subject to a foreign power are citizens even though born of unnaturalized foreign parents.

December 30, 1911.

MR. JOHN P. WALLACE,
City.

DEAR SIR: I have your letter of the 23d instant.

You submit the following question upon which you desire an opinion from this department, to-wit:

"If a foreigner and wife reside in this country without taking out naturalization papers are their children which are born in this country American citizens?"

Your question seems to be answered by section 1992 of the revised statutes of the United States which reads as follows.

"All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States."

Respectfully yours,

N. J. LEE,
Special Counsel.

BRIDGE CONTRACTS—NEED NOT BE ADVERTISED.—Contracts made by the board of supervisors for the construction of bridges need not be advertised when let to the lowest bidder.

December 30, 1911.

MR. J. L. TENNANT,
Rockwell City, Iowa.

DEAR SIR:—Yours of the 26th instant addressed to the attorney general has been referred to me for reply.

Your question, briefly stated is, whether it is legal for the board of supervisors to let the entire bridge work for the year in one contract, or must they advertise each bridge and let them separately.

I know of no provision which requires an advertisement or bidding for the letting of bridge contracts. Code section 429 provides for letting certain work for the improvement of roads to the lowest responsible bidder after having advertised for proposals, but I do not believe this provision applies to bridges. However, it is provided by code supplement section 423 that the board of supervisors shall not order the erection of a court house, jail, poor house or other building, or bridge, when the probable cost would exceed five thousand dollars, until a proposition therefor shall have first been submitted to the legal voters of the county and voted for by a majority of all persons voting for and against such proposition at a general or special election, notice of the same being given for thirty days previously in a newspaper," etc.

Hence, I am inclined to the view that the law does not contemplate that bridges should be contracted for in any other way than a separate contract for each bridge. Otherwise, they would never know how many bridges would exceed the five thousand dollar limit above referred to.

Yours very truly,
C. A. ROBBINS,
Assistant Attorney General.

CITIES AND TOWNS—COUNCILMEN.—A city councilman may not lawfully contract to furnish garbage cans to the city.

December 31, 1911.

HON. H. C. FINCH,
Northwood, Iowa.

DEAR SIR: This will acknowledge your letter of the 27th instant to the attorney general, which has been referred to me for reply.

You inquire whether a member of the city council may furnish garbage cans to the city in consideration of having the right to place on such cans an advertisement of his business and he receiving no other consideration.

The case you put probably comes within the rule announced in the case of *Bay vs. Davidson,* 133 Iowa, 688. Subdivision 14 of section 668 of the code prohibits members of the city council from being interested in any contract or job for work but I doubt very much if that applies to your case. Therefore, the transaction of which you speak does not seem to be prohibited by statute and thus unlawful in the sense that it is a violation of the criminal code. The most that could be said is that the councilman in question might be prevented from maintaining his advertisement in the manner stated on the ground that he receives from the city a valuable consideration. If it was a case where he sold goods or property or material of any kind to the city there would be no question and he could not recover the price or value of goods or property so sold or attempted to be sold under the rule of the case cited. In the case you state the city pays no consideration in money or property; extends a privilege to a member of its council which I assume has money value. Otherwise, the garbage cans would not have been given free of any other cost to the city. If it was the

intent and purpose to make the city a present of the garbage cans the condition as to the advertising feature would not have been included. I think the question raised is rather technical but it may be that if it is tested the councilman in question could be enjoined from maintaining his advertisement in the way you describe.

Respectfully yours,

N. J. LEE,
Special Counsel.

HIGHWAYS—HOW ESTABLISHED.—Ten years' travel of a road is sufficient to establish same as a public highway whether lawfully laid out or not.

January 2, 1912.

MR. CHARLES HUNTSBERGER,
West Union, Iowa.

DEAR SIR: Yours of the 28th ult. addressed to the attorney general has been referred to me for reply.

It is an indictable offense for any person to obstruct the public highway by the erection of a fence therein, under code section 4807, and any person discommoded by the obstruction may lawfully remove the same from the highway.

Ten years' travel of the road is sufficient to establish the same as a public highway, and a change of the location of the same cannot lawfully be made without the action of the board of supervisors thereon.

It is the duty of the road supervisor, and not the county attorney, to remove this obstruction, under code section 1560. It might be the duty of the county attorney to prosecute an indictment against the party erecting the fence.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

ITINERANT VENDOR OF DRUGS—LICENSE NOT TRANSFERABLE.—A license issued to an itinerant vendor of drugs under code section 2594 is not transferable.

January 2, 1912.

MR. M. O. LAWRENCE,
New Hampton, Iowa.

DEAR SIR: Yours of the 29th ult. addressed to the state treasurer has been referred to this department for reply.

Your inquiry is, whether or not the license permitting the sale of drugs by an itinerant vendor, issued under code section 2594, is transferable from one person to another.

The section referred to provides for the payment of an annual fee of $100.00, and for the issuance of a license upon the payment of such fee, and inasmuch as the statute fails to provide for any transfer where the licensee does not desire to use the license the entire year, I am of the opinion that your question must be answered in the negative.

Yours very truly,
C. A. ROBBINS,
Assistant Attorney General.

VISITING PRISONERS.—It is within the discretion of the warden to prevent persons visiting prisoners except in accordance with the provisions of code section 5686.

January 2, 1912.

J. C. SANDERS, *Warden,*
Iowa State Penitentiary,
Ft. Madison, Iowa.

DEAR SIR: Yours of December 26th, 1911, addressed to the attorney general has been referred to me for reply.

Your question, briefly stated, is, whether or not, under code section 5686, you are justified in denying an attorney the privilege of visiting and interviewing prisoners in the penitentiary who may be either clients or witnesses, or to impose terms or restrictions upon such privilege.

The section to which you refer provides:

"The following persons are authorized to visit the penitentiary at pleasure: The governor, secretary, auditor and treas-

urer of state, members of the general assembly, judges of the supreme, district and superior courts, county attorneys, and all regular officiating ministers of the gospel; *and no other person shall be permitted to go within the prison where convicts are confined except by permission of the warden.*"

It seems to me the latter portion of this section which has been underscored necessarily implies that a warden would have authority to exclude all persons except those mentioned in the former part of the section, and that, if he sees fit to permit any person to have that privilege, that he might impose such terms and restrictions as he sees fit.

Yours very truly,
C. A. ROBBINS,
Assistant Attorney General.

SCHOOL DISTRICTS—EMPLOYMENT OF ATTORNEYS.—A school district is without power to employ attorneys except when suit has been brought or commenced against a school officer in a matter in which the school district is really the party in interest and then only for the particular suit pending.

January 2, 1912.

A. L. CLINITE, *Secretary,*
Board of Education,
Des Moines, Iowa.

DEAR SIR: Your letter of the 21st ult. addressed to the attorney general has been referred to me for reply, and the question upon which you ask for an opinion from this office, as stated by you, is as follows:

"Has the school board of the city of Des Moines power to employ an attorney at a fixed annual salary (or on some other compensation basis) whose duties shall be to attend the meetings of the board in the capacity of legal adviser, give opinions to it and its officers whenever called upon so to do and represent it in suits brought by or against it?"

The latter part of code section 2759 provides as follows:

"In all cases where actions may be *instituted by or against any school officer* to enforce any provision of law, the board may employ counsel for which the school corporation shall be liable."

In passing upon this provision, our supreme court, in the case of *Scott vs. Independent District of Hardin,* found in 59 Northwestern Reporter, commencing on page 15, made use of the following language:

> "Now, bearing in mind the fact that this suit was brought against the directors to restrain them from doing an illegal act,—from consummating a fraud upon the district,—and that these directors, if not active parties to the fraud, were guilty of the grossest neglect and carelessness in the performance of their duties, does the law contemplate that they shall have power to bind the district by issuing orders, to pay attorneys and stenographers for services, not in defending a suit for the benefit of the district, but in defending acts of their own, which, when done, they knew were improper, if not fraudulent, and about the impropriety of which there could be no question? We think not. To hold such orders legal is to offer a premium to incompetent or dishonest school directors to squander the funds under their control, and then, when called to an account to further intrench themselves by hiring and paying attorneys out of the district funds, to aid in defending them. The law contemplates no such thing. It was designed that school directors, in the proper performance of their duty, should be provided with counsel in case of suits brought by or against them, but it was not designed that such officers should have the benefit of this statutory provision when a suit was brought against them by reason of their own corrupt or illegal acts, which, when done, were by them known to be such. By this construction of the law, directors who are honest in the performance of their duties, even though mistaken as to their powers, and so acting illegally, have power to employ counsel, at the expense of the district, in a case instituted against them as such officers, while directors who knowingly act illegally or corruptly, or knowingly disregard their duty, whereby an injury results to the district, are deprived of the benefit of this statutory provision."

In the case of *Templin & Son vs. the District Township of Fremont,* 36 Iowa, 411, it was held that the board was without authority to bind the district by employing attorneys to prosecute or defend an appeal which had been taken to the state superintendent from a decision of the county superintendent with reference to the location of the school house, or to a division of the district, on

the ground that such a proceeding was not a suit, within the meaning of the provision above quoted. In view of the language of this provision, and in view of the two decisions of our supreme court, from which extracts are made as above shown, I am of the opinion that the board is without power to employ counsel, except when a suit has been commenced by or against a school officer with reference to a matter in which the school district is the real party in interest, and then only for the particular suit then pending.

Yours very truly,
C. A. ROBBINS,
Assistant Attorney General.

SCHOOL BUILDING BONDS—INTEREST—HOW PAID.—The interest on school house bonds should be paid from the school building bond fund and no part of same should be paid from the contingent fund.

January 2, 1912.

HON. A. M. DEYOE, *Superintendent,*
Department of Public Instruction,
State House.

DEAR SIR: Your letter of the 12th ult. addressed to the attorney general has been referred to me for reply.

Your first question is:

"From what fund should the interest on the bonded indebtedness be paid? Is it legal to pay any part or all of this interest from the contingent fund?"

Code supplement section 2768 provides:

"The money collected by tax for the erection of school-houses and the payment of debts contracted therefor shall be called the *school-house fund;* that collected for the payment of school buildings bonds shall be called the *school building bond fund;* that for *rent, fuel, repairs* and other *contingent* expenses necessary for keeping the school in operation, the *contingent fund;* and that received for the payment of *teachers,* the *teachers'* fund;"

Code supplement section 2813 provides:

"The board of each school corporation shall, at the same time and in the same manner as provided with reference to

other taxes, fix the amount of tax necessary to be levied to pay any amount of principal *or interest due or to become due* during the next year in lawful bonded indebtedness which amount shall be certified to the board of supervisors as other taxes, and levied by them on the property therein as other school taxes are levied, but such tax shall not exceed five mills upon the dollar of the assessed valuation of such property for money borrowed for improvements."

Code supplement section 2783 provides:

"It may provide and pay out of the contingent fund to *insure school property* such sum as may be necessary, and may purchase *dictionaries, library books,* including books for the purpose of teaching *vocal music, maps, charts and apparatus* for the use of the school thereof to an amount not exceeding twenty-five dollars in any one year for each schoolroom under its charge;"

From an examination of these sections, I am of the opinion that the interest on the bonded indebtedness should be paid from the school building bond fund, and that no part of the same could legally be paid from the contingent fund.

Your second question is as follows:

"Must the board have authority from the electors before they can levy sufficient funds to pay interest on the bonded indebtedness? If the electors for any reason fail to give such authority, how should the board proceed?"

Code supplement section 2813, which is above set out, as it appeared in the Code of 1897, contained the following additional language:

"or any independent city or town district of any money borrowed for improvements after a vote thereof authorizing the same."

And while I am of the opinion that this language only referred to the lawful bonded indebtedness and did not contemplate a vote authorizing the payment of interest, yet since this language is eliminated from the section, there is in my opinion no room for the contention that a tax for the payment of interest cannot be levied without a vote of the district authorizing the same.

Your third question is as follows:

> "From which fund should the salary of the city superintendent and the supervisors, such as music, drawing, primary, kindergarten, etc., be paid? Can any part of this salary be paid from the contingent fund?"

I am of the opinion that all salaries, such as are referred to in this question, should be paid from the teachers' fund. By whatever name the instructor may be known, they are recognized under the law as teachers, within the meaning of code supplement section 2768 above set out. At any rate, none of these matters could lawfully be paid from the contingent fund, for the purposes for which it may be expended are enumerated in the sections above quoted,—2768 and 2783, which do not include the payment of teachers or other instructors.

Your fourth question is:

> "In case contracts have been made for the erection of school houses or purchasing sites in excess of the money available in the school-house fund, can the board legally issue warrants on said fund to meet such obligations?"

In addition to the language already quoted from code supplement section 2768, the section further provides:

> "Whenever an order cannot be paid in full out of the fund upon which it is drawn, partial payment may be made. All school orders shall draw lawful interest after being presented to the treasurer and by him endorsed as not paid for want of funds."

These orders undoubtedly refer to the warrants authorized to be issued by the president and secretary under the provisions of code supplement section 2762, which provides as follows:

> "He shall countersign all warrants and drafts upon the county treasurer drawn or signed by the president; draw each order on the treasurer, specify the fund on which it is drawn, and the use for which the money is appropriated."

If this be true, the law would seem to contemplate that warrants might be issued, even though there were not at the time any funds available for their payment.

GEORGE COSSON,
Attorney General.

MOON LAW—FIXING NUMBER OF SALOONS—WHEN EFFECTIVE.—The Moon law limiting the number of saloons to one for each 1,000 inhabitants became effective from the date of its passage, April 15, 1909.

January 2, 1912.

REV. C. E. LA REAU,
Denison, Iowa.

DEAR SIR: Your of the 21st ult. addressed to the attorney general has been referred to me for reply. Your questions briefly stated are:

"1st. When did the Moon law go into effect,—April 15, 1909, the date of its passage, or July 4 thereafter?

"2d. Whether resolutions of consent in excess of one to each one thousand population issued in June of 1909 are legal.

"3d. Whether a new petition circulated in 1911 would take precedence over the previous petition of consent, and whether or not they could continue under the old petition of consent with more saloons than one for each one thousand.

"4th. Whether, under the new law, the excessive numbers could be eliminated by some of the saloon keepers going into partnership in such a way as to reduce the number of saloons to the required minimum."

Answering your first question, will say that our supreme court held in the case of *Sawyer vs. Gallagher,* 130 N. W., 173, that while the Moon law did not take effect until July 4th, 1909, yet that resolutions of consent issued after the time the law was passed, to-wit: April 15, 1909, were unlawful, being in excess of the minimum number of saloons allowed, namely, one to each one thousand of population.

Your second and third interrogatories should each be answered in the negative.

According to a recent decision by Judge DeGraff of the Polk county district court, a saloon cannot lawfully be operated by a partnership firm; hence, it follows that your fourth interrogatory should be answered in the negative.

Yours very truly,
C. A. ROBBINS,
Assistant Attorney General.

INTOXICATING LIQUORS DEFINED.—Any beverage containing any percentage of alcohol, however slight, is an intoxicating liquor.

January 3, 1912.

L. H. MATTOX, *County Attorney,*
Shenandoah, Iowa.

DEAR SIR: Yours of recent date addressed to the attorney general with reference to the interpretation of chapter 105, acts of the thirty-fourth general assembly, has been referred to me for reply.

As I understand it, this statute makes the fact that the party has a federal license to sell intoxicating liquors prima facie evidence that he is engaged in the sale of intoxicating liquors in violation of the state law, and the burden would be on him to rebut this presumption.

If any restaurant keepers who you say have taken out licenses because of the fact that they feared that some soft drinks sold by them contained a percentage of alcohol, are actually selling drinks as a beverage which contain any percentage of alcohol, however slight, then they would be guilty under the state law, independent of the question of whether or not they had the federal license, and independent of the question as to whether or not such federal license is required by the general government for the sale of such drinks, and in these cases at least they would be unable to show that they were not guilty if you could show that the soft drinks contained any percentage of alcohol, and that they were sold by them for use as a beverage.

State vs. Yeager, 72 Iowa, 421;

State vs. Intoxicating Liquors, 76 Iowa, at 245;

State vs. Colvin, 127 Iowa, 632.

As to whether or not the other parties could rebut the presumption of guilt would doubtless depend upon the showing made in each particular case and upon the attitude of the particular court or jury trying the case.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

INDUSTRIAL SCHOOL—AGE AT WHICH CHILD MAY BE COMMITTED.—Where a child is sought to be committed to the industrial school as punishment for a crime the court is without power to commit under the age of ten years. A child under the age of ten years may be committed as a dependent or neglected child.

January 3, 1912.

BOARD OF CONTROL,
State House.

SIRS: Your letter of the 7th ult. addressed to the attorney general has been referred to me for reply.

You call attention to the provisions of chapter 5-B of title III of the supplement to the code of 1907, which you say, seems to authorize the commitment to the industrial school of boys and girls under the age of 16 years without any minimum age limit, while a later statute, found in chapter 136 of the acts of the thirty-fourth general assembly, fixes the minimum limit at 10 years; and then you ask, "May children under the age of 10 years be committed to the industrial school under the existing law?"

Section 254-a14 of the supplement to the code defines dependent and neglected children, and reads in part as follows:

> "Any child under the age of ten years, who is found begging, or giving any public entertainment upon the streets for pecuniary gain for self or another; or who accompanies or is used in aid of any person so doing; or who, by reason of other vicious, base or corrupting surroundings, is, in the opinion of the court, within the spirit of this act."

Section 254-a20 of the supplement to the code provides:

> "When any child of the age stated in section two (2), hereof, shall be found to be dependent or neglected, within the meaning of this act, the court may make an order committing the child to the care of *some suitable state institution,* or to the care of some reputable citizen of good moral character, or to the care of *some industrial school, as provided by law,* or to the care of some association willing to receive it, embracing in its objects the purpose of caring for and obtaining homes for dependent and neglected children, which association shall have been accredited as hereinafter provided."

These provisions seem to have been left untouched by chapter 136 of the acts of the thirty-fourth general assembly. The apparent purpose of this chapter 136 was to increase the minimum age limit of 9 years fixed in code supplement section 2708 to 10 years, and to increase the minimum age limit of 7 years, found in code supplement section 2709, to 10 years, but you will observe that these provisions only apply where the boy or girl is found guilty of a crime in a court of record, and in such cases, I am of the opinion that the court would be without power to commit a boy or girl under the age of 10 years to the industrial school.

On the other hand, the provisions of section 254-a14 do not require that there should be any such conviction in order to authorize the commitment, but only that the child should be a dependent or neglected child, within the meaning of that section; and while section 254-a20 does not specifically direct that such dependent or neglected child shall be committed to the industrial school, yet it authorizes the court to "make an order committing the child to the care of some suitable state institution (which might well be the industrial school), or to the care of some reputable citizen of good moral character, or to the care of some industrial school."

Hence, I am of the opinion that where the proceedings are had under the provisions of this chapter and where the commitment is sought, not on the ground that the person committed has been convicted of a crime, but on the ground that the person committed is a dependent or neglected child, that such commitment may be made, notwithstanding the fact that such child is under the age of 10 years.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

INTOXICATING LIQUORS—WHO MAY HAVE PERMIT TO SELL.—Only qualified electors may sell intoxicating liquors at retail and a partnership firm is not entitled to such permit.

January 5, 1912.

MR. W. S. INGMAN,
Tipton, Iowa.

DEAR SIR: Yours of the 3d instant addressed to the attorney general has been referred to me for reply.

You say that in the September, 1911, term of court one George Beacom of the drug firm of Beacom & Wallick was granted a permit to sell liquor in Tipton, Iowa, and that a few years ago Wallick was engaged in business at Mechanicsville, Iowa, and that his permit was revoked on account of his having made illegal sales of liquor, and you ask the question, as to whether or not Beacom has any right to this permit while in partnership with Wallick.

I do not think the question of Wallick's previous record with reference to the sales of liquor can have any bearing on the question, and that the real question in the case is, whether or not either member of a firm engaged in business can legally be granted a permit to sell intoxicating liquors for lawful purposes.

Section 1 of chapter 143, acts of the thirty-third general assembly, provides.

> "No *one* except a qualified elector of the town, city or township in which the business is conducted and carried on shall engage in the sale of intoxicating liquors at retail."

Our supreme court, in construing this section, has held that a registered pharmacist, doing business under a liquor permit, is a retailer of liquors, and that, under this section, a woman, even though a registered pharmacist, could not lawfully be granted a permit to sell liquors for lawful purposes, because she was not a qualified elector.

In re Carragher, 149 Iowa, 225.

The word "engaged" is synonymous with "transacted" or "carried on." It is difficult to conceive of one being engaged in a business who does not transact or carry it on, and it is equally difficult to picture one transacting and carrying on a business who is not engaged in it.

Inyo vs. Erro, 119 Calif., 119.

One who procures spirituous liquor with intent to sell it again in small quantities to any person who may apply for it, or who has such liquors on hand with such intent, is engaged in the retailing liquor business.

U. S. vs. Rennecke, 28 Fed., 847.

Judge DeGraff of the Polk county district court has recently held that this provision prevented the operation of mulct saloons by a partnership firm.

In view of the language of this section and the foregoing decisions, I am of the opinion that a permit to buy, keep and sell intoxicating liquors for lawful purposes cannot lawfully be granted to either member of the firm engaged in such business, and that if the proper objection had been urged, that the granting of the permit should have been denied.

The matter should be brought to the attention of the county attorney who would be familiar with the procedure required to secure a revocation of the permit.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

INTERSTATE SHIPMENTS—WHAT IS.—A shipment starting from an Iowa point and ending at an Iowa point but traveling through another state enroute is an interstate shipment.

January 5, 1912.

MR. JOSEPH M. RESSE,
Lohrville, Iowa.

DEAR SIR: Yours of December 29th addressed to the attorney general has been referred to me for reply.

Your question is, can a railroad company use interstate tariff when a car starts in Iowa, ends in Iowa but enroute travels three miles in another state?

This question must be answered in the affirmative. In the case of *Hanley vs. Kansas City Southern R. R. Company,* goods were shipped from Ft. Smith, Arkansas, by way of Spiro, Indian Territory, to Grannis, Arkansas, on a through bill of lading and the supreme court said:

> "The transportation of these goods certainly went outside the state of Arkansas, and we are of the opinion that in its aspect of commerce it was not confined within the state."

Hanley vs. Kansas City Southern R. R., 187 U. S., 617.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

CORPORATIONS—WHEN ENTITLED TO BEGIN BUSINESS.—A corporation may commence business as soon as the certificate is issued by the secretary of state.

January 5, 1912.

MR. W. M. ALLEN,
Ossian, Iowa.

DEAR SIR: Yours of the 4th instant addressed to the attorney general has been referred to me for reply.

Your question briefly stated is, whether or not a conveyance of real estate by a corporation which is doing business as such but which has failed to comply with the laws of the state would be valid and all right.

This department is not authorized to give opinions upon matters of this kind which would be of interest only to private parties. However, I call your attention to code section 1614, which provides:

> "The corporation may commence business as soon as the certificate is issued by the secretary of state and its acts shall be valid if the publication in a newspaper is made within three months from the date of such certificate."

I imagine that a deed made during this three months' period would be legal and perhaps the concern might be estopped from setting up its illegality, even if not made within the three months' period. Further than this I would not care to express an opinion.

Yours very truly,
C. A. ROBBINS,
Assistant Attorney General.

FLOUR—PRICE OF.—The price at which a retailer is to sell flour may not be lawfully fixed by an agreement between such retailer and the manufacturer. Such an agreement is illegal and in restraint of trade.

January 5, 1912.

MR. E. F. CONSIGNY,
Secretary Iowa Miller's Club,
Des Moines, Iowa.

DEAR SIR: I am in receipt of your letter of the 20th ultimo requesting an opinion as to whether a manufacturer of flour has

a right to regulate or fix the price which a merchant must charge for flour of his manufacture.

It is my opinion that any agreement between the manufacturer and retailer or the jobber and retailer that flour must be sold at a certain price is a combination or agreement in restraint of trade and that such an agreement is illegal.

Owing to my absence from the city I have been unable to make earlier reply to your communication but trust this will be in time for your annual meeting.

Yours very truly,

JOHN FLETCHER,
Assistant Attorney General.

INTOXICATING LIQUOR—RETAILER OF DEFINED.—One selling intoxicating liquors to the consumer whether in large or small quantities is a retailer within the meaning of the law.

January 6, 1912.

MR. F. E. GILL,
Sioux City, Iowa.

DEAR SIR: Replying to your favor of the 3d instant relative to the proper construction to be placed upon the Moon law as to who is a wholesaler, I have to advise that it has been my opinion that any person who sold liquor in quantities, either large or small, direct to a consumer would come within the definition of a retailer, as the word is used in chapter 142, acts of the thirty-third general assembly, commonly known as the Moon law. If this is not the law it should be the position taken by all public officials until the supreme court holds otherwise.

As to whether or not a person who sold strictly to the trade and did not sell at all either in large or small amounts direct to a consumer, but only to the person who had a lawful right to sell the same as a mulct saloon keeper, comes within the provisions of chapter 142 is a very grave question. I think, however, as I suggested to the county attorney at Council Bluffs, that some one ought to test this question out, but I would not want to attempt to forecast as to what position the courts would take on that question. I think the latter question will be tested by the county attorney of Pottawattamie county, as the city council of Council Bluffs has assumed to define just what is a retailer.

As before stated, however, I think your council should consider and treat as retailers at least all persons who sell in any quantity direct to a consumer, and if it is the desire of the council that others should have a license in addition to those selling direct to consumers, I think there should be some arrangement for a test case to try that question out.

In this connection I wish to direct your attention to the case of *Cameron vs. Fellows*, 109 Iowa, page 534, point on page 538, in which Judge Ladd, speaking for the court, said:

> "The keeping of a place under the mulct law does not authorize the peddling of beer in all parts of the city. *If this may be done at wholesale, it can be done at retail, as no distinctions are made by the statute.* The accused might lawfully sell beer at the cold storage plant, but not elsewhere. His sales at the different saloons and other places in the city were unlawful," etc.

This makes it clear, generally speaking, that a wholesaler is subject to all the restrictions of a retailer.

I am sending a copy of this letter to Mr. Whitley.

Yours very truly,

GEORGE COSSON,
Attorney General.

BANKS—TAXES AGAINST SHAREHOLDER MAY BE PAID BY BANK.—The taxes imposed upon a share of stock may be paid by the bank for the stockholder and deducted from his dividends on the stock under code sections 1322 and 1325.

January 7, 1912.

MR. A. W. CROSSAN, *Cashier*,
Spirit Lake, Iowa.

DEAR SIR: Your favor of the 5th instant addressed to the attorney general inquiring if a national bank is authorized to pay the taxes on the shares of stock of its stockholders and deduct the same from the dividends declared on such stock, was duly received and the attorney general has directed me to make reply thereto.

This department is not authorized by law to render an official opinion in such a case but in an unofficial way I call your attention

to sections 1322 and 1325 of the 1897 code of Iowa which seem to answer your question in the affirmative without doubt.

Yours very truly,

N. J. LEE,
Special Counsel.

COUNTY ATTORNEY—DUTIES OF.—It is the duty of the county attorney to prosecute suits commenced for the collection of delinquent taxes without compensation other than the salary provided by law.

January 9, 1912.

JOHN S. BLOW, *County Auditor,*
Spirit Lake, Iowa.

DEAR SIR: Your letter of the 5th instant addressed to the attorney general has been referred to me for reply.

Your questions, briefly stated, are, First, whether or not it is the duty of the county attorney to prosecute suits for the collection of delinquent taxes, without compensation other than his salary, and, Second, whether it is his duty to prosecute suits to collect from relatives liable for the care of inmates in the insane hospital where the county is entitled to recover,—without additional compensation other than his salary.

Chapter 17 of the acts of the thirty-third general assembly prescribes the duties of the county attorney with more particularity than they had previously been prescribed, all of which will more fully appear by reference to sections 2, 5 and 6 in said chapter, which are as follows:

> "2. *To appear for state and county.* To appear for the state and county in all cases and proceedings in the courts of his county, to which the state or county is a party, and in the supreme court in all cases in which the county is a party.
>
> "5. *To enforce forfeited bonds, etc.* To enforce all forfeited bonds and recognizances, and to prosecute all proceedings necessary for the recovery of debts, revenues, moneys, fines, penalties and forfeitures accruing to the state or his county, or to any school district or road district in his county; also to prosecute all suits in his county against public service corporations which are brought in the name of the state of Iowa.

"6. *To appear for county officers.* To commence and prosecute all actions and proceedings brought by any county officer in his official capacity."

On March 3, 1905, former Attorney General Mullan rendered an opinion to the effect that a resolution of the board of supervisors allowing to the county attorney an additional compensation of one thousand dollars for services performed as the attorney of the board of supervisors of the county, was illegal and void, and that whatever money was paid under such resolution was illegally taken from the county treasury and paid to the person receiving the same; which opinion was based on the decision of our supreme court in the case of *Heath vs. Albrook,* 123 Iowa, 559.

Our supreme court has frequently held that no contract can be made, looking to the allowance or payment to a public officer of any other or greater compensation than that fixed by law.

Massie vs. Harrison County, 129 Iowa, at 280.

The only case which I have been able to find in our court where additional compensation was allowed, is in the case of *Bevington vs. Woodbury County,* where the county attorney was allowed extra compensation for following and prosecuting in another county a state case which was removed from his own county by change of venue under an agreement with the board of supervisors of his own county to so prosecute said case, and there the supreme court based the decision upon the ground that it was no part of his official duty to prosecute the case in any county except his own county. 107 Iowa, 424.

From these opinions it would seem to be clear that it is the duty of the county attorney to prosecute whatever suits may be necessary to collect delinquent taxes, or to collect the other matters mentioned by you in your letter without compensation other than that already provided for by the law.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

MINORS—NOT PERMITTED IN POOL HALLS.—Minors should not be permitted to remain to play pool or remain in pool halls even with the consent of their parents.

January 10, 1912.

HON. S. W. BRYANT, *Mayor,*
Centerville, Iowa.

DEAR SIR: I am in receipt of your communication of the 9th instant in which you advise that certain parents in your city want their boys to play pool.

It may be that it would have been well if the law had provided that any boy over 18 or 19 years old should be permitted to play pool with the consent of his parents, but the law does not so provide. The section, viz.: section 5002, which prohibits persons keeping billiard halls, nine or ten pin alleys, or the agents, clerks or servants of such persons, from permitting minors to remain in such hall, also includes beer saloons. It is perfectly evident that if a parent had the authority to permit a minor to remain in a billiard hall, he would have a like authority (because they are all included in the same section) to permit a minor to remain in a beer saloon. This clearly is not the law.

Another difficulty would arise if it should be permitted at all, what age would the minor have to be in order for him to be permitted in the billiard hall with the consent of his parent. Obviously some boys are more sensible at 17 than others at 19.

The law was passed for the protection of the minor and even the parent himself would have no authority to waive it. If he wants the minor to play pool, he may go to the Y. M. C. A. rooms, if they have pool tables, or they may be installed in some private residence, but it is clear that the law prohibits all minors from entering either pool or billiard halls, beer saloons or nine or ten pin alleys.

Yours very truly,
GEORGE COSSON,
Attorney General.

TOWNSHIP OFFICES—VACANCIES IN.—A township trustee may continue to hold the office after moving into an incorporated town within the limits of his township.

January 10, 1912.

MR. S. R. GOTTSCHALK,
Minden, Iowa.

DEAR SIR: Mr. Taylor was just in the office and called attention to your request for an opinion concerning the right of a township trustee to change his residence from the country into the corporate limits of the town of Minden.

Unless there is some special provision in the law, it is always perfectly legal for any public officer to change his place of residence to any place in the district over which he has jurisdiction as a public official. This being true, a township trustee could reside any place within his township.

The statute with reference to vacancies in office makes this clear when it provides as one of the grounds for vacancy: "The incumbent ceasing to be a resident of the state, district, county, township, city, town or ward by or for which he was elected or appointed, or in which the duties of his office are to be exercised." See section 1266 of the code.

Yours very truly,
GEORGE COSSON,
Attorney General.

ASSESSORS—COMPENSATION OF—HOW FIXED.—The compensation of an assessor should be fixed by the hour or by the day and not by the roll.

January 11, 1912.

MR. C. F. HOUCK,
Allerton, Iowa.

DEAR SIR: Yours of the 8th instant addressed to the attorney general has been referred to me for reply.

Your question is, whether the compensation of assessors should be fixed by the board of supervisors by the roll or by the hour.

Chapter 41 of the acts of the thirty-third general assembly is the latest law on the subject, and provides:

> "Each township assessor shall receive in full for all services required of him by law, a sum to be paid out of the county treasury, and fixed annually by the board of supervisors at their January session; said compensation shall be for the succeeding year and shall not exceed the sum of two and one-half dollars ($2.50) for each day of eight hours, which said board determines may necessarily be required in the discharge of the official duties of such assessors."

Hence, it follows that the compensation should be fixed by the hour or by the day, and not by the roll, for if fixed by the roll, there would be no way of determining whether or not in some cases the compensation allowed some assessors would exceed the limit of $2.50 per day for each day of eight hours.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

DEPUTY SHERIFF—COUNTY BAILIFF.—A deputy sheriff cannot act as county bailiff and draw additional compensation therefor.

January 11, 1912.

W. H. WEHRMACHER, *County Attorney,*
Waverly, Iowa.

DEAR SIR: Yours of the 6th instant addressed to the attorney general has been referred to me for reply.

Your question is, "Can a deputy sheriff act as a court bailiff and draw the regular fees as bailiff in addition to his salary as such deputy sheriff?"

Upon examination I find that this department has heretofore had occasion to pass upon this question. On May 4, 1896, Attorney General Remley rendered an opinion to the county attorney of Calhoun county, in which he made use of the following language:

> "My conclusion from the authorities is that the sheriff or his deputy must be in attendance in court all the time the court is in session. Second, that the sheriff cannot perform the duties of his office by bailiffs. Third, if the deputy sheriff, instead of his principal, attends upon the court he cannot recover compensation as bailiff."

I also call your attention to the case of *State of Iowa vs. Welsh*, 109 Iowa, at page 24, where the supreme court, in passing upon the question, makes use of the following language:

> "Without entering into details, it may be stated generally that the defendant could not properly draw compensation from the county for clerk's services as bailiff, and also for fees earned by him when actually serving in that capacity. If, for any reason, he was required as deputy, in serving papers or process, during his attendance on court as bailiff, no claim for his work as such for the time so occupied should have been made."

Hence, it follows that your question should be answered in the negative.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

SCHOOL BOARD—INSURANCE CONTRACTS WITH DISTRICT.—It is against public policy to permit a school officer to act as the agent of an insurance company in the writing of a risk for the benefit of his district.

January 11, 1912.

MR. D. S. LEWIS,
621 Fifth St.,
Sioux City, Iowa.

DEAR SIR: Your letter of the 3d instant to the attorney general was referred to me for reply.

You say you noticed a reference in the newspapers recently to the effect that an opinion had been rendered by this department in which it was held that a member of a school board was not permitted, under the law, to write insurance on property of the school district of which he was a director in a company of which he was an agent.

You say further that you are a member of the firm of Flourny-Lewis Agency, which firm is engaged in the writing of fire insurance, as agent of insurance companies, and further that you are a member of the board of education of your school corporation and that said firm as agent of various fire insurance companies has

written policies of insurance on property of the school corporation of which you are a director.

You request an opinion from this department as to whether it would be proper and legal for said firm of which you are a member to renew policies of insurance now in force on the property of said school corporation and you suggest that if the impropriety of writing such insurance arises from the fact that you share in the profits of the transaction that you would be willing to waive your profits in the transaction in favor of the school corporation if that would render the transaction legal.

No official opinion of the import you state has been rendered by this department. About a month ago a question very similar to yours was propounded to the attorney general with request that he give his opinion thereon. The letter was referred to me and I did suggest in a personal way, as a courtesy to the writer of the letter, that a member of a school board probably was prohibited from writing insurance upon the property of a school district of which he was a member. The facts upon which this personal opinion was based were that a certain person was a member of the school board and also acted as the agent of an insurance company and he purposed placing insurance upon property of the school district of which he was a director with the company of which he was the agent and it was my view that it was contrary to public policy to permit an officer of this kind to represent more than one interest in transactions where the public was affected and it was my idea that the doctrine and principle announced in the case of *Bay vs. Davidson*, 133 Ia., 688, had application.

If the views expressed upon the facts just related are sound then I believe that they apply with equal force to your case. I do not think the fact that you are a member of a partnership which acts as agent for the insurance company changes the principle involved. The interest of the director may be a little more remote and indirect, yet it seems to me that in point of principle and policy the transaction is just as objectionable as if the member of the school board was the agent of the insurance company personally. Neither do I think that the waiving of the profit or compensation that you might derive from such a transaction would remove the objection. This is made clear by the case just cited.

It may be that the views I have expressed are somewhat technical and that the court would not extend the principle announced in

Bay vs. Davidson as far as I have suggested and in any event I do not want to be understood as reflecting the views of the attorney general or of this department in an official way. You will understand there is no statute which makes transactions of this kind unlawful and thus subjecting those concerned therein to any sort of penalty. If such transactions are forbidden it is on the theory that they are contrary to public policy at common law and the effect upon the contract would be to render it illegal and unenforcible.

I might add further that the fact that you say you are not a member of the school house committee of the board of education which awards and distributes the insurance upon the property of the district would make no difference as to the legality of the transaction in question. The action of the school house committee in this respect is in virtue of authority conferred by the entire board and becomes the action of the board. In any event it is the opportunity of representing two interests which may conflict that the policy of the law is opposed to.

Respectfully yours,

N. J. LEE,
Special Counsel.

ELECTRIC LIGHT PLANTS—FRANCHISE PREFERABLE.—It may not be absolutely essential but it is preferable that one operating an electric light plant should have a franchise from the city or town.

January 11, 1912.

MR. SAM D. HENRY,
Coon Rapids, Iowa.

DEAR SIR: Your letter of the 5th instant addressed to the attorney general has been referred to me for reply.

Your question, briefly stated, is, whether or not a private party owning an electric light plant is required by law to have a franchise from the town, and you refer to a decision of the supreme court in the case of the *East Boyer Telephone Company vs. The Incorporated Town of Vail*, which is found in 129 Northwestern, on page 298.

I will say with reference to that case that while it was therein decided that it was not necessary for a telephone company to have

a franchise, yet it did not purport to pass upon the question as to whether or not such a franchise would be required for an electric light plant. There are additional provisions of the law with reference to heating plants, water works, gas works, electric light and electric power plants which are not found with reference to telephone companies, and I call your attention especially to section 720 of the code supplement which provides in part as follows:

> "They (meaning cities and towns) may also grant to individuals or private corporations the authority to erect and maintain such works or plants for a term of not more than twenty-five years and may renew or extend the term of such grant, but no exclusive franchise shall be thus granted, extended or renewed."

The following section, 721, provides for submitting the question to a vote, and section 725 provides for the regulation of rates and service, and I am inclined to think this latter section would give the city power to regulate rates and service, whether the concern had been given a franchise or not.

While I would not want to be understood as saying that in the absence of a franchise you would have no right to operate, yet having a franchise, you would have many additional rights which you would not have without the franchise, such as the right to use the streets and alleys of the town in connection with the plant, and the right to enforce the rates fixed by the town, whereas, if no rates were fixed, you might have to have an individual contract with each patron.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

FIDELITY BONDS—MUST BE APPROVED.—A fidelity bond presented should be approved even though the approving officer is agent of the company, but such officer cannot require that the bond be signed by any specific surety company.

January 12, 1912.

A. T. RODDY & Co.,
Des Moines, Iowa.

GENTLEMEN: Yours of the 10th inst. addressed to the attorney general has been referred to me for reply.

Your question, briefly stated, is, whether or not a public officer who happened to be a stockholder in a fidelity insurance company, and hence entitled to a share in the profits of such company, can lawfully require bonds which are to be filed and approved in his office to be signed by such company as surety.

Code section 360 provides:

> "Whenever any person who now or hereafter may be required or permitted to give a bond applies for the approval thereof, any officer or body who is now or shall hereafter be required to approve the sufficiency of such bond, *shall accept and approve the same,* whenever its conditions are guaranteed by a company or corporation duly organized or incorporated under the laws of this state, or authorized to do business therein, and to guarantee the fidelity of persons holding positions of public or private trust."

Hence, it follows that if such bond were presented to the officer even though he happened to be a stockholder in the company signing the bond as surety, nevertheless, it would be his duty, under this law, to approve the bond.

Of course it goes without saying that no public official could require the bond to be signed by any specific surety company, as it would be his duty to approve the bond if signed by any such company; nor should any such public officer be offensively active in securing such business for the company of which he was a member.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

BUILDING AND LOAN ASSOCIATIONS—ARTICLES OF INCORPORATION—HOW AMENDED.

January 12, 1912.

MR. W. O. LUCAS,
Winterset, Iowa.

DEAR SIR: Yours of the 9th inst. in which you present the question as to whether or not, in view of the provisions of section 1893-a of the supplement to the code, a building and loan association which has once reduced its rate of interest to 6% could, by amending its articles of incorporation, increase the rate of in-

terest to 7%, there being outstanding mortgages at the time drawing 6% interest, has been received.

The section of the statute to which you refer contemplates that the rate of interest may be as high as 8%, and it is only where a reduction in the rate is made that a reduction to the same rate is required to be made on outstanding obligations drawing a higher rate. If a higher rate were established, it is clear that it could not be made to apply to outstanding obligations, unless at the time they gave their note and mortgage it was agreed that the rate might be increased. I am of the opinion, however, that new loans could be made at the higher rate without violating this section.

I have taken the matter up with the secretary of the executive council, and he is of the opinion that the rate might be increased, but that if it were so increased, those paying a higher rate should be included in a different series and the accounts kept separately from those paying the lower rate, and that by this means, there would be no discrimination among members of the same class or series, and that such an amendment to the articles of incorporation would meet the approval of the executive council.

Hoping that the foregoing may be sufficient for your purpose, I remain,

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

BANK STOCK—ASSESSMENT OF.—No deduction on account of non-taxable bond held by a bank should be allowed in assessing shares of bank stock.

January 13, 1912.

SHERWOOD A. CLOCK, *County Attorney,*
Hampton, Iowa.

DEAR SIR: Yours of the 11th instant addressed to the attorney general has been referred to me for reply.

Your question is:

> "Can banks deduct from the amount of their assets amounts invested in non-taxable bonds, such as municipal bonds, drainage bonds, etc., in arriving at the amount of their taxes?"

I note that you say that you are unable to obtain a copy of the decision rendered by our supreme court in a similar case. I assume you refer to the case recently decided by our supreme court which was appealed from Polk county, but this question was not involved in that case. If the assessment was to be made against the bank, then there would be some reason for the contention that that portion of its capital invested in non-taxable securities, such as government bonds or bonds such as you refer to in your question, should be deducted, but the present law does not authorize the shares of stock to be assessed against the bank.

In a case arising in New York, the state of New York assessed the shares of one Van Allen in the First National Bank of Albany. At that time *all* the capital of the bank was invested in United States securities, and it was asserted that a tax upon the *individual* in respect to the shares that he held in the bank was, unless the holding in United States securities were deducted, a tax upon the securities themselves, but the court held otherwise, and that the tax on an individual in respect to his shares in a corporation, is not regarded as a tax upon the corporation itself. The right of such taxation rests upon the theory that shares in corporations are *property* entirely distinct and independent from the property of the corporation.

See *Van Allen vs. the Assessors,* 3d Wallace, 573;

Home Savings Bank vs. Des Moines, 205 U. S. at 516 and 517.

It was for the purpose of meeting this very distinction that section 4 of chapter 63, acts of the thirty-fourth general assembly, provided that shares of stock of national banks and state and savings banks and loan and trust companies located in this state shall be *assessed to the individual stockholders at the place where the bank or loan and trust company is located.* Hence, if the assessment is to be made to the individual stockholder and not to the bank, the bank can make no deduction because there is no assessment against it on account of the stock. The individual can make no deduction because the bank, and not the individual, is the owner of the non-taxable securities.

It is further provided in section 4, "To aid the assessor in fixing the value of such shares, the said corporation shall furnish him a verified statement of all the matter provided in section 1321 of the supplement to the code, 1907, which shall also show sep-

arately the amount of the capital stock, the surplus and undivided earnings, and the assessor *from such statement* shall fix the value of such stock, based upon the *capital, surplus and undivided earnings.* In arriving at the total value of the shares of stock of such corporations, the amount of their capital actually invested in real estate owned by them * * * * shall be deducted from the real value of such shares, and such real estate shall be assessed as other real estate, and the property of such corporation shall not be otherwise assessed."

As the real estate owned is the only deduction mentioned and enumerated, it necessarily follows that no other deductions were contemplated by the act.

Hence, it follows that your interrogatory must be answered in the negative.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

NON-RESIDENT OWNERS OF BANK STOCK—HOW ASSESSED.—Shares of bank stock are assessed at the place where the bank is located even though the shareholder resides outside the state.

January 13, 1912.

MR. A. J. NORTON,
Traer, Iowa.

DEAR SIR: Your letter of the 11th instant addressed to the attorney general has been referred to me for reply, and the same presents two questions which, briefly stated, are:

"1st. Should shares of stock in corporations outside the state, such as mining stock, stock in a lumber company, or a land company, be assessed to the parties owning such stock at their place of residence in this state, or at the place of business of the company outside the state?

"2nd. Whether or not a person residing in this state and owning shares of stock in banks in other states should be assessed on such shares at his place of residence in this state or at the place where the bank in which he owns the stock is located."

With reference to your first question, will say that the certificate or share of stock has been held by the courts to be property independent of the property held by the company which issues such share of stock, and that such certificate or share of stock is properly assessable to the owner thereof at the place of his residence, even though the company may be required to pay a tax upon the property owned by it in another jurisdiction.

Van Allen vs. The Assessors, 3rd Wallace, 573.

Hence, it follows that all such stock owned by residents of your assessment district should be assessed to them in that district.

With reference to your second question, will say that under the laws of the United States, shares of stock in national banks must be assessed to the owner thereof, not necessarily at the place of his residence, but at the place where the bank is located. It therefore follows that any person residing in your district and owning a share of stock in a *national* bank outside of your district, even though within the state, should not be assessed by you. On the other hand, any resident of your district owning shares of stock in any bank other than a national bank, even though such bank is located outside the state, should be assessed with such stock in your district. The reason for this difference is, that the certificate of stock as heretofore stated is property, and the state where the owner resides and has such certificate has the power to tax it, except as I have stated that this right does not exist with reference to national bank stock except at the place where the bank is located.

By section 4 of chapter 63 of the acts of the thirty-fourth general assembly, shares of stock in state banks, savings banks and loan and trust companies located in this state are to be assessed to the individual stockholder at the place where the bank or loan and trust company is located, instead of at the place of residence of the stockholder, as might be inferred from the latter part of my previous letter. Our supreme court has also decided that the shares of stock of other *Iowa* corporations should be taxed to the stockholder at the principal place of business of the corporation, under code section 1323.

Layman vs. Iowa Telephone Co., 123 Iowa, 591.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

TAXATION—LIEN OF ON STOCKS OF MERCHANDISE.—Method of collection of taxes not yet due but assessed against stock of merchandise which is about to be removed in bulk discussed.

January 16, 1912.

MR. S. C. JOHNSON,
Knoxville, Iowa.

DEAR SIR: Yours of the 13th instant addressed to the attorney general has been referred to me for reply.

Your question, briefly stated, is, whether or not there is any remedy whereby a stock of merchandise can be held for the taxes for the year 1912 so as to prevent the stock being moved from the state before the taxes are paid, where the property has been assessed but no tax levy is made.

Code supplement section 1400 provides:

> "Taxes upon stocks of goods or merchandise shall be a lien thereon and shall continue a lien thereon when sold in bulk and may be collected from the owner, purchaser or vendee;"

and our supreme court has said:

> "Without this statute, a purchaser of such stock of goods would take title free from any claim on account of taxes. The statute makes taxes levied upon stocks of merchandise a lien thereon and provides that they may be collected from anyone in whose hands the goods may be found, so long as they remain in bulk. This does not mean that these taxes become a personal charge against anyone save the owner at the time the goods were assessed. It simply gives an additional remedy and a right to follow the goods and to distrain them for the taxes assessed, so long as they remain in bulk."
>
> *Mercantile Co. vs. Blair,* 123 Iowa, at 294.

In *Larson vs. Hamilton Co.,* 123 Iowa, 485, it was held that this statute creates a lien for taxes on the stock of goods, and that such lien attaches at the time of the tax levy, but that a sale of the stock between the date of the assessment and the date of the levy will not defeat the lien, but that neither the purchaser of the goods nor his other property become liable for such tax.

Our court has further said:

> "The tax payer's duty to pay does not arise until after the first Monday in January *following the levy,* and we think it can hardly be said that a personal property tax is due until the obligation to pay has arisen. It must be borne in mind that the question is one of lien.
>
> "If the opportunity of the tax payer to pay is entitled to controlling consideration, then the lien should not be held to attach until after the first Monday in January, for it is only after that date that there is any specific obligation on the part of the tax payer to pay or the public officer to collect."
>
> *Read vs. Doty,* 126 N. W., at 152.

In the case of *Crawford County vs. Laub,* 110 Iowa, 355, it was held that the statute which made the mulct tax collectible as ordinary taxes by tax sale was an adequate and exclusive remedy, and that a suit in equity to establish the lien could not be maintained.

In the case of *Plymouth County vs. Moore,* 114 Iowa, 700, it was held that "where a tax was *levied* on a stock of merchandise on September 9th, and that the section of the code hereinbefore quoted became effective in October thereafter, that the lien provided by this section attached on the date that the law became effective, and that inasmuch as the tax was a lien, that the statutory remedy for collection of taxes provided by code section 1406 and which authorized distress and sale of all personal property not exempt from execution, the tax list being a sufficient warrant therefor, that such remedy was exclusive, and that an action to collect the tax as a debt would not lie."

But even in the face of these authorities, I am of the opinion that the officer whose duty it is to collect the tax might, on account of the very fact that the tax assessed but not yet levied is not a lien, maintain an action in equity to enjoin the removal of the property from the state for the purpose of protecting the right of the state to levy and collect the tax, on the same theory that the holder of a chattel mortgage may enjoin the mortgagor from removing the property out of the state, even though the debt secured by the mortgage is not yet due. And likewise, a landlord may enjoin the tenant from disposing of property upon which his landlord's lien is attached before the

debt is due, but not afterward, for then his remedy by attachment becomes ample.

I have not had the time to amplify this latter proposition by the citation of authorities, but it seems to me that authorities might be found along this line.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

MONEYED CAPITAL—BANK STOCK—METHOD OF TAXATION DISCUSSED.

January 17, 1912.

E. W. CHRISTOPHER, *County Auditor,*
Decorah, Iowa.

DEAR SIR: Your letter of the 13th instant addressed to the attorney general has been referred to me for reply.

You ask for an interpretation of the term "moneyed capital," as referred to in section 1310 of the code, as amended by chapter 63 of the acts of the thirty-fourth general assembly, and further ask, "Would all money invested in such a way as to come in competition with the business of national banks come under the head of 'moneyed capital?' "

This term "moneyed capital" as used in that section has been frequently interpreted by the various courts of the country, and the best definition I have been able to find of the term is found in the opinion of the supreme court in the case of *Mercantile Bank vs. New York,* 121 U. S., at 157, where it is said:

> "The terms of the act of congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profits by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and re-invested. It includes money in the hands of individuals employed in a similar way, invested in loans or in securities for the payment of money either as an investment

of a permanent character or temporarily with a view to sale or re-payment and re-investment."

In the same case, on page 161, the court says:

"No one can suppose for a moment that savings banks come into any possible competition with national banks of the United States."

Some of the courts state the matter about as you have stated it in your question, that moneyed capital is any capital which comes in competition with the business of national banks, and while that is a true statement of the situation, yet under our statutes, state and savings banks are not taxed because their capital is moneyed capital, within the meaning of this section necessarily, but because of the provision in section 4 of the chapter under consideration,—that the shares of stock in such institution shall be assessed to the individual stockholder.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

CITIES AND TOWNS—ORDINANCES.—An ordinance of a city or town seeking to cover the same matter already covered by the state law should not be in conflict therewith.

January 17, 1912.

MR. S. M. CAMPBELL,
Bentonsport, Iowa.

DEAR SIR: Your letter of the 12th instant addressed to the attorney general has been referred to me for reply, and the same, as I understand it, involves two questions which might be briefly stated as follows:

"1st. Whether section 6 of the ordinance of the town of Bentonsport, making it a misdemeanor for any person to keep a gambling house within the corporate limits, and section 38 of which ordinance imposes a fine of ten dollars for the first offense and not exceeding twenty dollars for each subsequent offense, is legal and valid.

"2nd. If not, whether persons arrested under such ordinance and having entered pleas of guilty and paid fines imposed in accordance therewith, can recover the same back from the city."

With reference to your first question, I will say that our supreme court has held in the case of the *City of Iowa City vs. McInnerny,* 114 Iowa, 586, that a city ordinance which undertakes to impose a punishment other and different from that imposed by the state law for the same offense is in conflict with the state law and void, and as the section of the ordinance referred to in your letter does impose a different penalty from that provided by the state law, I am inclined to the view that this ordinance was not legal.

With reference to your second question, I will say that where the parties have pleaded guilty and paid their fines, believing the ordinance to be legal, this amounts to a payment of money voluntarily under a mistake of law and it cannot be recovered back, even though erroneously exacted and paid over. See *Ahlers vs. City of Estherville,* 130 Iowa, 272, at 274, and cases there cited.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

PARSONAGES—NOT EXEMPT FROM TAXATION.—Property in order to be exempt from taxation as church property must be owned by the church and where the title is in the name of the minister of the church the exemption is not allowable.

January 17, 1912.

MR. E. E. ILGENFRITZ,
721 Carroll Street,
Boone, Iowa.

DEAR SIR: I am in receipt of your communication of the 15th instant requesting an opinion as to whether a parsonage owned by a minister or division superintendent is exempt from taxation under the Iowa statutes.

I have given this matter careful consideration and I find that under paragraph 2 of section 1304, supplement to the code, 1907, the following classes of property are not to be taxed:

> "All grounds and buildings used for public libraries, * * * * and for literary, scientific, charitable, benevolent, agricultural and religious institutions, and societies devoted solely to the appropriate objects of these institutions, not exceeding one hundred and sixty acres in extent, and

not leased or otherwise used with a view of pecuniary profit. * * * *''

Our supreme court has held in the case of *Trustees of Griswold College vs. State of Iowa,* 46 Iowa, 275, and in the case of *Cook vs. Hutchins,* 46 Iowa, 706, that a parsonage owned by the church and used as a parsonage is exempt from taxation; but our supreme court in the case of *Laurent vs. City of Muscatine,* 59 Iowa, 404, held that in order that the exemption may apply, the use and ownership, either legal or equitable, must combine in the institution, and hence under this decision the property in question would not be exempt from taxation for the reason that it is not actually owned by the church. As before stated, in order that the property may be exempt from taxation, it must be owned by a religious society and used for religious purposes.

See also:

In re Dille, 119 Iowa, 575;

Nugent vs. Dillworth, 95 Iowa, 49;

37 Cyc., page 943.

Yours very truly,

GEORGE COSSON,
Attorney General of Iowa.

DELINQUENT TAXATION ON BANK STOCK—HOW COLLECTED.—Taxes levied against shares of stock in banks are required to be paid by the bank and the bank may charge it up against the dividends of the stockholders.

January 20, 1912.

R. L. FARNSWORTH, *Cashier,*
New Hartford, Iowa.

DEAR SIR: Yours of the 18th instant addressed to the attorney general has been referred to me for reply.

Your inquiry is with reference to the remedies available for the collection of delinquent tax on bank stock, and you especially inquire as to whether or not such tax is a lien upon the real estate of the owner of the bank stock the same as other personal property tax.

Under section 1322 of the supplement to the code, 1907, as amended by section 4 of chapter 63, acts of the thirty-fourth general assembly, it is provided:

> "Shares of stock of national and state and savings banks and loan and trust companies *located in this state* shall be assessed to the individual stockholder *at the place* where the bank or loan and trust company is located."

And while it is doubtless true, as suggested by you, that this tax would be a lien upon any real estate owned by the stockholder in the county where the bank is located, yet as the stock in a bank is frequently held by persons not having any land in that county, but having land in other counties where the tax would not be a lien, it would seem that some better remedy for its collection should exist.

This remedy is found in code section 1325, which provides as follows:

> "The corporations described in the preceding sections shall be liable for the payment of the taxes assessed to the stockholders of such corporations, and such tax shall be payable by the corporation in the same manner and under the same penalties as in case of taxes due from an individual taxpayer, and may be collected in the same manner as other taxes, or by action in the name of the county. Such corporations may recover from each stockholder his proportion of the taxes so paid, and shall have a lien on his stock and unpaid dividends therefor. If the unpaid dividends are not sufficient to pay such tax, the corporation may enforce such lien on the stock by public sale of the same, to be made by the sheriff at the principal office of such corporation in this state, after giving the stockholders thirty days' notice of the amount of such tax and the time and place of sale, such notices to be by registered letter addressed to the stockholder at his postoffice address, as the same appears upon the books of the company, or is known by its secretary."

Hence, it follows that the bank, by virtue of this section, can be compelled to pay the tax by an action in court, if necessary, and the bank should see to it that the tax does not become delinquent, and in the particular case which you cite, I think the purchaser of the bank stock is bound to know this provision of the law, and hence, purchases the stock subject to any unpaid

tax, and the bank would still have the right to charge the tax to the share of stock, even though the ownership of the share of stock has changed hands.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

OFFICES—VACANCY IN—BY REMOVAL.—The office of justice of the peace becomes vacant by removal of incumbent to another township.

January 20, 1912.

MR. W. S. KENWORTHY,
Oskaloosa, Iowa.

DEAR SIR: Your letter of the 19th instant to the attorney general was referred to me for reply. You request an opinion from this department upon the following proposition, as set forth in your letter:

> "O. H. Vance was elected justice of the peace for Harrison township, this county (Mahaska) at the general election in 1910. He qualified and served but now desires to and will remove to Oskaloosa township March 1, 1912. Can he exercise the duties of the office of justice of the peace in Oskaloosa township for the balance of the term to which he was chosen?"

Section 1266 of the code enumerates the different acts and things that create a vacancy in various offices. It provides that every civil office shall be vacant when the incumbent ceases to be a resident of the state, district, county, township, city, town or ward by or for which he was elected or appointed, or in which the duties of his office are to be exercised.

In view of this statutory provision there can be no question but there will be a vacancy in the office held by Mr. Vance if he gives up his legal residence in Harrison township. You do not say whether that is his intention or not but say that he desires to and will remove to Oskaloosa township. If his absence from Harrison township is to be only temporary in its character and he does not intend to give up his legal residence in Harrison township nor to acquire a legal residence in Oskaloosa township or any place other than Harrison township, but intends in good

faith to return to Harrison township (the place of his legal residence) then I do not think that a vacancy would occur in the office he holds, but even if Mr. Vance absents himself from Harrison township temporarily and does not give up his legal residence in that township, I do not think he can discharge the duties of his office outside of Harrison township.

I call your attention to the case of *State vs. Hemsworth,* reported in the 112th Iowa at page 1, which supports the foregoing views.

Respectfully yours,

N. J. LEE,
Special Counsel.

POOL HALLS—POWER OF CITIES AND TOWNS OVER.—Cities and towns have power to regulate, license or prohibit the keeping of billiard or pool halls for hire.

January 20, 1912.

COUNTY ATTORNEY C. B. HUGHES,
Guthrie Center, Iowa.

DEAR SIR: In reply to your communication with reference to minors playing pool and billiards, I am enclosing you copy of an opinion given to B. B. Hadley in which I held that it would be permissible in a private residence or Y. M. C. A. rooms. I am clearly of the opinion, however, that no club would have a right to conduct pool or billiard tables for hire or profit.

Section 702 of the code, as you know, provides that city and town councils shall have power to regulate, license, tax or prohibit billiard saloons, billiard tables, pool tables, and all other tables kept for hire.

This makes it clear that cities and towns have the right to prohibit any one from operating pool or billiard tables for hire.

Yours very truly,

GEORGE COSSON,
Attorney General.

SCHOOLS—NON-RESIDENT PUPILS.—A school board may require non-resident pupils to pay tuition.

January 23, 1912.

MR. H. H. FEIGE,
Lake City, Iowa.

DEAR SIR: I am in receipt of your communication of the 12th instant enclosing statement of facts with reference to the ruling of your board as to whether or not one Edith Robertson, a child seven years of age whose parents are now living in Ashton, Idaho, should be required to pay tuition fee for attending your school.

If the daughter was actually and in good faith making her home with her grandmother, or if she was merely attending school here and her parents were poor and unable to pay her tuition, I would suggest that the board waive any right it might have under the law of collecting tuition, as the law ought not to be so construed as to prevent any child from receiving an education; but if, as I understand the facts, the child is simply here for the purpose of attending school without any intention on the part of her parents to surrender any right or control over her, and without the intention on the part of any one that she shall acquire a permanent residence in the state of Iowa, or permanently live with her grandmother, and considering further that from your statement it is clear that both her parents and grandmother are well able to pay for her tuition, I think the action of the board is entirely legal in requiring that she pay tuition in order that she may attend the public school.

"Residence," as the term is used in the statute, evidently means something more than a temporary stay or sojourn at the place where school is held and simply for the period of time in which school is in session. That being true as before stated, I am of the opinion that the action of the board is entirely legal and that such action is not in abuse of the power lodged in the board with respect to matters of this nature.

Yours very truly,

GEORGE COSSON,
Attorney General of Iowa.

ROAD SUPERINTENDENT.—One acting as road superintendent may not draw compensation as such for time he is engaged in dragging the roads for which dragging he is also compensated.

January 24, 1912.

N. M. NELSON, *Township Clerk,*
Clear Lake, Iowa.

DEAR SIR: Your letter of the 19th instant to the attorney general was referred to me for reply.

You inquire if there is any legal objection to the same person holding the office of road superintendent and superintendent of dragging.

The attorney general is not authorized to render official opinions in matters of this kind to local officials but in this instance I may say in a personal way that I can think of no legal objection to the same person holding both of said offices. Of course it will be understood that while a person is performing work and rendering service as superintendent of dragging he cannot for the time so engaged draw the compensation allowed him as road superintendent.

Respectfully yours,

N. J. LEE,
Special Counsel.

TOWNSHIPS—SUITS BY.—A suit may not be brought by a township.

January 24, 1912.

I. J. SAYRS, *Attorney,*
Webster City, Iowa.

DEAR SIR: Yours of the 23rd instant addressed to the attorney general has been referred to me for reply.

The questions propounded by you are:

> "1st. In case property belonging to the township has been wrongfully converted by third parties, have the trustees the right to bring action in their own right as such trustees for the recovery thereof?
>
> "2nd. In such a case as stated above, would it be the duty of the county attorney to bring such action in his own name for and on behalf of such township?"

Your first question seems to be answered in the negative by the decision of our supreme court in the case of *Sanderson vs. Cerro Gordo County,* 80 Iowa, page 89, wherein it is held that the trustees of a township and the township clerk in their capacity as a local board of health could not maintain an action against the county for the recovery of money paid out by them to a physician employed for the suppression of smallpox, conceding the liability of the county to repay the money on the ground that the trustees and the clerk were not the real parties in interest, nor were they trustees of an express trust.

Hence, it follows that both of your questions should be answered in the negative.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

NOXIOUS WEEDS—DESTRUCTION OF—DISTRIBUTION OF SEED ON PUBLIC HIGHWAY.—There is no law preventing the distribution of quack grass seed along the public highways by farmers or others hauling hay containing same. Provision is made by chapter 96, acts of the thirty-third general assembly for the destruction of certain noxious weeds along the public highway including quack grass.

January 25, 1912.

WALLACES' FARMER,
Des Moines, Iowa.

GENTLEMEN: Your letter of the 23rd instant addressed to the attorney general has been referred to me for reply.

Your question briefly stated is, whether or not, under the law, there is any way to prevent the distribution of quack grass seed along the public highway by farmers or others hauling hay contaminated with such quack grass seed.

I have been unable to find any provisions directly preventing this kind of traffic upon the public highways, yet it seems to me that the provisions of chapter 96, acts of the thirty-third general assembly, provide a somewhat indirect method of reaching the desired result. Section 2 of said chapter provides:

> "The following weeds are hereby declared to be noxious weeds, namely, *quack grass,* Canada thistle, cocklebur, wild

mustard, sour or curled dock, smooth dock, buckhorn or ribbed plaintain, wild parsnip, horse nettle, velvet weed or button weed, and burdock."

Section 3 provides:

"It shall be the duty of the township trustees or other officers responsible for the care of public highways in each townhip or county in this state to destroy or cause to be destroyed all noxious weeds mentioned in section 2 hereof on the highways in such a manner as to effectually prevent the production of their seeds or their propagation in any other manner, * * * * and for neglect or failure to perform this work, they shall be subjected to penalties in this act."

This same section further provides:

"If any occupant of lands adjacent to the public highways neglect or refuse to destroy the noxious weeds upon his land, or shall fail to prevent the said noxious weeds from blooming or coming to maturity, when such weeds are likely to be the means of infesting the public highway, or upon complaint of any land owner to the township trustees that his lands have been or are likely to be infested by weeds from the lands of another including railway right of way, the trustees shall make investigation of such condition or complaint and if the same appears to be well founded they shall make an order fixing the time within which the weeds shall be prevented from maturing seed, and an order that within one year such noxious weeds shall be permanently destroyed, and prescribing the manner of their destruction and shall forthwith give notice to the occupant of the lands where the noxious weeds exist, and if he shall neglect to obey such order within the time so ordered the trustees may cause such noxious weeds to be prevented from maturing seeds or may cause such noxious weeds to be permanently destroyed and the cost of the work shall be recovered from the owner by a special tax to be certified by the township clerk in the same manner as other road tax not paid."

This latter provision would seem to give the trustees authority to cause such weeds to be destroyed before they are allowed to bloom or come to maturity, and the cost of the work to be taxed against the owner.

Hence, it follows that if this provision is thoroughly enforced, there would be no quack grass seed in the hay to be distributed along the highway or elsewhere.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

MOVING PICTURE SHOWS—FIRE ESCAPES—EXITS—HOW CONSTRUCTED.

January 27, 1912.

MR. AL STADER,
Ankeny, Iowa.

DEAR SIR: Your letter of the 26th instant addressed to the attorney general has been referred to me for reply.

Your questions are:

"1st. Is it against the state law to conduct a moving picture show on second floor of a hall building?

"2nd. Does a public hall, used for all public purposes, have to be equipped with more than one exit, or have fire escape where it is located on second floor?"

Your first question should be answered in the negative. A bill was introduced at the last session of the legislature seeking to regulate moving picture shows, but did not become a law.

With reference to your second question, I call your attention to code supplement section 4999-a7, which provides:

"The buildings, structures and enclosures contemplated in this act shall be classified as follows:

"First, hotels, etc.;

"Second, tenements or boarding houses of three or more stories in height;

"Third, buildings used as *opera houses,* theaters or public halls of a *seating capacity exceeding three hundred.*"

Also to section 4999-a8, which provides as follows:

"Buildings under classification 3 of section 2 of this act shall be provided with at least one drop or counterbalance stairway from the second story balcony to the ground, or a stationary stairway may be carried down within five feet of the ground, or

such a number of exits or such a number of the above described stairways as may be determined by the chief of fire department or the mayor of each city or town where no such chief of fire department exists."

Also to section 4999-a9, as amended by chapter 220 of the acts of the thirty-third general assembly, which reads as follows:

"In buildings under all above classifications, signs indicating location of fire escapes shall be posted at all entrances to elevators, stairway landings and in all rooms. The entrance and exit doors of all hotels, churches, lodge halls, court houses, assembly halls, theaters, opera houses, colleges and public school houses, and the entrance doors to all class and assembly rooms in all public school buildings in all cities and incorporated towns shall open outward."

Hence, it follows that the answer to your second question must depend upon whether or not the seating capacity of your public hall exceeds 300. If so, the foregoing provisions would govern. Otherwise, the only provisions governing would be that last above quoted with reference to doors opening outward.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

MANUFACTURING COMPANIES—SHARES OF STOCK IN—HOW ASSESSED.

January 30, 1912.

MR. G. H. ORCUTT,
Monroe, Iowa.

DEAR SIR: Yours of yesterday addressed to the attorney general has been referred to me for reply.

Your question, briefly stated, calls for the proper method of taxation of shares of stock in the Quaker Oats Company,—whether on the five mill basis or on 20 per cent of its actual value; also for the proper basis of taxation of money in the bank on time deposit and in bank subject to check, where these items are held by a farmer living on his own farm.

If the Quaker Oats Company is an Iowa corporation it would in all probability be a manufacturing corporation, and the cor-

poration itself should be assessed with its property under section 1319 of the code. And you will observe by the last few lines of this section that the owners of capital stock of a manufacturing corporation which has listed its property are exempt from assessment on such shares of stock. If, on the other hand, the Quaker Oats Company is a foreign corporation, then shares of stock held by residents of your taxing district would be moneys and credits and should be taxed on the five mill basis, even though the property of the company is taxed in the state of its residence.

See *Judy vs. Beckwith,* 114 N. W., 565.

The money in bank on time deposit, as well as the checking account, should be taxed on the five mill basis where, as you say, the same is held by a farmer, being one who is not engaged in the making of money by the use of his moneyed capital as money.

Very truly,

C. A. ROBBINS,
Assistant Attorney General.

PRESIDENTIAL ELECTORS—HOW ELECTED.—Presidential electors are voted for individually the same as other state officers.

January 30, 1912.

MR. G. W. FREDERICK,
Conrad, Iowa.

DEAR SIR: Your letter of the 26th instant to the attorney general was referred to me for reply.

You inquire whether a voter is entitled to vote for all of the presidential electors in voting at a presidential election.

While the attorney general is not required to answer questions of this kind, I may suggest in a personal way that your question ought to be answered in the affirmative. Each voter qualified to vote at a presidential election is entitled to vote for all of the presidential electors if he chooses. The manner of voting for them is the same as voting for other candidates upon the ticket.

Respectfully yours,

N. J. LEE,
Special Counsel.

ASSESSMENT OF PROPERTY OF PERSON ABOUT TO LEAVE STATE.—A person about to leave the state and having property in the state on January 1st should be assessed even though he may be liable for another tax in same year on same property in the state to which he moves.

January 30, 1912.

MR. J. F. MOORMAN,
Truro, Iowa.

DEAR SIR: Yours of yesterday addressed to the attorney general has been referred to me for reply.

Your question is, "Has the assessor the lawful right to list all property in view of the fact that you are leaving the state for Nebraska, and whether or not, if the property is listed here, the Nebraska authorities are bound by the proceedings here?"

Under our law it is not only the right, but the duty of the assessor to assess all property which was in this state on January 1st to the then owner thereof. I do not know what the laws of Nebraska are. It may be that you would be liable for a double tax on the property by moving to Nebraska. If their date for listing is after the time you arrive there, but in the same year, you would be liable for a double tax.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

TOWNSHIP CLERK—MAY ACT AS ROAD DRAGGING SUPERINTENDENT.

January 30, 1912.

MR. J. M. WOLDEN,
Wallingford, Iowa.

DEAR SIR: I received your letter several days ago, in which you inquire if there is any legal objection to a township clerk acting as superintendent of dragging.

I would have answered your letter sooner, but was out of the city on other matters and just returned Saturday evening.

I have not had time to investigate this question with thoroughness, but it is my judgment that there is no legal objection to the same person holding the office of township clerk and that of

superintendent of road dragging at the same time. I can think of no instances where there is a conflict in the duties or relations of the two officers in such sense as would make them incompatible under the rules of the common law.

Yours very truly,

N. J. LEE,
Special Counsel.

BRICK AND TILE COMPANIES—HOW ASSESSED—MOTOR CAR COMPANIES—HOW ASSESSED.

January 30, 1912.

R. J. MULLEN, *Assessor,*
Dougherty, Iowa.

DEAR SIR: Your letter of the 28th instant addressed to the attorney general has been referred to me for reply.

You call attention to the fact that some of the stockholders in the Farmers' Brick & Tile Company of Mason City and the Colby Motor Company refused to list their stock in these corporations until they are shown proof that they can be assessed for these stocks, and ask to be advised with reference to the matter.

Our supreme court, in the appeal of *Iowa Pipe & Tile Company,* 70 N. W., 115, has held that a brick and tile company is a manufacturing corporation, and would hence be taxed under the provisions of section 1319 of the code, and the property of the corporation should be assessed instead of the shares of stock. You will notice the last lines of this section provide:

> "The owners of capital stock of manufacturing companies, as herein provided for, having listed their property as above directed, shall be exempt from assessment and taxation on such shares of capital stock."

I do not know enough about the Colby Motor Company to know whether or not it should be assessed in the same way, but if it is a manufacturing concern instead of a selling concern, then the same rule would apply with reference to it and its stockholders. On the other hand, if it is not a manufacturing concern and is a foreign corporation, the shares of stock must be assessed to the individual owners thereof where they reside, and those residing in this state should be assessed with their shares of stock, even though

the property of the corporation is assessed in the foreign state where it is organized.

Judy vs. Beckwith, 114 N. W., 565.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

TOWNSHIP TRUSTEES—MAY NOT ACT AS ROAD SUPERINTENDENT.

January 30, 1912.

MR. JOHN PICKAR, *Supervisor,*
R. F. D. No. 2, Ionia, Iowa.

DEAR SIR: Your letter of the 22nd instant to the attorney general was referred to me for reply.

You say it is a common thing for the township trustees of your township to act as road superintendents. You inquire if this is legal, and if not, how it can be stopped.

It is in violation of law for a township trustee to also act as road superintendent. I think this is clearly prohibited by section 468-a of the supplement to the code, 1907, and I believe that such violation amounts to the commission of a crime for which the offender may be indicted and convicted. Aside from being a criminal act, it is in violation of the rules of common law. A trustee acting as road superintendent could be enjoined from drawing any pay from the township for services rendered in the capacity of road superintendent. It is contrary to public policy to allow a person to appoint himself to office or have any voice in it, or to fix his own compensation or have any voice in it, or any opportunity to do either of said things.

I call your attention to the case of *State vs. York,* 131 Iowa, 635; also the same case in 135 Iowa, 529; and the case of *Bay vs. Davidson,* 133 Iowa, 688.

Respectfully yours,
N. J. LEE,
Special Counsel.

TOWNSHIP TRUSTEE—MAY NOT ACT AS ROAD DRAGGING SUPERINTENDENT.

January 30, 1912.

W. M. KEELEY, *Attorney at Law,*
Washington, Iowa.

DEAR SIR: Your letter of the 26th instant addressed to the attorney general was referred to me for reply.

You request an opinion from this department as to whether a township trustee may also act as superintendent of dragging.

In my opinion, these offices are incompatible at common law and may not be held by the same person. The township trustees appoint the superintendent of dragging and also fix his compensation and audit his claims for salary and expenses, and also audit his other disbursements of public funds. It would be contrary to public policy to permit one having the appointing power to have a voice in appointing himself to another office, or to fix his salary or audit his bills. It is immaterial whether he actually does have a voice in these matters; it is sufficient that he has the opportunity.

Respectfully yours,

N. J. LEE,
Special Counsel.

MONEYS AND CREDITS—TAXATION OF.—Notes held by a resident of this state should be assessed in the county of his residence even though the mortgage securing same is taxed in another state.

January 30, 1912.

MR. S. O. GRIDLEY,
Chapin, Iowa.

DEAR SIR: Yours of yesterday addressed to the attorney general has been referred to me for reply.

You propound the following question:

> "Is a man living in Iowa, owning a mortgage on real estate in Minnesota, required to list the mortgage for taxation here?"

Our supreme court has held that moneys and credits should be assessed to the owner at the place where he resides, and that they

should be so assessed at such place, even though they have been previously assessed in another county.

Snakenburg vs. Stein, 126 Iowa, 650.

Code, section 1313.

Hence, I am of the opinion that the notes secured by the mortgage rather than the mortgage should be listed for taxation at the place where the owner resides in Iowa, even though the mortgage may be taxed in the state of Minnesota.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

VETERINARY SURGEONS—WHO ENTITLED TO PRACTICE.

January 30, 1912.

E. J. VAN NESS, *County Attorney,*
Algona, Iowa.

DEAR SIR: Your letter of the 22nd instant addressed to the attorney general has been referred to me for reply.

You call attention to section 2 of chapter 100, acts of the thirty-fourth general assembly, and especially to that portion of the section which reads as follows:

> "or in lieu thereof a certificate signed by a duly qualified veterinarian who shall be a *regular graduate of a recognized veterinarian college,* certifying that such animal is free from hereditary, contagious or transmissible disease,"

and you then propound the following questions:

> "Does this mean to discriminate against regular licensed veterinary practitioners who are authorized to do business? And is this not such a discrimination as to nullify that part of the act?"

You will notice that this provision is not required to be complied with except that this certificate may be filed in lieu of an affidavit of the owner of the animal to the effect that the animal is, to the best of his knowledge, free from such hereditary, contagious or transmissible disease. No veterinarian would have any vested right to make the examination or furnish the certificate authorized by this section. The legislature might, if it had seen

fit, have provided that this certificate should be signed by the state veterinarian or some of his assistants, but they have seen fit to accept the certificate of any veterinarian coming within the prescribed class,—that is, duly qualified veterinarians who shall be a regular graduate of a recognized veterinary college. Hence, I am of the opinion that both of your questions would be answered in the negative.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

ROAD DRAG LAW.—The provisions of the road drag law are mandatory.

January 30, 1912.

HON. SHERWOOD A. CLOCK, *County Attorney*,
Hampton, Iowa.

DEAR SIR: Your letter of the 25th instant addressed to the attorney general was referred to me for reply.

You request an opinion from this department as to whether cities and towns are authorized to levy the one mill for road drag fund provided for in chapter 70 of the acts of the thirty-fourth general assembly, by virtue of section 4 of that act.

You say that some of the towns in your county have levied this tax, but that the Great Western Railroad is resisting its payment. With reference to your question, I may say that I have doubted whether section 4 of said chapter required cities and towns to levy this tax, and I still think it doubtful whether such power is conferred. In view of the fact, however, that the question is raised in the way as suggested, I do not think that this department ought to hold or take the position that the tax is illegal, but rather should proceed on the theory that it was regularly levied and allow the question to be raised by the person or company resisting its collection and thus have the law determined.

Respectfully yours,

N. J. LEE,
Special Counsel.

ROAD SUPERVISORS—TREES IN HIGHWAY.—The road supervisors may not destroy trees by the roadside which do not obstruct the travel.

January 31, 1912.

MR. GUS MONGIN,
Woodward, Iowa.

DEAR SIR: Replying to your letter of the 21st instant to the attorney general, will say, first, section 1556 of the code provides:

> "The road supervisor shall not cut down or injure any tree growing by the wayside which does not obstruct the road or which stands in front of any town lot, inclosure or cultivated field, or any ground reserved for any public use, and shall not enter upon any lands for the purpose of taking timber therefrom without first receiving permission from the owner."

Of course you are aware of the provisions with reference to the trimming of hedges, but I take it that this is not what you have in mind.

Your second question is: "Have the county supervisors the right to use a township one mill road tax any place in the township they wish to?"

Section 1 of chapter 97 of the acts of the thirty-third general assembly provides:

> "That on written petition of a majority of the electors who are free holders of any township in any county, the board of supervisors may levy an additional mill in said township to be *expended by said board of supervisors on roads in the township* where the same is levied."

Hence, it follows that your question should be answered in the affirmative, provided, however, the board confines the work within the township for which the one mill tax is levied.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

CITIES AND TOWNS—MAYOR—SIGNATURE TO ORDINANCES.—A mayor may sign an ordinance for the purpose of its authenticity even though he has vetoed the same.

January 31, 1912.

HON. J. M. MCGLONE, *Mayor,*
Shenandoah, Iowa.

DEAR SIR: Replying to yours of the 29th instant addressed to the attorney general, will say that it is not your duty, but that of the clerk to sign the ordinance vetoed by you, but after the ordinance entering into the contract is duly adopted, then there would be no objection to your signing the contract for the purposes of authentication, and by referring to the ordinance as your authority and direction, it would fully appear that the contract was not of your making, but that your signature was a ministerial act.

In the case of *Moore vs. The City of Perry,* 119 Iowa, at page 428, our supreme court says:

> "There is a broad distinction between a requirement that the mayor shall sign ordinances simply as a means of authentication and a requirement that he shall sign as an evidence of his approval. The former requirement may well be said to be ministerial and directory only, while the latter is undoubtedly mandatory and plainly intended as a check against hasty, unwise and inexpedient legislation."

And while, as I said before, it would not be improper for you to sign in this way, there is no law which makes it mandatory for you to so sign.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

POLICEMEN'S PENSION FUND.—The tax for policemen's pension fund may be levied when the city has an organized police force but not otherwise.

January 31, 1912.

FRED G. FISK, *Marshal,*
Osage, Iowa.

DEAR SIR: Yours of the 29th instant addressed to the attorney general has been referred to me for reply.

Your question, briefly stated, is whether or not the policemen's pension law applies to a city of the second class where there is only one policeman.

The policemen's pension law is found in chapter 62, of the acts of the thirty-third general assembly, and section 1 provides:

> "In all cities and towns including cities organized under special charter, *now or hereafter having an organized police department*, there may be annually levied at the time of the levy of other taxes for city purposes a tax not exceeding one-half of a mill on the dollar for the purpose of creating a policemen's pension fund."

I am inclined to believe that this law was only intended to apply in cases where there is an organized police department. If you will examine section 668 of the supplement to the code, specifying the duties and powers of city and town councils, and especially subdivision 12 of that section, you will find that it provides:

> "They shall have power to establish a police force, and to organize the same under the general supervision of the marshal, and to provide one or more station houses."

Should your city comply with these provisions, then I think the tax provided for might be levied and you or any other disabled policeman might be entitled to the pension.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

TRAVELERS IN THE HIGHWAY—DUTIES IN PASSING.—One overtaken in the highway by another traveling in the same direction is not required to surrender any portion of the highway.

January 31, 1912.

MR. M. C. STARRETT,
Marathon, Iowa.

DEAR SIR: Your letter of the 29th instant addressed to the attorney general has been referred to me for reply.

Your question is:

> "When the driver of a motor vehicle overtakes a person riding or driving upon the public highway in same direction, must the person riding or driving turn to the right, giving

half of the beaten track, so that motor vehicle can safely pass to left? Or can the person riding or driving, if so inclined, keep the motor vehicle behind until such time as the road will permit the motor to run past on either side?''

Code section 1569 provides:

''Persons on horseback or vehicles meeting each other on the public roads shall give one-half of the same, turning to the right,''

but our supreme court has held in the case of *Elenz vs. Conrad,* 123 Iowa, 522, that where teams are traveling in the same direction, the team in front is not required to yield any portion of the road being used in order to let another pass him.

The new automobile law is silent as to the matter of turning out in order to let other autos or vehicles pass when going in the same direction. Section 19 provides:

''A person operating or driving a motor vehicle shall * * * if traveling in the same direction, use reasonable caution in thereafter passing such horse or animal,''

but there is nothing in this section that fixes the duty of the person in front on the highway, whether he have an automobile or team.

Hence, it follows that the first part of your question must be answered in the negative and the latter part in the affirmative.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

SUPERINTENDENT OF DRAGGING—WHO ELIGIBLE.—The township trustees may not appoint one of their own number as superintendent of dragging.

February 2, 1912.

MR. A. BOLLER,
Goodell, Iowa.

DEAR SIR: Your letter of the 30th ultimo addressed to the attorney general was referred to me for reply.

You request an opinion from this department as to whether the township trustees are authorized to appoint one of themselves as superintendent of dragging or, in other words, whether a township

trustee is authorized to accept and perform the duties pertaining to the office of superintendent of dragging.

While the attorney general is not required to officially advise you in a matter of this kind, I have no objection in this instance to say to you in a personal way that the township trustees may not appoint one of their number as superintendent of dragging and further that one who acts as superintendent of dragging while holding the office of township trustee cannot collect any compensation for his services.

Respectfully yours,

N. J. LEE,
Special Counsel.

BREEDING ANIMALS—REGISTRATION OF.—Animals blind from whatever cause are not entitled to be registered under chapter 100, acts of the thirty-fourth general assembly.

February 3, 1912.

HON. F. W. RUSSELL,
Forest City, Iowa.

DEAR SIR: Your letter of the 31st ult. addressed to the attorney general has been referred to me for reply.

Your question, as stated by you, is as follows:

> "A stallion having been bought by a company and stood for public service in a community for 12 years had the pink eye twice and lost the sight of both eyes. He has always been a good breeder and his offspring have had good eyesight. Breeders still wish to use him. If the owners of said stallion state on their bills that the horse has this defect and how he got it, would they have the right to stand this horse for public service in the eyes of the law?"

You will notice by a careful reading of section 3 of chapter 100, acts of the thirty-fourth general assembly, that the presence of any one of the following named diseases *shall* disqualify the animal for public service, and no certificate shall be issued by the secretary of the state board of agriculture. The diseases named follow and are: Glanders; farcy; blindness; bone spavin; bog spavin; cataract, and others. Commencing with line 5 of this section, it is provided that an animal possessing any of the following named unsoundnesses may receive a certificate, but each cer-

tificate and every advertisement shall state in large type or writing the unsoundness or unsoundnesses with which the animal is afflicted, and where afflicted in a very aggravated or serious form, the department of agriculture *may,* upon investigation, disqualify such animal from public service if considered unfit. Among the unsoundnesses mentioned in this subdivision are: Ring bone, side bone, curb, etc., but blindness is not included.

With this section of the law worded as it is, there can be no doubt but that blindness is an absolute disqualification, whether such blindness was caused by disease or by some accidental injury which would not ordinarily affect the health of the animal.

The secretary of the agricultural department has encountered several instances of this kind, and it would seem that there might well be a classification of blindness, and that, where the blindness is not caused by disease, the animal should not be arbitrarily disqualified, but in order to reach this result, the legislature must take action on the matter.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

ROAD SUPERINTENDENT—BOND OF.—By code supplement section 1545, each road superintendent is required to give bond in such sum and with such security as the township clerk may require.

February 5, 1912.

GUST HADSCHER, *Township Clerk,*
Hubbard, Iowa.

DEAR SIR: Yours of the 2d instant addressed to the attorney general has been referred to me for reply.

Your question is, whether or not road superintendents and superintendents of dragging are required to give bonds.

By code supplement section 1545 it is provided:

> "Each road *superintendent* or *contractor* shall give bond in such sum and with such security as the township clerk may require, conditioned that he will faithfully and impartially perform all the duties required of him, and devote all moneys that may come into his hands by virtue of his office, according to law."

From this it would seem to be clear that the road superintendent is required to give bond.

In the law creating the office of superintendent of dragging nothing is said about his giving bond. However, I am inclined to think that he would be a "contractor" within the meaning of that term as used in the section above quoted. Hence, I am of the opinion that both the road superintendent and the superintendent of dragging are required to give bonds.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

REGISTRATION OF VOTERS.—Registration of voters is required in cities having a population of 3,500 or over.

February 5, 1912.

A. B. MAXWELL, *City Clerk,*
Ames, Iowa.

DEAR SIR: Your letter of the 23d ult: addressed to the secretary of state has been referred to this department for reply.

Your question is, whether or not your city, now having a population of more than 3,500 and being required to establish registration of voters, is required to so establish the same for the coming city election to be held in March of this year.

Code supplement section 1076 provides: "In cities having a population of 3,500 or more, not including inmates of any state institution, the council, on or before the sixth Monday preceding each general election, and on or before the third Monday prior to any city election to be held during the year 1906, shall appoint one suitable person from each of the two political parties which cast the greatest number of votes at the last general election, from three names presented by each chairman of the city central political committee of such parties, to be registers in each election precinct in the city for the registration of voters therein, who shall be electors of the precinct in which they are to serve, * * *

"They shall hold their office for two years, but registers appointed for city elections during the year 1906 shall hold office only until such election is completed."

Section 1077 provides: "The registers shall meet on the second Thursday prior to any general, city or special election, at the usual

voting place in the precinct in which they have been appointed, and shall hold continuous sessions for two consecutive days from 8 o'clock in the forenoon until 9 o'clock in the afternoon, and in presidential years, such sessions shall be held for three days."

Hence, I am of the opinion that the registration should be established for the coming March city election.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

HIGH SCHOOL TUITION—HOW PAID.—The district in which a high school pupil resides is liable to the district where he attends high school if no high school course is provided by his home district.

February 5, 1912.

W. R. HART, *County Attorney,*
Iowa City, Iowa.

DEAR SIR: Your letter of the 2d instant addressed to the attorney general has been referred to me for reply.

Your question, as stated by you, is as follows:

> "A student, resident of Union township, Johnson county, having exhausted the school facilities of his township and who has complied with section two of this law, presents himself to a high school, which is a private institution, supported by private funds. The student is accepted by said private high school. Is the debtor corporation, Union township, obligated to pay the tuition fee of said student to said private institution?"

While section 1 of chapter 146 of the acts of the thirty-fourth general assembly provides:

> "Any person of school age, who is a resident of a school corporation not offering a four-year high school course, and who has completed the course of study offered in such school corporation, shall be permitted to attend *any high school* that will receive him," etc.

yet I am of the opinion that the legislature did not contemplate a private institution when it made use of the term "any high school," for in section 3 we find the language:

"The school corporation in which such student resides shall pay to the treasurer of the school corporation in which such student shall be permitted to enter, a tuition fee," etc.

and section 4 provides:

"If payment is refused or neglected the board of the creditor corporation shall file with the auditor of the county * * * a statement certified by its president specifying the amount due for tuition, * * * and the auditor shall transmit to the county treasurer an order directing such treasurer to transfer the amount of such account from the debtor corporation to the creditor corporation."

I would not at this time care to go farther than to hold that a private high school was not within the contemplation of the legislature at the time this chapter was passed. It may be that the private high school might have some recourse against the other school corporation.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

MARRIAGE OF COUSINS—WHEN LEGAL.—The marriage of first cousins in a state where such marriages are legal would be respected as legal in Iowa.

February 5, 1912.

MR. V. R. SEEBURGER,
Iowa City, Iowa.

DEAR SIR: Your letter of the 2d instant addressed to the attorney general has been referred to me for reply.

Your questions are:

"First. Would a marriage of first cousins, where the man is a resident of Iowa, and the woman a resident of a state where such a marriage is legal, be respected by the Iowa courts were it to be celebrated in the state of the woman's residence, and were the parties immediately to return to Iowa?

"Second. Would the decision be the same were both parties residents of another state where their marriage was legal if they subsequently came to reside in Iowa?"

Both of your questions should be answered in the affirmative. It is an elementary proposition of law that a marriage which is legal where made is legal everywhere.

While the courts of this state would undoubtedly respect the validity of such marriages, yet it is probably true that if such parties co-habit in this state, each of them in either instance might be prosecuted for incest, under code supplement section 4936, as amended by chapter 212 of the acts of the thirty-third general assembly.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

BANKS—TAXATION OF—DEDUCTIONS.—In taxing shares of bank stock they may deduct capital actually invested in real estate.

February 8, 1912.

E. L. PARTCH, *Cashier*,
Rock Rapids, Iowa.

DEAR SIR: Your letter of the 5th instant addressed to the attorney general has been referred to me for reply.

You call attention to chapter 63, acts of the thirty-fourth general assembly, relative to the taxation of moneys and credits, and to the fact that your bank owns its banking house and certain farm lands in the state of Minnesota, and you then say the question is, "Can we offset the *value* of this land in Minnesota?" And you further state, "There seems to be no question about the offset of the banking house and real estate occupied by us, but the assessor seems to question our right to an offset of the value of the real estate located in Minnesota."

As I understand this law, you are neither entitled to deduct the *value* of your banking house nor the *value* of your Minnesota land, but according to the plain words of the law, you are entitled to deduct "the amount of your capital *actually invested* in real estate owned by you." You will readily observe that there may be a wide difference between the value of a piece of land and the amount of capital actually invested in it. For instance: You might buy it for one thousand dollars and it would be worth two thousand dollars at the time of the assessment. You would be entitled to

deduct the amount actually invested,—one thousand dollars, rather than the real value,—two thousand dollars. Construing the law in this way, I see no reason why you would not be entitled to the deduction on capital invested in lands, whether within or without the state.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

BANKS—TAXATION OF—DEDUCTIONS.—No deductions should be made from the valuation of bank stock on account of the fact that the surplus or undivided earnings may be invested in government bonds.

February 8, 1912.

C. J. CASH, *County Attorney*,
Anamosa, Iowa.

DEAR SIR: Yours of the 6th instant addressed to the attorney general has been referred to me for reply.

Your questions are:

"1st. Can any deduction be made by reason of part of the surplus and undivided earnings being invested in government bonds?

"2d. Is there any deduction on account of real estate owned by the bank or by a company in which they hold stock except real estate 'on or in which the bank or trust company is located'?"

Your first question should be answered in the negative. The chapter to which you refer requires the assessment to be made against the individual stockholders and not against the bank. It is clear, therefore, that the bank is not entitled to make any deduction for the reason that there is no assessment against it. The individual stockholder is not entitled to make any deduction because the bank, and not the stockholder, is the owner of the government securities.

Your second question should be answered in the affirmative, modified by the proposition that the deduction to be made is not the value of the real estate, but "the amount of their capital actually invested in real estate owned by them." This deduction is not to be confined to the building in which the bank or loan and trust

company is located, but where the banks own such a building, a deduction is to be made on account thereof.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

CITIES AND TOWNS—ORDINANCES.—An ordinance should be read three different times, and when adopted after a single reading is invalid.

February 8, 1912.

GEO. B. MACOMBER, *Recorder,*
Olin, Iowa.

DEAR SIR: Yours of the 7th instant addressed to the attorney general has been referred to me for reply.

You will find the method required for the adoption of ordinances clearly set forth in sections 681 to 687 of the code. The proposed ordinance should be distinctly read on three different days, as provided by section 682, or by a three-fourths vote of the council, the rule may be dispensed with, and the ordinance read the third time and then adopted, but an ordinance adopted after one reading only is invalid.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

PUBLIC LIBRARIES—TAX FOR THE SUPPORT OF.—Code supplement section 732 providing for a library tax, since its amendment by chapter 46, acts of the thirty-third general assembly, is unconstitutional.

February 8, 1912.

MR. CHARLES S. MACOMBER,
Ida Grove, Iowa.

DEAR SIR: Yours of the 6th instant addressed to the attorney general has been referred to me for reply, and I call your attention to the decision of our supreme court in the case of *State vs. Des Moines,* wherein the original section to which you refer was held to be unconstitutional. To meet this decision, the code, section 732, was, by the thirty-first general assembly, amended in

such a way as to leave the taxing power with the city, the language being, "and shall cause the same to be certified to the city council which shall levy such tax or *so much thereof* as it may deem necessary to promote library interests."

Hence, I am of the opinion that code supplement section 732 is legal and valid, but I also call your attention to chapter 46 of the thirty-third general assembly, where the words which I have quoted above and which made the section unconstitutional were again stricken out by the hand of an all-wise legislature, and in my opinion the section as it now stands would be and is unconstitutional the same as it was at the time of the decision in the case of *State vs. Des Moines,* 183 Iowa, at 76.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

SCHOOL FUNDS—INTEREST ON.—There is no law requiring or prohibiting the payment of interest upon school funds deposited in the bank by the school treasurer.

February 12, 1912.

E. C. FISHBAUGH, *Cashier,*
Security Trust & Savings Bank,
Shenandoah, Iowa.

DEAR SIR: Your letter of the 3d instant addressed to the attorney general has been referred to me for reply.

Your question is:

> "Are school treasurers given the authority to arrange with the banks to pay interest on daily balances of school funds, or must such action be taken under direction of the board?"

By chapter 91 of the acts of the thirty-third general assembly, the county treasurer, with the approval of the board of supervisors, by resolution entered of record, is authorized to deposit funds with banks at interest at the rate of at least 2 per cent per annum on 90 per cent of the daily balances payable at the end of each month.

I know of no provision of law specifically authorizing or requiring school treasurers or school boards to make any similar arrangement for the payment of interest. However, I understand it to

be the practice in some localities for the school treasurers to arrange for the payment of such interest as may be agreed upon, and no legal objection is known to such an arrangement.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

VOTERS—QUALIFICATIONS OF.—A citizen of the United States of the age of twenty-one years, a resident of the state six months and of the county sixty days, is a qualified elector. In city elections he must also be a resident of the precinct ten days. Women may vote at elections where certain specified questions are involved.

February 12, 1912.

MR. GEORGE H. HAYNES,
Worcester, Mass.

DEAR SIR: Replying to your letter of the 30th ult. with reference to the qualifications required of voters by the laws of this state, will say, first, that by the constitution of Iowa, section 1, article II, it is provided:

> "Every male citizen of the United States of the age of twenty-one years who shall have been a resident of this state six months next preceding the election, and of the county in which he claims his vote, sixty days, shall be entitled to vote at all elections which are now or hereafter may be authorized by law."

By section 642 of the code it is provided, in addition to the foregoing, that persons voting at city or town elections must have been a resident of the town and of the precinct in which he desires to vote ten days prior to the election.

By code supplement section 1076, in cities having a population of 3,500 or more, registration is required. No educational tax, property tests or other qualifications are required.

By code section 2747, it is provided: "In any election hereafter held in any school corporation for the purpose of issuing bonds for school purposes or for increasing the tax levy, the right of any citizen to vote shall not be denied or abridged on account of sex, and women may vote at such elections the same as men,

under the same restrictions and qualifications, so far as applicable." By section 1131, same provision is applied to city and town elections for similar purposes.

By section 5, article II of the Iowa constitution, it is provided:

"No idiot or insane person or person convicted of any infamous crime shall be entitled to the privilege of an elector."

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

ROAD SUPERINTENDENTS—WHEN APPOINTED.—Road superintendents may be appointed at any time; the provision requiring them to be appointed is directory and not mandatory.

February 12, 1912.

HON. J. P. HERTERT,
Harlan, Iowa.

DEAR SIR: Your letter of the 7th instant to the attorney general was referred to me for reply.

You say the township trustees of several townships in your county met before the first Monday in February and let the contract for the road work for the coming year and hired superintendents of dragging and you inquire if their action in this respect was illegal.

It is my opinion that this action of the township trustees was not illegal, and further that it will not render the acts and doings of the officers so appointed illegal. I call your attention to the case of *Easton vs. Savery,* 44 Iowa, 654, which seems to be in point. My conclusion in this matter is based upon the idea that the statute in question as to the time of appointing such officers is not mandatory but directory. No one is injured by the fact that such officers were elected a little in advance of the time fixed by law. The statute does not contain words or language negativing the right of the trustees to appoint such officers at some other time.

Respectfully yours,

N. J. LEE,
Special Counsel.

POLL TAX—EXEMPTIONS.—Officers and soldiers of the guard are exempt from poll tax during their terms of service.

SOLDIERS' EXEMPTION.—The soldiers' exemption provided for by chapter 62, acts of the thirty-fourth general assembly, is available only to Union soldiers or sailors of the Mexican war and the war of the rebellion and is not available to the soldiers of the Spanish-American war.

February 12, 1912.

MR. WALTER L. COOK,
R. R. No. 2, Rolfe, Iowa.

DEAR SIR: Yours of the 9th instant addressed to the attorney general has been referred to me for reply.

Your questions are:

"First. Whether an ex-soldier of the Spanish-American war is exempt from poll tax.

"Second. Whether or not such soldier is entitled to the $1,200 exemption from taxation."

Code section 2209 provides: "Every officer and soldier of the guard shall be exempt from jury duty and poll tax *during his term of service.*"

As this exemption applies only during the term of service, it follows that your first question should be answered in the negative.

With reference to your second question, will say that chapter 62, acts of the thirty-fourth general assembly, provides: "The property not to exceed $1,200 in actual value, of any honorably discharged *Union soldier* or sailor of the *Mexican war* or of the *war of the rebellion,* shall not be taxed."

From this it is clear that soldiers serving in other wars were not intended to be within the provisions of this act, and hence, a soldier of the Spanish-American war or of any other war other than the Mexican war or the war of the rebellion would not be entitled to this exemption.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

BANK STOCK—VALUATION AT WHICH ASSESSED.—Under chapter 63, acts of the thirty-fourth general assembly, bank stock and loan and trust company stock should be assessed at 20% of its actual value.

February 12, 1912.

J. H. CHRISTY, *Assessor*,
Tabor, Iowa.

DEAR SIR: Replying to yours of the 7th instant addressed to the attorney general, will say that code section 1322, as amended by chapter 63, acts of the thirty-fourth general assembly, requires that bank stock and loan and trust company stock and moneyed capital shall be assessed and taxed upon the taxable value of 20% of the actual value thereof. However, in practice many assessors assess this property at 80% at the same time that they assess the other property at 100%, and then divide all by four, which would result in assessing the bank stock at 20% and the other property at 25%. It is not material which way it is done, so long as it clearly appears that the assessment is made on a 20% basis.

The holders of shares of stock are not entitled to deduct their indebtedness therefrom in order to reduce their assessment.

Yours very truly,
C. A. ROBBINS,
Assistant Attorney General.

CITY ELECTIONS—ROTATION OF NAMES ON BALLOT.—The law requiring the rotation of names does not apply to city elections.

February 14, 1912.

HON. W. E. HAYES, *City Auditor*,
Clinton, Iowa.

DEAR SIR: Your letter of the 7th instant to the attorney general was referred to me for reply.

You request an opinion as to whether the names of candidates to be voted for at the primary election to be held in the city of Clinton this month should be rotated or whether they should be arranged and printed in alphabetical order, according to surnames.

It is my opinion that such names should not be rotated but arranged and printed in alphabetical order, according to surnames

so that the tickets in all of the precincts of the city would be uniform as to arrangement of names of candidates to be voted for by the voters of the entire city.

In compliance with your request I am sending you under separate cover three copies of compilation of election laws.

Respectfully yours,

N. J. LEE,
Special Counsel.

SALOONS—USE OF ADJOINING PROPERTY.—An overhead or adjoining room or building controlled by a person carrying on a saloon business may not lawfully be used for dancing or other entertainments.

February 15, 1912.

W. H. PALMER, *County Attorney,*
Maquoketa, Iowa.

DEAR SIR: Your letter of the 14th instant addressed to the attorney general has been referred to me for reply.

Your question, briefly stated, is, whether or not the owner of a building may lawfully operate a saloon in a room on the lower floor, after having leased an adjoining upper room in the same building to a tenant for use as a hall for lectures, entertainments, dancing, etc.

Subdivision 6 of code section 2448, to which you refer, reads as follows:

> "There shall be no * * * music, dancing, or other form of amusement or entertainment, either in the room where said business is carried on, or in any adjoining room or building controlled by the person * * * carrying on said business."

I am inclined to think that the word "controlled," as used in this section, should be construed the same as though it read "owned or controlled." In other words, the owner of property, as a matter of law, controls it. He may lease it for a time, but still it is under his control. Should he lease it for a single evening, in one sense it would be beyond his control, yet if such a lease would render the property not under his control within the meaning of this section, then the very purpose of the statute could always be

defeated, and the building would never be under his control while it was being so used.

In view of the rule that these statutes are to be construed so as to prevent evasions, your question should be answered in the negative.

Yours very truly,
C. A. ROBBINS,
Assistant Attorney General.

MILK DEALERS' LICENSE—WHEN REQUIRED.—No milk dealer's license is required except where the milk is to be sold from a store or vehicle in or for use in an incorporated town for purposes other than manufacture.

February 15th, 1912.

L. W. DANIELS,
Guthrie Center, Iowa.

DEAR SIR: Your letter of yesterday addressed to the attorney general has been referred to me for reply.

Your chief question is whether or not a person selling milk without the use of a wagon in connection with such sales is required to have a license.

Section 3 of chapter 113 of the acts of the thirty-fourth general assembly which provides for the license fee among other things, provides as follows:

> "Nothing herein shall be construed as requiring persons to procure such license unless such person shall sell milk or cream from a store or vehicle."

Hence it follows that a license is not required unless the sales are made either from a store or from a vehicle.

With reference to your other questions will say that I have requested the state dairy and food commissioner to send you a copy of the law in pamphlet form, and after you have received it and studied it over you find anything that you do not fully understand and will write the commissioner with reference to it, he will be glad to make full explanations to you.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

AUTOMOBILES—REGISTRATION AND TAXATION OF.—Where the owner of an automobile registers the same it is exempt from other taxation.

February 16, 1912.

JOHN WALSH, *City Assessor,*
Albia, Iowa.

DEAR SIR: Replying to yours of the 15th instant in which you propound several questions with reference to the proper manner of assessing motor vehicles, will say that I will endeavor to answer your inquiries in the order as stated by you.

Your first question is, whether or not the payment of the registration fee which is paid to the state exempts said automobile from being listed by the assessor for taxation in the town or township where the owner resides.

This question should be answered in the affirmative. Section 9 of chapter 72 of the acts of the thirty-fourth general assembly provides:

> "The registration fees imposed by this act upon motor vehicles other than those of manufacturers and dealers, shall be in lieu of all taxes, general or local, to which motor vehicles may be subject."

Your second question is, whether a dealer who has paid the registration fee of $15.00 on one automobile, and also procured an additional set of number plates for use on demonstrating cars is entitled to have one car exempt from being listed by the assessor for taxation purposes.

Assuming your statement to be correct, this question should be answered in the affirmative. However, I fear that you have not stated the situation correctly, and that really what the dealer obtained for his $15.00 payment was a dealer's registration number instead of the registration number for any particular car, and if this be true, then he would not be exempt on any of the machines and they should be listed as other property by the local assessor. However, such a dealer by registering each machine separately, would not be liable for the dealer's registration fee of $15.00, nor would the property be liable to assessment for local taxes. The buying of extra plates does not exempt any car from taxation, but is only a convenience for the use of a dealer who has paid the dealer's license.

Your third question is, whether or not you should list for taxation automobiles where the registration fee for the year 1912 has not yet been paid.

This question should be answered in the affirmative. Taxation is the rule, and all property is subject to taxation. It is only by the payment of the registration fee to the state for the particular year that the owner of the machine is permitted to escape local taxation, and you could not take their promise to pay the state tax and let them off. Your duty would be to make the assessment. Later on, if they paid the state fee, then it would be the duty of the county auditor to cancel the local assessment in accordance with the provisions of section 9 of the act.

Your next question is, as to whether or not an automobile used as an ambulance by the management of your city hospital should be assessed for taxation purposes where the owners thereof fail to pay the state registration fee.

Section 2 of the chapter above referred to provides:

> "The term 'motor vehicle' as used in this act, except where otherwise expressly provided, shall include all vehicles propelled by any power other than muscular power, except motor trucks, motor drays, motor delivery wagons, traction engines, road rollers, fire wagons and engines, police patrol wagons, *ambulances,*" etc.

Hence, the owner of an auto used as an ambulance would not be required to pay the state registration fee, and the only section under which it might be exempt in the hands of the hospital management would be subdivision 2 of section 1304, as "apparatus belonging to the above institutions." This, however, would only be true where the hospital was a charitable and benevolent institution, and if it conducts the hospital for private profit, then neither its automobile nor other property would be exempt from local taxation.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

TAXATION—EXEMPTION OF BY CITY COUNCIL.—Neither the city council nor the board of supervisors have authority to exempt from taxation for city or county purposes brewery property.

February 16, 1912.

MR. M. P. WILSON,
819 4th Ave.,
Clinton, Iowa.

DEAR SIR: Yours of the 9th instant addressed to the attorney general has been referred to me for reply.

You call attention to the fact that the city council and the county board of supervisors have by some order attempted to exempt from taxation for city and county purposes the Clinton Brewery Company, and you ask what the duties of the county treasurer are in connection with such a case, and whether or not it is up to him to take action to collect the lawful taxes for the current year, as well as for previous years. You also ask what action should or could a citizen take in the case.

There is no authority in law for such an exemption being made, and that it would be the duty of the city council and the board of supervisors, as well as the county treasurer and the county attorney, to see to it that these taxes are collected; and it is doubtless true that the proper officers might be compelled by mandamus proceedings to take the necessary steps to collect this tax. It is equally true that if the proper officers fail to collect this tax, their bondsmen would be liable for the damage sustained by reason thereof.

There are various steps that might be taken by an interested citizen to bring about the collection of this tax. I would suggest, however, that the first step should be to serve a written notice on the city council, the members of the board of supervisors, the county treasurer and the county attorney, calling their attention to the illegality of the practice, and demanding that they proceed to collect the tax.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

SCHOOLS—TAXATION.—A school district is limited to a five mill tax for the purpose of paying principal and interest on school improvement indebtedness.

February 17, 1912.

MR. P. H. GREEN,
Oakland, Iowa.

DEAR SIR: In compliance with your request, I have reviewed the opinion furnished your board by Mr. A. L. Preston of Avoca.

The question, briefly stated, is, whether or not the five mill levy provided for by code supplement section 2813 is a limitation upon the power of the board to levy taxes to pay principal and interest on bonds, in view of the fact that chapter 145 of the acts of the thirty-fourth general assembly expressly authorizes indebtedness to be incurred up to four per cent of the actual value of the taxable property in the district, instead of being limited to 1¼ per cent of such value, as provided by the law previously in force.

I cannot concur in the view of Mr. Preston to the effect that there is no limit on the amount of the tax levy for this purpose. The case cited by him from the *20th Federal Reporter*, 294, was decided under a differently worded statute.

Code section 2813 (as Mr. Preston states) originally provided:

> "The board of each school corporation shall, at the same time and in the same manner as provided with reference to other taxes, fix the amount of tax necessary to be levied to pay any amount of principal or interest due or to become due during the next year on lawful bonded indebtedness *or in an independent city or town district of any money borrowed for improvements after a vote thereof authorizing the same,* which amount shall be certified to the board of supervisors as other taxes, and levied by them on the property therein as other school taxes are levied, but such tax shall not exceed five mills upon the dollar of the assessed valuation of such property for money borrowed for improvements,"

and I agree with him that at that time the five mill limit only referred to "money borrowed for improvements" in independent city or town districts.

However, by chapter 95 of the acts of the twenty-seventh general assembly, the underscored portion of the section above quoted was stricken out, but the five mill limit was retained, and as there is

nothing left in the section for it to apply to but "the tax necessary to be levied to pay any amount of principal or interest due or to become due", the conclusion is irresistible that it was from that time at least intended to apply to such tax.

The situation is, that the legislature raised the statutory limit of indebtedness from 1¼ per cent to four per cent of the actual value of the taxable property of the district but failed to make the necessary corresponding increase in the limit of the tax levy.

Your papers are herewith returned.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

PENSION MONEY EXEMPTIONS.—It is doubtful if the rent accruing from property purchased with pension money is subject to execution.

February 19, 1912.

MR. A. V. TYLER,
Bagley, Iowa.

DEAR SIR: Yours of the 15th instant addressed to the attorney general has been referred to me for reply.

Your question, briefly stated, is, whether or not the rent on real estate purchased with pension money is exempt from execution.

While this is a matter upon which this department would not be authorized to give an official opinion, yet the writer is willing to give you the benefit of his personal wievs with reference to the matter.

Code section 4009 provides:

> "All money received by any person, a resident of the state, as a pension from the United States government, whether the same shall be in the actual possession of such pensioner, or deposited, loaned or invested by him, shall be exempt from execution, whether such pensioner shall be the head of a family or not."

Under this section our court has held that it is the money or that in which it is invested which is exempt by this section, and not the *proceeds or accumulations* of it.

Hoefer vs. Mullison, 90 Iowa, 372.

And the federal court has gone so far as to hold that crops raised on land bought with pension money are not exempt, even though the land is a homestead.

Hence, it is a very doubtful question whether the rent would or would not be subject to execution, with the chances in favor of a holding to the effect that it would not be exempt.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

ROAD DISTRICTS.—The township trustees, after a trial of two years or more, may return to the one district plan if petitioned by a majority of the voters so to do.

February 19, 1912.

MR. R. RICHARDS,
Eldora, Iowa.

DEAR SIR: Replying to yours of the 12th instant addressed to the attorney general, would say that a return to the old one district plan is authorized by chapter 98 of the acts of the thirty-third general assembly and the duties of the township trustees in this connection are fixed by section 2 of the act, which provides:

> "The board of township trustees after a trial of two or more years of this plan, shall, when a written petition is presented to them signed by a majority of the voters who voted at the last preceding general election, at the April meeting in any year consolidate the road districts of the township and return to the one district plan, said change to take effect on the first day of January following."

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

CITIES AND TOWNS—PARK COMMISSIONERS—WHO ELIGIBLE.—Women are not eligible to the office of park commissioner.

February 20, 1912.

MRS. A. S. BLOUNT,
Dubuque, Iowa.

DEAR MADAM: Yours of the 19th instant addressed to the attorney general has been referred to me for reply. Your question

is, whether or not a woman is eligible for the office of park commissioner in cities in the state of Iowa, provided she is elected by a big majority of the votes.

I have carefully examined the statute and fail to find any qualifications expressly provided for the office of park commissioner. However, the general rule in this state is, that women are ineligible for election to offices except those where there is express statutory provision authorizing them to be held by women. The only statutory provisions authorizing women to hold office are code section 493, making women eligible for the office of county recorder, code section 2734, making them eligible for county superintendent, and code section 2748, making them eligible to school offices and members of the school board. Hence, it follows that your inquiry must be answered in the negative.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

MUNICIPAL INDEBTEDNESS—HOW COMPUTED.—In calculating the indebtedness of a city or town the amount of taxes due the city for the year should not be deducted.

February 20, 1912.

HON. F. M. NORRIS, *Mayor,*
Mason City, Iowa.

DEAR SIR: Your letter of the 7th instant addressed to the attorney general was referred to me for reply.

You request an opinion from this department upon the following:

> "In calculating or determining the amount of indebtedness as of December 31st, 1911, are we not entitled to deduct, from the amount of outstanding bonds and accounts payable and contracted on such date, the amount of taxes due the city for the year 1911?"

It is my idea that your question should be answered in the negative. I believe this view is supported by the supreme court of this state in the case reported in the 27th Iowa at page 227.

Respectfully yours,

N. J. LEE,
Special Counsel.

CITIES AND TOWNS—MUNICIPAL LIGHT BONDS—WOMEN MAY VOTE.

Women may vote at a city election where the proposition is to issue bonds for the purpose of installing a municipal light and power plant.

February 21, 1912.

MR. E. L. C. WHITE,
Villisca, Iowa.

DEAR SIR: Your letter of the 12th instant addressed to the attorney general has been referred to me for reply.

You call attention to the fact that it is proposed to hold an election in the city of Villisca for the purpose of issuing bonds for the installation of a municipal light and power plant and ask for the opinion of the attorney general as to whether or not women may vote at this election, and if so, with what qualifications.

Code section 1131 provides:

> "The right of any citizen to vote at any city, town or school election on the question of issuing any bonds for municipal or school purposes and for the purpose of borrowing money, or on the question of increasing the tax levy, shall not be denied or abridged on account of sex."

Hence, I am of the opinion that women may lawfully vote at the proposed election, and that the only qualifications required would be the same as is required of a man voting at the same election,—that is, that they be citizens of the United States, a resident of the state six months, of the county sixty days, and of the town ten days.

With reference to your other question, I will say that I am inclined to believe that under section 720, a bare majority of the legal electors voting thereon and voting in favor of the proposition would be all that would be required. However, I do not quite understand what you mean by a proposition to vote bonds in excess of the statutory limit, and doubt if this could be done by any kind of a majority vote.

Yours very truly,
C. A. ROBBINS,
Assistant Attorney General.

RESIDENTS.—One may retain his residence in the country while residing temporarily within a city.

February 21, 1912.

MR. FRANK A. NIMOCKS,
Ottumwa, Iowa.

DEAR SIR: I am in receipt of your communication of the 2d instant in which you say that Mr. Hall was elected a member of the board of supervisors from Washington township, commencing his services on January 1, 1911, and has recently temporarily removed to Ottumwa owing to special reasons; that he retains his farm in Washington township on which his sons are working, and the question arises as to whether he may retain his residence in Washington township although temporarily residing in the city of Ottumwa for the purpose of convenience.

This undoubtedly may be done if he so desires. If he retains his legal residence at his old home in Washington township, he can continue to run for office from that township; this being true, of course there will be nothing to prevent Mr. Patterson from again being a candidate and being elected if he can receive the suffrage of the people from the city of Ottumwa.

Yours very truly,
GEORGE COSSON,
Attorney General of Iowa.

PRIMARY ELECTION NOTICE—PUBLICATION OF.—The primary election notice must be published in one, and not to exceed two newspapers of general circulation, and where there are only two papers and both are Republican, it may be published in both.

February 21, 1912.

GEO. J. CUMMINGS, *County Auditor,*
Osage, Iowa.

DEAR SIR: Your letter of the 19th instant addressed to the attorney general has been referred to me for reply.

You request an interpretation of that provision of section 1087-a12 of the supplement to the code, 1907, as amended, relating to the publication of notice of primary elections. You say that you have no democratic paper in your county, but have two of the leading papers of the county designated as the official papers, both

being republican in politics, and you inquire if such notice should be published in both papers or in one only.

You will note from a reading of the statutory provision referred to that such notice is to be published in not to *exceed* two newspapers of general circulation in the county. It is further provided that one of such newspapers shall represent the political party which cast the largest vote at the last preceding general election, and the other, if any, shall represent the political party which cast the next largest vote in the county at such general election. I construe this to mean that if there are newspapers representing the two political parties which cast the highest and next highest vote as aforesaid, and the notice is published in two newspapers, they must be in papers representing such political parties, and they cannot both be published in papers representing one of the parties casting the highest or next highest vote, but I do not understand that it is mandatory that the notice be published in more than one newspaper in any case.

Answering your question then, I would say that it would be perfectly legal and proper to have the notice published in two republican papers, under the facts as you give them. In answering the question as I do, I am assuming that the democratic party east the next highest vote in your county at the last preceding general election.

Respectfully yours,
N. J. LEE,
Special Counsel.

MILLAGE TAX—HOW APPORTIONED.—The millage tax realized on moneys and credits is to be apportioned among the several funds in the same proportion that the tax realized from other sources in the several funds bear to each other.

February 21, 1912.

MR. BERT CODER,
Letts, Iowa.

DEAR SIR: Yours of the 19th instant addressed to the attorney general has been referred to me for reply.

My understanding of section 1 of chapter 63, acts of the thirty-fourth general assembly, with reference to the apportionment of the 5 mill tax on moneys and credits, is, that the tax realized

from this source is to be apportioned among the several funds in the same proportion that the tax realized from other sources, in the several funds, bear to each other. For instance, if the tax for the state fund was 1 mill, for the county fund 2 mills, and for the school or corporation fund 1 mill, then whatever tax was realized from the 5 mill levy on moneys and credits would be divided in the same proportion,—that is, one-fourth to the state fund, one-half to the county fund, and the remaining one-fourth to the school or corporation fund.

Yours very truly,
C. A. ROBBINS,
Assistant Attorney General.

UNIVERSITY PROPERTY—WHEN LIABLE FOR TAXATION.—Where a university property is conducted with a view to pecuniary profit it is not exempt from taxation.

February 21, 1912.

W. M. BAIR, *Mayor,*
University Park, Iowa.

DEAR SIR: Yours of the 19th instant addressed to the attorney general has been referred to me for reply.

Your question, briefly stated, is, whether or not the property belonging to the Central Holiness University is liable for taxation.

Our supreme court has held in the case entitled *In Re Dille,* 119 Iowa, 575, with reference to the property and grounds known as Highland Park College in this city, that "when such an institution is used and maintained with a view to pecuniary profit, it is not exempt," and I assume the same rule would apply to your university. Of course if no charges are made for tuition or other instruction, then the property would doubtless be exempt; otherwise not.

Yours very truly,
C. A. ROBBINS,
Assistant Attorney General.

SURETY BONDS—HOW CONDITIONED.—While the law compels the approving officer to accept as surety a fidelity company it is nevertheless his duty to see to it that the bond is conditioned as required by law.

February 23, 1912.

S. M. BENTLEY, *Clerk District Court,*
Waterloo, Iowa.

DEAR SIR: Yours of the 16th instant addressed to the attorney general has been referred to me for reply.

Your question, briefly stated, is whether or not it is your duty, under code section 360, to approve bonds of local officers of a domestic local building and loan association when the bonds tendered are signed by a surety company which has complied with section 359 of the code, but which bonds do not contain the conditions required by code section 1183 and code supplement sections 1177-a and 1177-d.

I am of the opinion that, while the statute makes it mandatory on the officer to approve the bond when tendered, the only question sought to be foreclosed was the responsibility of the surety company, and that, even in the face of this statute, it is not only the right, but the duty of the approving officer to see that the bond is conditioned as required by law.

Yours very truly,
C. A. ROBBINS,
Assistant Attorney General.

SOLDIERS' EXEMPTIONS.—When a soldier owns property in a city or town and also in an adjoining taxing district, his exemption should be apportioned between the districts.

February 23, 1912.

O. A. HAMMAND, *County Attorney,*
Spencer, Iowa.

DEAR SIR: Yours of the 17th instant addressed to the attorney general has been referred to me for reply.

Your question, as stated by you, is:

> "Suppose a soldier lives in Spencer and owns real property here, also real property in this county outside of town. Should the exemption be allowed in town or in the country?"

The question is one not easy of solution. The statute allowing this exemption is entirely silent as to the selection of the property from which the deduction is to be made, either by the soldier or by the assessing officers. However, this department has recently ruled that where the soldier has real estate taxable on the 25% basis, bank stock taxable on the 20% basis and moneys and credits taxable on the 5 mill basis, that it was fair and equitable, in the absence of a definite rule, to allow the deduction to be apportioned among the several classes of property owned by the soldier, and I see no better method to be applied in the case which you suppose. In other words, if the soldier had property of the value of $600 or over in the town of Spencer, and of the value of $600 or over in a country taxing district where the rate was lower, he would be entitled to have one-half of the $1,200 exemption, or $600, deducted from the assessment in each place.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

TAXATION—LAND CONTRACTS.—A land contract whereby the owner is bound to sell and the purchaser bound to buy is taxable as moneys and credits.

February 26, 1912.

JAS. P. RECKNOR, *Township Trustee,*
R. F. D. No. 1, Prescott, Iowa.

DEAR SIR: Yours of the 12th instant addressed to Governor Carroll has just been referred to this department for reply.

Your question, briefly stated, is whether or not one who has executed a contract for the sale of land should be assessed and taxed on the deferred payments due on such contract.

Where the contract binds the land owner to sell and also binds the purchaser to pay the deferred payments, then such deferred payments are moneys and credits and the seller of the land should be taxed accordingly. *Cross vs. Snakenburg,* 126 Iowa, 636.

Where, however, the contract simply gives the purchaser an option on the land and binds the land owner to convey if the option is exercised, then the seller of the land is not liable to be taxed on the contract. *Schoonover vs. Petcina,* 126 Iowa, 261.

It is the duty of the assessor rather than the township trustees to see that all such contracts are properly assessed.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

SHERIFF—COMPENSATION OF FOR BOARDING PRISONERS.—The sheriff is entitled for boarding prisoners to 12½ cents per meal, not exceeding three in twenty-four consecutive hours, and 12½ cents for each night's lodging.

February 26, 1912.

E. F. BROWN, *County Attorney,*
Vinton, Iowa.

DEAR SIR: Mr. Cosson will reply to that portion of your letter of the 9th instant covering the report on prisons, but he has referred to me for reply that portion of your letter with reference to the sheriff's compensation for lodging prisoners, and as to whether or not the item of 25 cents for each commitment and discharge of prisoners should be deducted from his salary.

The compensation of the sheriff for boarding prisoners is now fixed by chapter 36 of the acts of the thirty-third general assembly,

> "For boarding prisoners, a compensation of twelve and a half cents for each meal, and not to exceed three meals in twenty-four consecutive hours, and for each night's lodging, the sum of twelve and a half cents."

The fact that this compensation is thus fixed excludes the idea that anything additional might be allowed.

I am inclined to think that the sheriff should account for the fees received for commitments and discharge of prisoners. There is no greater reason for these fees being retained in addition to the salary than any other fees mentioned in code supplement section 511, and where the sheriff is put on a salary basis, the theory is that he should account for all fees.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

PRIZE FIGHTS.—Not to be exhibited by a moving picture show.

February 26, 1912.

MR. T. C. ALBERTSON,
Numa, Iowa, Box 72.

DEAR SIR: Yours of the 25th instant addressed to the attorney general has been referred to me for reply.

Your question, briefly stated, is whether or not it is unlawful to show a picture of a prize fight in a moving picture show. You are respectfully referred to code section 4973 which reads as follows:

> "It shall be unlawful for any person, persons or corporation to exhibit in this state by means of the photograph, kinetograph, or any kindred device or machine, any picture of any prize fight, glove contest, or other match between men or animals that is prohibited by the laws of this state."

Hence, it follows that such an exhibition is unlawful.

Yours very truly,
C. A. ROBBINS,
Assistant Attorney General.

NEWSPAPER DEFINED.—A newspaper is a publication issued periodically containing general or current news and intended to circulate as such.

February 27, 1912.

HON. A. M. DEYOE, *Supt. Public Instruction,*
State House.

DEAR SIR: Your letter of the 19th instant addressed to the attorney general has been referred to me for reply. You enclose a pamphlet purporting to show the official proceedings of the board of education of the city of Des Moines published in pamphlet form, and inquire whether or not such publication is in compliance with section 2781 of the code. This section provides:

> "It shall publish in each independent city or town district two weeks before the annual school election, by one insertion in one or more newspapers, if any are published in such district, or by posting up in writing in not less than three conspicuous places in the district, a detailed and specific statement of the receipts and disbursements of all funds expended for school and building purposes for the year preceding such

annual election. And the said board of directors shall also at the same time publish in detail an estimate of the several amounts, which in the judgment of such board, are necessary to maintain the schools in such district for the next succeeding school year."

Newspapers, in ordinary acceptation, are publications issued periodically, containing general or current news, or news of the day, designed to be read by the public generally.

Rosewater vs. Pinzenschan, 57 N. W. Rep., 563.

A newspaper, as defined by Webster, "is a sheet of paper printed and published at stated intervals, for conveying intelligence of passing events, advocating opinions, etc.; a public print that circulates news, advertisements, proceedings of legislative bodies, public announcements," etc.

Hence, it would seem to be clear that the pamphlet which you enclose does not amount to a newspaper, within the meaning of section 2781, and hence, is not in compliance with it.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

HOTEL LAW.—Code section 5076 punishing frauds against hotels applies to regular boarders, but the proof of intent to defraud must be furnished and is not supplied by code section 5077.

February 27, 1912.

A. E. IRVINE, *Attorney,*
Oelwein, Iowa.

DEAR SIR: Your letter of the 15th instant addressed to the attorney general has been referred to me for reply.

Your first question is with reference to the application of code sections 5076 and 5077 to regular boarders.

As suggested by you, the last two lines of the last mentioned section provide:

"but this section shall not apply to regular boarders, nor when there has been an agreement for delay in payment."

Hence, it follows that section 5076 would apply to regular boarders, but the prosecution would be left without any statutory rule

of evidence, and would hence be required to prove the "intent to defraud" mentioned in section 5076 in some other way than by the proof specified in section 5077.

Your second question, briefly stated, is whether the expenses of keeping an inmate at the inebriate asylum are to be borne by the patient or by the state.

Of course this expense is borne by the state in the first instance, and if the patient is unable to pay, that probably ends the matter. However, it is provided by code supplement section 2310-a5:

> "That the expense of trial, commitment and treatment of such persons so committed under the provisions of this act shall be borne and paid in the same manner and out of the same fund as the expenses of insane patients are borne and paid, and the estates of such patients shall be liable therefor to the same extent as in the case of insane persons."

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

SCHOOL TAX.—Where a school house tax of $50,000 has been lawfully voted it may be split up and levied in different years.

February 27, 1912.

HON. A. M. DEYOE,
Supt. Public Instruction,
State House.

DEAR SIR: With reference to the letter of Charles C. Clark, president of the Burlington school board, addressed to you and submitted to this department, in which he submits for an opinion the following proposition:

> "In 1911 at the March election there was submitted to the voters a proposition to levy a school tax of $50,000, for the purpose of building a new school house in the West Madison district. It is the second proposition upon the ballot sent to you. This was carried, and $15,000 was accordingly levied by the board of supervisors in 1911. Now the question is whether the action of the voters is sufficient to allow a levying of $20,000 in 1912 and $15,000 in 1913 without a further vote or whether the proposition must be again submitted to the voters at the coming March election."

I have to say that while the proposition is a little unusual, yet assuming the vote on the entire $50,000 to be legal, there would be no necessity for again submitting the matter to a vote each year, as that vote is as much authority for making the levies for 1912 and 1913 as for the year 1911. However, it would be the better practice to issue bonds rather than undertake to raise the money by tax levy such as was done in this case.

I herewith return Mr. Clark's letter with sample ballot.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

NOMINATION PAPERS.—Where a senatorial district is composed of two counties, the signatures required may all come from one county, but the percentage should be figured on the total vote of the party in both counties.

February 28, 1912.

A. D. NYE, *Treasurer,*
Bedford, Iowa.

DEAR SIR: Yours of the 25th instant addressed to the attorney general has been referred to me for reply.

Your questions are:

"First. In a senatorial district composed of two counties, is it necessary to get signers in both counties on a nomination paper to place a candidate's name on the ballot at the primary election?

"Second. Do signatures on nomination papers necessarily have to be written in ink?"

Subdivision 2 of code supplement section 1087-a10 provides:

"If for a representative in congress, district elector, or senator in the general assembly in districts composed of more than one county, by at least two per centum of the voters of his party, as shown by the last general election, in at least one-half of the counties of the district, and in the aggregate not less than one per centum of the total vote of his party in such district, as shown by the last general election."

Hence, it follows that your first interrogatory should be answered in the negative. However, the signatures should aggregate not less

than one per centum of the total vote of the party in both counties of the district.

The statute seems to be silent on the question of whether or not the nomination paper should be signed in ink. Hence, I am of the opinion that this interrogatory should also be answered in the negative.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

CITIZENSHIP.—Persons born in the United States, although of foreign parentage, are citizens thereof. A child accompanying his parents to the United States becomes a citizen when the father becomes a citizen by naturalization.

March 1, 1912.

MR. K. HASSELMANN,
Manning, Iowa.

DEAR SIR: Yours of the 26th ult. addressed to the attorney general has been referred to me for reply.

Your first question is:

> "Is a child, born in America, whose parents came to this country maybe 25 or 30 years ago, but never took out the papers of naturalization, a citizen of the United States if the parents have lost the citizenship in their mother country? Or must the child take out the papers to get a citizen of the United States?"

In answer to this question, will say that a child born in the United States is a citizen thereof, no matter where his parents were born or whether they have ever been naturalized or not.

Your second question is:

> "Or if the child came with the parents to America when about 10 or 15 years old and the parents did not take out the naturalization papers, will the child get the citizenship without taking out the papers?"

This question should be answered in the negative. Where the parents are naturalized, this operates to naturalize all children

under 21 years of age, but unless the father is naturalized, foreign born children must be, in order to gain citizenship.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

COMPULSORY EDUCATION.—Chapter 187 of the acts of the thirty-third general assembly requires every child of the age of seven to fourteen to attend school for the minimum time fixed.

March 2, 1912.

MR. CHAS. R. BRENTON,
Dallas Center, Iowa.

DEAR SIR: I am in receipt of your communication of the 1st instant requesting to be advised as to whether a child who has attended the minimum of twenty-four consecutive weeks of a school year, as provided by section 2823-a supplement to the code, 1907, as amended by chapter 187 acts of the thirty-third general assembly, and who thereafter habitually frequents and loiters about public places during school hours without lawful occupation, may be apprehended and taken into custody by any truant officer or school board and required to attend school.

The amendment to the act, as found in chapter 187 acts of the thirty-third general assembly, makes it clear that the board of school directors in cities of the first and second class, may require attendance for the entire time schools are in session for any school year, but leaves the matter in doubt in independent districts in towns and unincorporated villages. I think, however, a reasonable construction would be that every child of the age of seven to fourteen years is required to attend school for the minimum time, but that if said child has some lawful employment, after attending the minimum time, it cannot be required to attend additional time; but if it has no lawful occupation, habitually frequents and loiters about public places during school hours, and without a certificate showing that it has attended some private school, it may be apprehended, taken into custody and required to attend school.

It seems to me that this is the construction that will best carry out the legislative intent and is in consonance with sound reasoning.

Yours very truly,

GEORGE COSSON,
Attorney General of Iowa.

SCHOOL ELECTIONS—LEGALITY OF AN ELECTION DISCUSSED.

March 4, 1912.

HON. W. M. McGEE,
Indianola, Iowa.

DEAR SIR: Your letter of the 10th ultimo to the attorney general has been referred to me for reply.

You request an opinion from this department as to the legality of an election held in an independent school district in your county in January last, the election being for the purpose of electing directors for a newly formed independent district, under the provisions of section 2795 of the code.

You say that notice of this election specified that two directors were to be elected for the term ending March, 1913, two ending March, 1914, and one ending March, 1915, and that at said election two directors were elected to serve until March, 1913, two until March, 1914, and one until March, 1915.

Your question with reference to the foregoing is:

> "Was this election illegal or could the terms of the directors be shortened one year each to comply with section 2795 of the code?"

The state of facts you set forth presents a question very difficult of solution. There may be authorities which would announce principles and rules which would govern in this kind of a case but I do not have any in mind nor have I the time to devote in making an extensive search of the law.

It occurs to me that the only directors whose election is regular and legal were the two elected for the term expiring March, 1913. There was no authority in the law to elect two directors whose terms were to expire in 1914 nor to elect one director whose term was to expire in March, 1915. It is clear, of course, what the voters had in mind. They naturally supposed that the terms were to expire as stated by you. The electors of the district were authorized to elect two persons as directors to serve until March, 1913, and this they did, and we cannot presume that if the voters had understood that only one director could be elected to serve until March, 1914, and that they could elect two directors to serve only until March, 1912, that they would have elected the same persons whom they elected to serve until March, 1914, for the term ending March, 1913, and likewise elected the same men to serve until

March, 1912, that they in fact elected to serve until March, 1913. If all of the voters had been advised as to what the provisions of the law were as to the length of the respective terms for which they could elect these directors, they might have elected a different person to serve until March, 1914. They attempted to elect two persons to serve until March, 1914; they were entitled to elect but one. That was the longest term for which any director could be elected, but I do not think we can assume that the one they attempted to elect until March, 1915, would have been elected to serve until March, 1914, if the voters had understood their rights.

Respectfully yours,

N. J. LEE,
Special Counsel.

CITY ELECTIONS.—One nominated for some city office on two tickets may elect upon which his name shall appear.

March 4, 1912.

MR. A. P. NORTON,
Fremont Iowa.

DEAR SIR: Your letter of the 17th ultimo to the attorney general has been referred to me for reply.

You say that the same man has been nominated on two tickets for the office of mayor and you inquire if such person has the right to withdraw his name from the nomination first made.

The attorney general is not authorized to render official opinions on questions of this kind, but in this instance, as a courtesy to you, I may say in a personal way that I think your question ought to be answered in the affirmative. Sections 1101-1106 of the code clearly give the right to one who has been nominated for an office on two tickets to determine on which ticket his name will appear. It would be very unjust if this were not the rule. It would force a person to be a candidate upon a ticket without his consent. In the absence of any declaration by the candidate it would be the duty of the clerk to recognize the one first filed.

Respectfully yours,

N. J. LEE,
Special Counsel.

GAMBLING—ELECTION BETS.—Betting on the result of an election is gambling, but the making of such a bet does not disqualify the maker thereof from voting.

March 4, 1912.

MR. LEE W. LANG,
700 W. Eighth St.,
Muscatine, Iowa.

DEAR SIR: Your letter of the 26th ultimo to the attorney general was referred to me for reply.

You submit two questions upon which you request an opinion from this department:

"1. Is there anything in the election laws that prohibits anyone from betting on any candidate or party?

"2. Is one who has made a wager or bet on the result of an election disqualified from voting?"

The making of any bet or wager on the result of any election or on the success or failure of any candidate for any office is a crime under our law. The statute making such an act or transaction unlawful is code section 4964 and reads as follows:

"If any person play at any game for any sum of money or other property of any value or make any bet or wager for money or other property of value, he shall be guilty of a misdemeanor."

The penalty for a violation of this section is imprisonment in the county jail for not more than one year or by fine not exceeding $500.00 or both.

I think your second question should be answered in the negative. The practice of betting on the result of an election is most reprehensible and may have a very pernicious effect upon the result of elections. Persons having money staked on the result of elections might thereby be influenced to work for the defeat of certain candidates or measures, not because the man or measures were not meritorious but because of the valuable consideration involved, but no matter how vicious this practice is it would not disqualify one participating therein from voting. I am not aware of any statutory provision which makes the betting or making of any wager on the result of an election a disqualification on the part of a voter who is guilty of this crime. Moreover, I think the legislature is powerless to pass a law making such betting a dis-

qualification. Our constitution has fully defined the qualifications of voters at all elections and the legislature is without power to add to or take from the qualifications as enumerated in the constitution. These constitutional provisions are found in article 2, sections 1, 2, 3, 4 and 5.

Section 1115 of the code provides on what conditions a person may vote, if his right to vote is challenged, which is by making an affidavit that he possesses the qualifications enumerated in the sections of the constitution just mentioned.

I call your attention to the case of *Edmonds vs. Banbery,* 28 Ia., 267; also *15 Cyc.,* 301, which I think support the conclusions announced.

Respectfully yours,

N. J. LEE,
Special Counsel.

PUBLIC OFFICERS—BRIBERY OF DISCUSSED.

March 4, 1912.

H. C. BATES, *Township Trustee,*
Albia, Iowa.

DEAR SIR: Your letter of the 22d ultimo to the attorney general has been referred to me for reply.

You request information in regard to the giving or receiving of discounts, commissions, bribes to or on the part of public officials.

You also inquire if it is contrary to law for township trustees to permit a person to pay their fare for the purpose of going to personally inspect certain tools or implements which such person desires to sell to the township.

The statute you probably have in mind as to the giving or receiving of discounts, commissions, etc., is section 5028-n of the supplement to the code, 1907, which reads as follows:

> "It shall be unlawful for any agent, representative or employe, officer or any agent of a private corporation, or a public officer, acting in behalf of a principal in any business transaction, to receive, for his own use, directly or indirectly, any gift, commission, discount, bonus or gratuity connected with, relating to or growing out of such business transaction; and it shall be likewise unlawful for any person, whether acting in his own behalf or in behalf of any co-partnership, associa-

tion or corporation, to offer, promise or give directly or indirectly any such gift, commission, discount, bonus or gratuity. Any person violating the provisions of this act or any of them shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than twenty-five dollars ($25), nor more than five hundred dollars ($500), or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment."

This statute is specific and plain and needs no explanation.

Answering your specific question as to the legality of allowing a person under the circumstances mentioned to pay the railroad fare of the township trustees, will say that if the payment of such fare was not in any way made a condition for the purchase of any property or the taking of any official action on the part of the trustees and it was paid by such person and accepted by the trustees in good faith for the mere purpose of personally inspecting property sought to be sold to them and without any obligation or understanding, express or implied, I would not think it would be in and of itself unlawful. But even if such things are done without thought of violating any law and without in fact violating any law, the practice is not a good one and would be regarded with suspicion. Generally speaking, persons dealing with public officials in the sale of property to them in their official capacity do so for the purpose of making profit, and it is not presumed that they make voluntary donations to public officers without receiving its equivalent in return.

I can imagine cases where the public officials could render much better service to their constituents if they were enabled personally to inspect the property which they ought to buy and it would not be expected that they would pay car fare and their own expenses in going any distance to inspect property desired to be purchased, and I think within reasonable bounds it would be proper to at least charge a per diem for time so spent.

You will not regard this in any sense as an official opinion from this department but rather as the personal views of the writer given as a courtesy to you.

Respectfully yours,

N. J. LEE,
Special Counsel.

MEDICINES—COMPOUNDING OF—USE OF INTOXICATING LIQUOR.—A corporation may use intoxicating liquor in the compounding of medicines the same as an individual.

March 5, 1912.

STRUBLE & STIGER, *Attorneys at Law,*
Toledo, Iowa.

GENTLEMEN: Your letter of the 26th ultimo to the attorney general has been referred to me for reply.

You call attention to chapter 104, acts of the thirty-fourth general assembly, which authorizes corporations engaged in the business of selling drugs, etc., at wholesale, to sell intoxicating liquors to pharmacists who operate retail drug stores, and you request an opinion from this department as to whether registered pharmacists who do not have permits to sell or handle intoxicating liquors are authorized to compound prescriptions, extracts and tinctures and sell the same if they contain intoxicating liquors.

I think the purpose of chapter 104, acts of the thirty-fourth general assembly, is to permit the corporations therein referred to to do the same thing that an individual is permitted to do under section 2385 of the code. Said section 2385 provides in part that "Registered pharmacists, physicians holding certificates from the state board of medical examiners, and manufacturers of proprietary medicines may buy from permit holders intoxicating liquors (not including malt) for the purpose of compounding medicines, tinctures and extracts that cannot be used as a beverage."

The same rule is by implication announced in section 2588 of the code. These sections of the statute were interpreted in *State vs. Gregory,* 110 Iowa, 624, and were held to authorize registered pharmacists not holding permits to compound prescriptions, tinctures, etc., containing alcohol, and to sell such compounds and prescriptions when they have lost their distinctive character as beverages and are no longer desirable for use as beverages.

Respectfully yours,

N. J. LEE,
Special Counsel.

ROAD DRAGGING.—The position of road superintendent and superintendent of dragging may be held by the same person.

March 6, 1912.

MR. H. E. MEREDITH,
Victor, Iowa.

DEAR SIR: Your letter of the 20th ultimo to the attorney general has been referred to me for reply. It has been impossible to notice your letter before now on account of the large volume of official business requiring attention.

As near as I gather it from your letter, you request an opinion as to whether the same person can hold the two positions of road superintendent and superintendent of dragging.

The attorney general cannot give you an official opinion on this question but in a personal way I may say that I know of no legal objection to the same person holding both of said offices at the same time in the same place.

Respectfully yours,

N. J. LEE,
Special Counsel.

ROADS.—A road supervisor has authority to shovel open a road that is closed by drifted snow. A traveler in such a highway has no right to break fences and cross fields.

March 6, 1912.

MR. J. H. PRIER,
Dyersville, Iowa.

DEAR SIR: Yours of the 4th instant addressed to the attorney general has been referred to me for reply.

Your questions, briefly stated, are:

"First, whether or not the road supervisor has authority to shovel open a road that is closed by drifted snow, and

"Second, whether a person driving over a road and meeting with such an obstruction in the way of snow that he was unable to get through, would have the legal right to break a fence and go through fields."

Your first question should be answered in the affirmative. Under sections 1557 and 1558 of the code, the supervisor is rendered liable

for damages resulting from the unsafe condition of the road and is authorized to call out any or all the able-bodied men in the district for not more than two days at one time, and I think this right would exist where the work to be done was to shovel out snow the same as it would if the road were washed out by a flood or filled with trees or rubbish by a cyclone.

Your second question should be answered in the negative.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

USURY—PENALTY.—One charging usurious interest is subject to indictment.

March 6, 1912.

J. N. PATTERSON, M. D.,
Burlington, Iowa.

DEAR SIR: Yours of the 5th instant addressed to the attorney general has been referred to me for reply.

Your question briefly stated is, "What may be done with the loan shark?"

Under the present law there is no statute specifically making it a crime to charge usurious interest. However, it is provided by code section 3040 that:

> "No person shall, directly or indirectly, receive in money or in any other thing, or in any manner, any greater sum or value for the loan of money, or upon contract founded upon any sale or loan of real or personal property, than is in this chapter prescribed."

Section 3038 of the same chapter fixes the rate of interest in the absence of agreement and the maximum rate at 8% on the hundred by the year.

In the case of *State of Iowa vs. York,* 131 Ia., 635, it was held that township trustees who furnished men and teams to perform labor for the township under a contract with the road superintendent, which contract was prohibited by section 468-a of the code supplement, were guilty of an indictable misdemeanor under code section 4905, which provides:

"When the performance of any act is prohibited by any statute and no penalty for the violation of such statute is imposed the doing of such act is a misdemeanor."

Hence, I am inclined to think that in the case which you mention, or any other similar case where you are able to prove that the usurious interest has been exacted, the party exacting the same is subject to indictment.

Very truly yours,

C. A. ROBBINS,
Assistant Attorney General.

TAXATION.—The owner of a stock of goods on January 1st is personally liable for the taxes levied thereon and cannot escape such liability by transferring the goods.

March 6, 1912.

HON. W. J. MCCARTY, *County Treasurer,*
Emmetsburg, Iowa.

DEAR SIR: Your letter of the 26th ultimo to the attorney general was referred to me for reply.

You request an opinion from this department upon the following state of facts which I quote from your letter:

"A sells stock of merchandise to B May, 1910, and continues the business. Does A have to pay the tax of 1910 due in 1911, nothing being said by either party as to taxes?

"Another case: C sells stock (feed, flour, etc.) to D on January 20, 1912, before assessor makes assessment. Which one should be assessed for 1912, C or D? Is merchandise same as other personal property, assessed to owner January 1st?"

I think your first question should be answered in the affirmative. A would be personally liable for the 1910 taxes. He cannot relieve himself of that obligation by selling the stock to another. The taxes, however, would be a lien upon the stock of merchandise and could be enforced against the stock, no matter who owned it, but B would not be personally liable for the taxes upon the stock nor would they be a lien upon his real estate.

Under the second case supposed by you C should be assessed for the stock of feed and flour, as he was the owner thereof on January 1st, as I understand it. Taxes on stocks of merchandise

remain a lien on such stocks so long as they are kept intact. I call your attention to the case reported in the 123d Iowa at page 485, which seems to definitely settle these questions.

Respectfully yours,

N. J. LEE,
Special Counsel.

CANDIDATES.—A candidate for office should be a resident of the district in order to be eligible for the office.

March 6, 1912.

MR. C. A. WHALEN,
Decorah, Iowa.

DEAR SIR: Yours of the 24th ult. addressed to the attorney general has been referred to me for reply.

Your question, briefly stated, is whether or not a single man whose permanent residence is in Chickasaw county and has been since 1908, but who has been teaching in another county during most of the time since 1908, would be eligible to the office of county superintendent of Chickasaw county, the nomination for which is to be made at the primaries in June, 1912, and you ask, "Must he give up his residence in Winneshiek county in order to become a candidate for said primaries, or may he become a candidate in Chickasaw county and still retain his residence in Winneshiek county?"

It is a fundamental proposition that a party must be a resident of the territory for which he seeks nomination, but if his permanent residence is there, this is sufficient, even though he may have a temporary residence elsewhere. On your statement of the matter, the party still has his permanent residence in Chickasaw county, for he voted there in 1910, although he had been teaching in the other county since 1908. If, during the time he has been teaching in Winneshiek county, he claimed his permanent home in Chickasaw county and during all the time intended to return to that county, then in my judgment he would be eligible, even though he is still teaching in Winneshiek county. On the other hand, if he did not have that intention, he would have to be a resident of Chickasaw county at least sixty days prior to the primary.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

AUTOMOBILE TAX—HOW DISPOSED OF.—The automobile tax should be kept in the county motor vehicle road fund and should not be transferred to the permanent road fund.

March 6, 1912.

JOS. BOLICK,
Danville, Iowa.

DEAR SIR: Yours of the 26th ultimo addressed to the attorney general has been referred to me for reply.

Your question briefly stated is whether or not the board of supervisors have the right to transfer the automobile tax to the permanent road fund.

This question should be answered in the negative. Section 33 of chapter 72 of the acts of the thirty-fourth general assembly provides that:

> "This fund shall be kept by the county treasurer and designated as the 'county motor vehicle road fund,'"

and further provides:

> "The said county motor vehicle road fund shall be expended for the following purposes, only: Crowning, draining, dragging, graveling or macadamizing of public highways outside the limits of cities and towns and for building permanent culverts on such highways. Said fund shall be under the control of the board of supervisors for said purposes only."

Very truly yours,
C. A. ROBBINS,
Assistant Attorney General.

PRIMARY NOMINATIONS—ELIGIBILITY OF CANDIDATES.—In order to be eligible to nomination one must have been a resident of the county at least sixty days before the date of the primary.

March 7, 1912.

MR. L. J. BOWMAN,
Ionia, Iowa.

DEAR SIR: Yours of the 2d instant addressed to the attorney general has been referred to me for reply.

Your question, briefly stated, is, for what length of time prior to the date of the primary must one be a resident of the county in order to be eligible for nomination for a county office.

The rule is, that in order to be eligible for such nomination, the candidate must be a qualified elector of the county. Hence, it follows that you must be a good faith resident of the county at least sixty days before the date of the primary, which would be about April 3d.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

DRAGGING ROADS—COMPENSATION FOR.—Compensation for dragging roads is to be fixed by the trustees at not to exceed 50 cents per mile for each mile of travel.

ROAD TAX—WHEN WORKED.—The provision of the law requiring 75% of the road tax to be worked out by July 15th is mandatory.

March 8, 1912.

M. N. ANTHONY, *Township Clerk,*
Glenwood, Iowa.

DEAR SIR: Your letter of February 25th addressed to the attorney general was received during his absence and has just been referred to me for reply.

This department is at a loss to know why there is such a general misunderstanding, or rather want of understanding, as to the meaning of the clause with reference to the compensation for dragging roads. Notwithstanding all that has been written and published concerning the interpretation that has been given, it seems that there are road officers who will not take our interpretation.

In short, this law means that the trustees may allow not to exceed 50 cents per mile for each mile traveled by the drag back and each mile traveled by the drag forth while being used on the public highway in dragging the road. In other words, if a man had a contract to drag 5 miles of road, and he could drag the same in one round trip, the drag would travel 10 miles and the trustees would be authorized to allow him not to exceed 50 cents for each of the 10 miles. The point that is most generally overlooked is, that the whole matter is within the power of the trustees to regulate. That is, they may allow 25 cents a mile, 35 cents a mile, or any amount not to exceed 50 cents per mile for each mile traveled by the drag. They are not compelled to allow the 50 cents per mile, but are authorized to do so.

You also call attention to the fact that the law requiring 75% of the road tax to be worked out by the 15th day of July is habitually violated, and ask whether or not this law should be complied with. This provision of the law is mandatory and it is the duty of all road officers to see that it is enforced.

With reference to your other question, this department has ruled that the road superintendent and the dragging superintendent may be one and the same person.

I am sorry that the department was unable to reply to your letter in time for your meeting held March 4th.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

LODGE PROPERTY—TAXATION OF.—The building and regalia belonging to an Odd Fellows lodge are not subject to taxation.

March 8, 1912.

C. F. DAVIS, *Justice of the Peace,*
Bloomfield, Iowa.

DEAR SIR: Yours of the 29th ultimo addressed to the attorney general has been referred to me for reply.

Your question briefly stated is whether or not the building and regalia belonging to the Odd Fellows are subject to taxation. Also whether any money belonging to said lodge and to be used for charitable purposes is liable to taxation.

Subdivision 2 of code supplement section 1304 in which exempt property is enumerated provides as follows:

> "All grounds and buildings owned and kept by associations or corporations for charitable or benevolent purposes, not exceeding 160 acres in extent, and not leased or otherwise used with a view to pecuniary profit, the books, papers and apparatus belonging to the above institutions, used solely for the purposes above contemplated; moneys and credits belonging exclusively to such institutions and devoted solely to sustaining them."

Hence, it follows that the money and regalia to which you refer are not subject to taxation, nor is the building subject to taxation

unless it is leased or otherwise used with a view to pecuniary profit.

Very truly yours,

C. A. ROBBINS,
Assistant Attorney General.

SCHOOL BUILDINGS—LOCATION OF.—The selection of a school house site is for the determination of the board and a school building may be located by them on an old site even though a new site were contemplated when the bonds were voted for building the same.

March 8, 1912.

O. A. HAMMAND, *County Attorney,*
Spencer, Iowa.

DEAR SIR: Yours of the 4th instant addressed to the attorney general and enclosing form of ballot used at your school election February 29, 1912, has been referred to me for reply.

The form of ballot is as follows:

> "Shall the independent school district of Spencer, in the county of Clay, and state of Iowa, issue bonds in sum not to exceed $65,000 for the purpose of constructing and equipping a high school building and procuring a site therefor?"

In view of this, you inquire whether or not the school board would have the authority to locate the new building on the old school ground.

You will notice that the words "and procuring a site therefor" are in addition to the form of ballot prescribed by law. However, I would not wish to be understood as holding that the form of ballot used was not authorized, yet the thought occurs to me that possibly the building of the new school building on the old site would be the procuring of a site for the new building, within the meaning of this term as used in the form of ballot, for it does not say, "procuring a *new* site," and in view of the statute giving the board the power of locating the school buildings, it is very doubtful whether this clause in the ballot would be sufficient to prevent them from locating the new building on the old site. The question is one not entirely free from doubt and is also one upon which the

department would not care to express an opinion, and the foregoing is simply the best judgment of the undersigned.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

INTOXICATING LIQUORS—SALE OF BY PERMIT HOLDERS.—Prior to the enactment of chapter 103, acts of the thirty-fourth general assembly, requests for liquor were required to be filled out by the applicant in his own handwriting in ink, but now the request is to be filled out by the person making the sale.

March 8, 1912.

CHARLES M. CARR, *Director,*
National Association Retail Druggists,
127 N. Dearborn, Chicago.

DEAR SIR: Your letter of the 29th ult. addressed to the attorney general has been referred to me for reply.

The opinion of the Iowa supreme court referred to in the clipping which you enclosed was rendered in the case of *Smith vs. Foster,* January 13, 1912, and is found reported in advance sheet No. 1, volume 134 of the Northwestern Reporter, which you can readily find in any lawyer's office in your city, or by sending 25 cents to the West Publishing Company of St. Paul, Minnesota, the advance sheet containing this information will be forwarded to you. This opinion was rendered in a case which arose while chapter 139 of the acts of the thirty-third general assembly was in force. It contained the following provision:

> "The permit holder shall require each applicant for liquor to fill out in his or her handwriting, requests for same in ink, and shall fill out the corresponding stubs in ink."

By chapter 103 of the acts of the thirty-fourth general assembly this provision was stricken out and the following provision inserted in its stead:

> "Such blank requests and the corresponding stubs shall be filled out by the person making the sale in ink and in the presence of the applicant for such liquors and prior to the applicant's signature thereof."

The supreme court in this opinion note this change in the following language:

> "To avoid any confusion as to the applicability of this decision to the present law, it should be noticed that by chapter 103, acts of the thirty-fourth general assembly, passed since the judgment in the present case was rendered it is provided that the blank request is to be filled out by the person making the sale."

As I interpret this decision, all that is required where the liquor is desired for medical use is to so state in the request, but that if required for a mechanical use, then the particular mechanical use for which it is desired must be stated. The court, in passing upon this phase of the question, states:

> "From the language of the statute it appears that the insertion of the word 'medical' in the statutory blank form was sufficient description of the use for which the liquor was desired, but that the description of such use as 'mechanical' was not sufficient without further specification."

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

CITY OFFICERS—WHO ELIGIBLE.—A citizen of the state who is a a resident of the town ten days is eligible to a city office even though he has not resided in the county sixty days.

March 8, 1912.

MR. H. I. RAMSEY,
Melvin, Iowa.

DEAR SIR: Yours of the 4th instant addressed to the attorney general has been referred to me for reply.

Your question, briefly stated, is whether or not a person who is a resident of Iowa and has been for more than six months, but who has only been a resident of Osceola county since February 5, 1912, would be eligible to the office of mayor in an incorporated town located in such county.

If it were a county office for which you were about to be a candidate, then of course you would be required to have lived in the county sixty days, but inasmuch as it is a town office, you

would only be required to be a resident of the town ten days. Hence, I am of the opinion that if you have been a resident of the town for ten days prior to the city election, you would be eligible to the office of mayor.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

SHERIFF—COMPENSATION OF AFTER EXPIRATION OF TERM.—A sheriff rendering services after the expiration of his term is not entitled to retain the fees earned in connection with such services.

March 9, 1912.

HON. L. E. FRANCIS,
Spirit Lake, Iowa.

DEAR FRANCIS: I am in receipt of your communication of the 2d instant in which you say that in Osceola county the sheriff, pursuant to the provisions of section 504 of the code, has performed services after the expiration of his term of office, and you request an opinion as to whether under these circumstances he is entitled to retain the fees for the services.

I submitted the matter to Mr. Robbins to look up and he, after a conference with Judge Henderson, came to the conclusion that the sheriff is not entitled to retain the fees. After giving the matter some consideration I arrive at the same conclusion. The sheriff is virtually upon a salary basis. (Section 510-a supplement to the code, 1907.)

It is true that the fees of his office are applied upon his salary, but that is a mere matter of convenience in bookkeeping. The sheriff having received his full salary, would not, in my opinion, be entitled to retain the fees because fees are only to be considered in the matter of determining whether anything additional is to be paid to the sheriff at the time of settlement with the board of supervisors. Furthermore, while the sheriff could lawfully perform the services under section 505 of the code, he might have transferred these papers to the incoming sheriff and relieved himself of that duty.

It seems to me this is the safer and more reasonable view to take, although I can see that the question is not free from doubt.

Yours very truly,

GEORGE COSSON,
Attorney General of Iowa.

MULCT SALOONS.—Resolution of consent for operation of mulct saloons should be renewed annually.

March 9, 1912.

MR. JOHN A. REED,
Cedar Rapids, Iowa.

DEAR SIR: I am in receipt of your communication of the 2d instant directing my attention to the case of *Conly vs. Dilley* and requesting an opinion as to whether this decision should be construed as requiring persons who operate mulct saloons to have the resolutions of consent from the city council renewed annually at the beginning of each tax year.

The proposition was directly urged upon the court and I am of the opinion that it is a fair construction of the decision to say that a majority of the court would hold that this was required.

At the bottom of page 734 in Vol. 133 of the N. W. R., the court makes this statement:

> "If a general consent was in force, city councils were authorized to grant consents to individual dealers *annually;* that is, the consent to the individual, unless renewed, would expire in one year. Some of the counsel appearing for appellants deny this limitation; but we think it clearly implied from the conditions laid down in code section 2448. Such, also, is the practical construction which has quite generally been placed upon the statute by city councils throughout the state, and it has been so held by this court in *Fidelity Co. vs. Jenness,* 138 Iowa, 725."

And again at the bottom of said page in the right hand column, the court says:

> "When do such consents expire as by law provided? Primarily it must be said that, under the construction we have

put upon the mulct statute, all resolutions of consent expire with the annual period for which they are granted."

If this language is to be taken at its full face value undoubtedly a resolution by the city council would only be good for the tax year. Near the conclusion of the opinion, however, Justice Weaver, speaking for the court, says:

"It should be said in closing that, while the court is united in the conclusion above indicated, some of its members do not wish to be committed to the holding that resolutions of consent provided for by the statute must be renewed annually. In their judgment it is sufficient for the purposes of this appeal to hold that it is competent for the city council to issue resolutions of consent for a definitely fixed period and to renew the same from time to time as that period expires," etc.

From the whole record then, as before stated, I believe that the majority of the court holds that it is necessary to renew each year, but that some of the members either thought otherwise, or thought there was no necessity to express an opinion upon that point at the time. In any event, in view of this decision, it would be extremely dangerous for any saloon keeper to fail to secure annually at the beginning of each tax year a resolution of consent from the city council.

Yours very truly,

GEORGE COSSON,
Attorney General of Iowa.

Y. M. C. A. PROPERTY—EXEMPT FROM TAXATION.—A building owned by the Young Men's Christian Association, or leased by such association where no rent is reserved and the building is used only for appropriate objects of such association is exempt from taxation.

March 11, 1912.

MR. E. L. GUILD,
Conrad, Iowa.

DEAR SIR: Your letter of the 4th instant addressed to the attorney general has been referred to me for reply.

Your question, briefly stated, is, whether or not a building used for the purposes of reading room, gymnasium and assembly

room in connection with the Young Men's Christian Association would be subject to taxation.

Subdivision 2 of code supplement section 1304 provides:

> "All grounds and buildings used for public libraries, including libraries owned and kept by private individuals, associations or corporations for public use and not for private profit, and for literary, scientific, charitable, benevolent, agricultural and religious institutions, and societies devoted solely to the appropriate objects of these institutions, not exceeding one hundred and sixty acres in extent, and not leased or otherwise used with a view to pecuniary profit, but all deeds or leases by which such property is held shall be filed for record before the property above described shall be omitted from assessment."

Hence, I am of the opinion that where the building is owned by the Young Men's Christian Association, or where it is leased by such association and where no rent is reserved and the building is used only for the appropriate objects of such institution, the same would be exempt from taxation.

I herewith enclose a blank form which I think would be sufficient upon which to take the preliminary subscriptions. As to the articles of incorporation, I would suggest that you correspond with some similar association either here or elsewhere and they will doubtless be able to furnish you copies of their articles of incorporation.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

AUTOMOBILES—REGISTRATION OF—HALF RATES WHEN AVAILABLE. —The half rates available for cars which have been used four years are not available in the year 1912 for a car which has been registered under the old law during the years 1908, 1909, 1910 and 1911. The four years referred to must have been under the provisions of this act which did not go into effect until July, 1911.

March 11, 1912.

MR. S. E. STANFIELD,
Sac City, Iowa.

DEAR SIR: Your letter of the 9th instant addressed to the attorney general has been referred to me for reply.

Your question, briefly stated, is whether or not an automobile purchased in February, 1908, and on which the registration fee has been paid for the years 1908, 1909, 1910 and 1911, is entitled, under section 8 of chapter 72 of the acts of the thirty-fourth general assembly, to be registered at half the annual rate for the year 1912.

Section 7 of said chapter provides:

> "Registration thereafter (July 4, 1911) shall be renewed annually in the same manner and upon payment of the same annual fee, as provided in section 8 for registration, *to take effect on the first day of January in each year,* beginning with that date in the year 1912. All certificates of registration issued under the provisions of this act shall expire on the last day of the *calendar year* in which they were issued."

Section 16 of the same chapter provides:

> "The provisions of section 7 relating to first registrations made under this act, and duration of renewals, shall apply to registration and re-registration under this section. Within thirty days after the first of July, 1911, and within thirty days after the first of January annually thereafter, the secretary of state shall forward to the county attorney of each county a list of the owners of automobiles in said county, who may have failed or neglected to pay the license required by this act, whereupon the county attorney shall proceed to enforce the provisions of this act, as herein provided."

From these provisions it is quite apparent that the registration fee required to be paid is for the calendar year of 1912, and that the same is due on January 1, 1912, and delinquent January 30, 1912.

Section 8 provides:

> "That if a motor vehicle shall have been licensed for four separate years *hereunder,* and for which there shall have been paid the annual registration fee *herein provided* during said period, or any motor vehicle which shall have been in use for a period of not less than four years including the time before and after the taking effect of this act, the annual registration fee *thereafter* shall be one-half that amount."

Construing all of these provisions together, it is clear that the car in question is not entitled to the registration fee at half rate

on account of having paid a registration fee for the years 1908, 1909, 1910 and 1911, for the reason that such fees were not paid under the provisions of this chapter, and until the machine has been registered four times under this act and paid four annual registration fees under the provisions of this act, it will not be entitled to half rates, on this ground. The only question remaining is, whether the car has been in use for a period of not less than four years, within the meaning of section 8. Inasmuch as the registration fee for the year 1912 became due on January 1st and delinquent on January 30th, it is equally clear that the four years' use referred to in this section must have been completed before January 1, 1912, and according to your statement, the four years' use was not completed until February, 1912, and if the application for registration had been made in January, no one would claim that the car would be entitled to be registered at half rates.

Inasmuch as the registration fee is for the entire year and is exacted no matter when the application for registration is made, it would seem to be clear that a party could not change the rate by making his application after the time when the law requires it to be made. The practical effect of this law is, to render cars which were purchased at any time in the year 1907 and prior thereto, and which have been in use continually since that time, entitled to the half rate for the year 1912, and all cars purchased thereafter,—that is, at any time in the year 1908 or subsequently thereto, liable for the full rate for the year 1912.

Yours very truly,
C. A. ROBBINS,
Assistant Attorney General.

ARRESTS WITHOUT WARRANT—WHEN MADE.—A private person may make an arrest without a warrant where a public offense is committed or attempted in his presence and when a felony has been committed and he has reasonable ground for believing that the person arrested committed it.

March 13, 1912.

REV. ENOCH HILL,
Greenfield, Iowa.

DEAR SIR: Yours of the 11th instant addressed to the attorney general has been referred to me for reply.

Your question briefly stated is, when, if ever, can an arrest be made by a common citizen without warrant.

The answer to your inquiry is found in code section 5197, which reads as follows:

"A private person may make an arrest:

"1. For a public offense committed or attempted in his presence;

"2. When a *felony* has been committed and he has reasonable ground for believing that the person to be arrested has committed it."

You will understand that the word "felony" as here used means a crime which is or may be punished by imprisonment in the penitentiary.

A peace officer has the same right to arrest without warrant, the only difference being, that he is not confined to cases of felony, but may arrest for any public offenses which have been committed and which he has reasonable ground for believing that the person to be arrested has committed. (See code section 5196.)

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

TOBACCO AND CIGARETTES—SALE OF TO MINORS.—Sales of tobacco and cigars to minors under sixteen years of age except upon the written order of the parent or guardian is prohibited. The sale of cigarettes and cigarette paper to adults as well as minors is prohibited.

March 13, 1912.

G. JOHNSON, *City Marshal,*
Logan, Iowa.

DEAR SIR: Yours of the 11th instant addressed to the attorney general has been referred to me for reply.

You ask to be informed as to the provisions of the law of this state in regard to the sale of tobacco, cigars and cigarettes to minors.

Code section 5005 provides as follows:

"No person shall directly or indirectly, by himself or agent, sell, barter or give to any minor under sixteen years of age any cigar or tobacco in any form whatever, except upon the written order of his parents or guardian. Any violation of this section shall be punished by a fine of not less than five nor more than one hundred dollars, and the offender shall stand committed until fine and costs of prosecution are paid."

Code section 5006 provides as follows:

"No one, by himself, clerk, servant, employe or agent, shall, for himself, or any person else, directly or indirectly, or upon any pretense, or by any device, manufacture, sell, exchange, barter, dispense, give in the consideration of the purchase of any property, of any services, or in evasion hereof, or keep for sale, any cigarettes or cigarette paper or cigarette wrappers, or any paper made or prepared for the purpose of making cigarettes, or for the purpose of being filled with tobacco for smoking; or own or keep, or be in any way concerned, engaged or employed in owning or keeping, any such cigarettes or cigarette paper or wrappers, with intent to violate any provision of this section; or authorize or permit the same to be done."

I also call your attention to chapter 223 of the acts of the thirty-third general assembly which authorizes the seizure and destruction by search warrant proceedings of cigarettes and cigarette papers or wrappers kept for unlawful sale; also to chapter 224 of the acts of the thirty-third general assembly, making it unlawful for persons under 21 years of age to smoke or use cigarettes in certain places, and imposing punishment therefor.

Yours very truly,

C. A. ROBBINS,

Assistant Attorney General.

PEDDLERS—LICENSE REQUIRED.—Peddlers may be required to pay a license to the county when operating outside of the city or town; when operating within a city or town the city has power to regulate, license and tax them.

March 13, 1912.

MR. H. M. HARWICK,
511½ Broadway,
Milwaukee, Wisconsin.

DEAR SIR: Yours of the 11th instant addressed to the treasurer of state has been referred to this department for reply.

By code supplement section 1347-a, it is provided:

> "Peddlers plying their vocation in any county in this state outside of a city or incorporated town shall pay an annual county tax of twenty-five dollars for each pack peddler or hawkers on foot, fifty dollars for each one horse conveyance, and seventy-five dollars for each two horse conveyance."

This tax is paid to the county treasurer who issues a duplicate receipt, and upon presentation of one of the same to the county auditor, he issues a license for the term of one year from the date thereof.

Code supplement section 700 provides, with reference to the powers of cities:

> "They shall have power to regulate, license and tax peddlers."

Hence, you will observe that while the law is the same throughout the state where one seeks to sell outside the city or town, yet within a city or town the regulations are controlled by the particular city or town.

Yours very truly,
C. A. ROBBINS,
Assistant Attorney General.

CITIES AND TOWNS—SINKING FUND.—Cities and towns may create a sinking fund for the erection of city buildings and fire stations.

March 15, 1912.

D. CLAASSEN, *Clerk*,
Wellsburg, Iowa.

DEAR SIR: Yours of the 13th instant addressed to the auditor of state has been referred to this department for reply.

You state that, "years ago the council levied a sinking fund, but did not make any disposition as to what it should be used for, and this levy has been made every year until there is about $1,300 on hand in this fund," and your question is whether or not this fund can be applied to the payment of outstanding warrants for improvements, such as laying mains, labor on streets, mains, hydrants, gasoline for pumping water and other outlays.

By code supplement section 741-k, which took effect July 4, 1904, it is provided:

> "Cities of the second class and towns are hereby authorized to purchase buildings and grounds or to erect buildings specified in section one of this chapter (which are city buildings or fire stations or both), and are authorized to continue the levying of the three mill tax herein provided for until the purchase price, principal and interest or the cost incurred in the erection of said building is fully paid and discharged."

The following section provides:

> "Cities of the second class and towns levying such sinking fund tax are hereby authorized to let a contract or contracts for the purchase or erection of said buildings and purchase of grounds."

The following section provides for submitting the question to a vote of the people before the same are binding on the city or town.

These provisions contain the only authority for a city or town to create a sinking fund, and unless these provisions have been complied with and the fund was created for such purpose, a fund on hand would not be a sinking fund within the meaning of this law. If this sinking fund was created in harmony with these provisions, there would certainly be some record of showing that

it was submitted to a vote of the people, and of the purpose for which the fund was created. If these provisions were not complied with, or if the tax was levied prior to the time this law went into effect, then in my judgment it could amount to nothing more than a general fund, perhaps irregularly levied, and could be used for any purpose for which the general fund might lawfully be needed.

You had better have your county attorney make a thorough investigation of the record and see if something cannot be unearthed showing the purpose for which the tax was levied.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

ELECTIONS—AUSTRALIAN BALLOT—WHEN USED.—The Australian ballot is required to be used in all elections except school elections.

March 16, 1912.

REV. J. H. PERRY,
Renwick, Iowa.

DEAR SIR: Yours of the 15th instant addressed to the attorney general has been referred to me for reply.

Your first question is: "Is it necessary for a town of about four thousand population to use the Australian ballot in a town election?"

This question should be answered in the affirmative. The Australian ballot law is provided for by chapter 3, title VI, of the code, as amended, and the first section of this chapter provides:

> "The provisions of this chapter shall apply to all elections known to the laws of the state, except school elections."

Hence, it follows that it applies to all city and town elections.

Your second question is: "Our school election resulted in a tie for treasurer. Can they cast lots for same?"

This question should also be answered in the affirmative. The last lines of code supplement section 2754 provide:

> "A tie vote for any elective school office shall be publicly determined by lot forthwith, under the direction of the judges."

Your third question is: "We have two public halls; the doors of each open in at the foot of a narrow stairway. Is this in violation of the law?"

This question should also be answered in the affirmative. Chapter 220 of the acts of the thirty-third general assembly provides:

> "The entrance and exit doors of all hotels, churches, lodge halls, court houses, assembly halls, theatres, opera houses, colleges and public school houses, and the entrance doors to all class and assembly rooms in all public school buildings, in all cities and incorporated towns, shall open outward."

Your last question is: "What steps can be taken to stop the running of a pool hall?"

Code section 702, with reference to the powers of cities and towns, provides:

> "They shall have power to regulate, license, tax or *prohibit* billiard saloons, billiard tables, *pool tables* and all other tables kept for hire."

If it is desired to exercise this power, it should be done through the medium of an ordinance regularly adopted by the town either regulating, licensing or prohibiting the same.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

CITY ELECTIONS—FORM OF TICKET.—Where nomination papers are filed and no party name or other designation made the clerk is authorized to designate a suitable title for such ticket.

March 18, 1912.

MR. CHARLES P. FROST,
Fonda, Iowa.

DEAR SIR: Your letter of the 15th instant addressed to the attorney general has been referred to me for reply.

You submit the following questions upon which you desire the opinion of the attorney general:

> "1. What do you consider the last day on which nomination papers for our town election can be filed with me, our election day being March 25th?

"2. (a) Where nomination papers, naming councilmen, have been filed with me under heading of 'Citizens' Ticket,' and then later nomination papers were filed with me naming the same candidates for councilmen under the heading of 'People's Ticket,' must the candidates, to appear under second ticket first withdraw before the filing of the second papers?

"(b) Is it not true that where any candidate wishes to have his name printed upon the ticket named in *nomination papers last filed*, his withdrawal should be filed with the town clerk on or before the last day on which nomination papers can be filed?

"(c) Or can they withdraw at any time before the ballots are printed?

"3. Where a petition as filed *fails to name any ticket* under which to place the name or names of candidates on the ballot, would it be proper and right for me to place the name of such candidate on a ballot under the head of 'Independent Ticket?' "

Answering your first question will say it is my idea that the last day for filing nomination papers for town officers was March 15th.

Answering the questions set forth in the several divisions of your second question will say that where the same person is nominated for the same office upon two or more tickets it is not necessary for the person so nominated to withdraw from any one of them in the strict sense of the term, but he may have his name printed upon any one of the tickets of the parties so nominating him by filing a written request duly verified, with the town clerk in the manner set forth in section 1106 of the code, designating which ticket on which he wants his name to appear, and this request, I take it, may be filed any time before the tickets are printed.

Answering your third question will say that the clerk is authorized to designate a suitable title for a ticket if none is designated by the persons or party filing same.

You will not regard the foregoing as the expression of an official opinion from this department but rather the personal views

of the writer given without very much opportunity of investigating the subject.

Respectfully yours,

N. J. LEE,
Special Counsel.

DRAGGING OF ROADS.—Where no dragging superintendent can be found or is selected the trustees may have the roads dragged, but the same should not be paid for from the dragging fund but from the general road fund. The dragging fund can only be expended for dragging approved by the superintendent of dragging.

March 21, 1912.

MR. CHAS. A. BAILEY,
Diagonal, Iowa.

DEAR SIR: Your letter of the 18th instant to the attorney general has been referred to me for reply.

You state that the township trustees of your township have been unable to secure anyone to act as superintendent of dragging, and you ask if, under these conditions, the township clerk can draw the one mill dragging tax from the county treasury, and also whether the township trustees are required to make a levy of such tax for the ensuing year.

The right and duty to levy and collect such tax does not depend upon the ability of trustees to secure a person to act as superintendent of dragging, nor upon the ability to expend such tax. The law is mandatory and explicit and requires that a one mill tax for dragging purposes shall be levied each year, and that it shall be expended only for the purpose of dragging the roads within the township.

You say further that you have nine road supervisors in your township, and that they are in good position to handle the dragging under the direction of the trustees, and you inquire whether it would be proper to have the roads dragged by such supervisors under the direct supervision of the trustees.

If there is no superintendent of dragging, the trustees would have ample authority to have the roads dragged, but I do not think that any of the dragging fund can be expended therefor.

The expense of dragging the roads under such conditions would have to be paid out of the other township road funds and would come under the head of road work. The new road dragging law is very explicit that none of the road dragging fund shall be paid out except upon the approval of the work by the superintendent of dragging, and under contracts made by that official, etc.

Respectfully yours,

N. J. LEE,
Special Counsel.

DRAGGING ROADS.—The dragging superintendent may not drag the roads himself and draw compensation therefor.

March 21, 1912.

MR. T. A. SHILLINGTON,
Clarion, Iowa.

DEAR SIR: Your letter dated March 28th, 1912, addressed to the attorney general has been referred to me for reply.

You say that it is difficult, and in some cases impossible, to secure persons who will act as superintendents of dragging unless they are allowed to do some of the dragging themselves, and you inquire if it is legal and proper for the trustees to contract with the superintendent of dragging to drag some of the roads.

The superintendent of dragging is not authorized to draw any compensation for dragging the roads. He is required to make contracts with third persons to do the dragging. He must oversee and approve the work. There are other reasons why it is not permissible for the superintendent of dragging to drag the roads himself and draw pay therefor, but I need not set them out here.

Respectfully yours,

N. J. LEE,
Special Counsel.

BANKS—ASSESSMENT—TAXATION OF.—Banks being assessed are not entitled to have any deduction made from their assessment on account of the fact that part of the capital is invested in drainage bonds which are exempt from taxation.

March 21, 1912.

W. L. BARKER, *City Solicitor,*
Cresco, Iowa.

DEAR SIR: Your letter of the 18th instant to the attorney general has been referred to me for reply.

You request an opinion from this department as to whether drainage bonds issued under the laws of this state are exempt from taxation in the hands of private bankers when held as a part of the assets of the bank.

It is my view that such bonds are not exempt under the circumstances suggested, or, in other words, that when such bonds are held by a private bank as a part of its assets, they may not be deducted from the total value of moneys and credits for the purpose of taxation. The section of the statute which prescribes the manner of assessing a private bank is No. 1321 of the supplement to the code 1907, as amended by section 4, chapter 63, acts of the thirty-fourth general assembly.

Unless such deduction of such securities is denied, there would be a discrimination in the assessment of private banks and the shares of stock in incorporated banks.

Respectfully yours,
N. J. LEE,
Special Counsel.

RESIDENTS—FOR PURPOSES OF TAXATION.—Where one has no legal residence elsewhere his temporary residence of a year should be considered his place of residence for taxation purposes.

March 22, 1912.

REV. W. H. SHIPMAN,
College Springs, Iowa.

DEAR MR. SHIPMAN: Replying to yours of the 16th instant relative to the taxation of moneys and credits, the law generally provides that moneys and credits shall be assessed to the owner at

the place where he is residing. If he has no legal residence elsewhere, then his temporary residence of a year should be considered his place of residence, and he should there give in all moneys and credits, choses in action and intangible property, unless the same is kept entirely without the state and not under his personal charge and also taxed in another state. Of course he should not pay double taxes, but in the absence of this, the person himself should give his money and credits in at his place of residence.

Yours very truly,

GEORGE COSSON,
Attorney General.

AUTOMOBILES—LICENSE TAX.—The license tax provided for automobiles may not be exacted unless such automobile is used upon the highway.

March 22, 1912.

MR. CHAS. S. STEWART,
Bristow, Iowa.

DEAR SIR: I am in receipt of your communication of the 16th instant advising that you understand a state license on automobiles is in lieu of all other taxes.

The law does not require the payment of a license unless the automobile is to be used; that is to say, an old automobile stored which is not used at all on the highways, is not required to have a license and a register number. In all such cases the machine should be assessed as other personal property at its actual value.

Yours very truly,

GEORGE COSSON,
Attorney General.

INCOMPATIBLE OFFICES.—The offices of city councilman and town clerk are incompatible.

March 23, 1912.

MR. THEOPH REED,
Kirkville, Iowa.

DEAR SIR: Your letter of the 20th instant addressed to the attorney general is referred to me for reply.

You request an opinion from this department as to whether the same person at the same time may hold the two offices of councilman of a town and town clerk.

It is my opinion that the same person may not at the same time and in the same jurisdiction hold the two offices mentioned. One is in a sense subordinate to the other, and the person holding the same would have a voice in appointing himself and passing upon his own acts and fixing his own compensation, etc. And for these and other reasons, it would be improper, from considerations of public policy, for these offices to be held by the same person. They are in law considered incompatible.

Respectfully yours,

N. J. LEE,
Special Counsel.

ROAD FUND—FOR WHAT PURPOSE USED.—The road authorities may use the township road fund for the purpose of opening roads which have been blockaded by snow.

March 26, 1912.

MR. H. C. WALLACE,
c|o Wallaces' Farmer,
Des Moines, Iowa.

DEAR SIR: Your letter of the 25th instant addressed to the attorney general has been referred to me for reply.

You request an opinion as to whether the township road authorities may expend township road funds for the purpose of opening roads that have been blockaded with snow.

I do not know that this exact question has been presented before, but I can think of no sound reason why it would not be perfectly proper and legal to use road funds of the township for the purpose of removing snow from the highway in order to make it passable. If the highway is made impassable by reason of the snow it is in the nature of an obstruction and it is primarily the duty of the road superintendent to remove obstructions in the highway. Furthermore, it is in the nature of road work and it is as important to remove snow under certain conditions as it is

to drain water from the highway when that condition makes the road impassable.

Respectfully yours,

N. J. LEE,
Special Counsel.

ROAD POLL TAX—WHO LIABLE FOR.—Mexicans or other railway employees residents of a township are subject to road poll tax even though not citizens of this country.

March 29, 1912.

MR. L. J. NEWQUIST,
Dudley, Iowa.

DEAR SIR: Hon. Frank A. Nimocks of Ottumwa, Iowa, has written this department that you desired an opinion as to whether certain Mexicans who worked on the railway as section men in your township may be required to perform labor upon the roads, under section 1550 of the supplement to the code, 1907. Mr. Nimocks says that these men have been there for some time and worked there all last season, and that some of them remained during the winter and are there during the present time.

If these men are residents of your township they are subject to a road poll tax, and the fact that they are not citizens of this country would not afford them an excuse from performing such labor.

Respectfully yours,

N. J. LEE,
Special Counsel.

WOMEN—ELIGIBLE TO CERTAIN OFFICES.—Women are eligible to the offices of county recorder, county superintendent and library trustee, and ineligible to other offices.

March 30, 1912.

HON. N. R. MORISON, *Mayor*,
Traer, Iowa.

DEAR SIR: Your letter of the 27th instant addressed to the attorney general has been referred to me for reply.

The question briefly stated is, whether or not a woman is eligible to the office of park commissioner of an incorporated town.

Code supplement section 850-a provides for the election of park commissioners in cities containing a population of forty thousand or over, and also provides:

> "and all other cities and towns may, by ordinance, provide for the *election* of three park commissioners whose terms of office shall be six years," etc.

It will be observed that this section is silent as to the qualifications of such park commissioners, and I find no other provision in the chapter which attempts to fix their qualifications.

Our supreme court, in passing upon the right of an alien to hold the office of sheriff under the laws of Iowa, laid down the following proposition:

> "There is no provision in our constitution or statute upon that subject, yet it is certainly a fundamental principle of our government that none but qualified electors can hold an elective office unless otherwise specially provided."
>
> *State vs. Van Beek*, 87 Iowa, at 577.

It has recently been held by our supreme court that a woman could not be granted a permit to sell intoxicating liquors under a statute which limited such right to qualified electors.

> *In re Carragher*, 149 Iowa, 225.

The only instances known to the writer in which women are eligible to office are:

First, the office of library trustee provided for by code supplement section 728, wherein it is provided:

> "Bona fide citizens and residents of the city or town, male or female, over the age of twenty-one years, are alone eligible to membership."

Second, the office of county recorder, provided for in code section 493, which reads as follows:

> "In counties with a population of ten thousand or less, the same person may hold the office of county recorder and treasurer, and no person shall be disqualified on account of sex from holding the office of recorder."

Third—

> "School officers or members of the board may be of either sex." Code section 2748.

Fourth—

"The county superintendent who may be of either sex, shall be the holder of a first grade certificate," etc. Code supplement section 2734-b.

If there are any other instances, they have escaped my attention. Hence, it follows that your inquiry must be answered in the negative.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

INCOMPATIBLE OFFICES—WHAT ARE NOT.—There is no incompatibility in the offices of school board and mayor of a city; both may be held by the same person.

April 1, 1912.

DR. O. W. FOXWORTHY,
Leon, Iowa.

DEAR SIR: I am in receipt of your communication of the 30th ultimo advising that you are now a member of the school board and that you have also been elected mayor of your city. You request an opinion as to whether you may hold both of these offices.

In the absence of a statute prohibiting the holding of two offices, the general rule is that a person may not hold two offices which are incompatible or where the duties are similar, so that the same person holding two offices would result in depriving the public of one office.

No incompatibility occurs to me at this time between these offices, but I would not be authorized to advise you officially, as the attorney general is not authorized to give official opinions except to the various state departments.

Yours very truly,

GEORGE COSSON,
Attorney General.

DRAGGING SUPERINTENDENTS—CONTRACTS—HOW MADE.—Contracts made with dragging superintendents need not be in writing.

April 1, 1912.

C. B. HUGHES, *County Attorney*,
Guthrie Center, Iowa.

DEAR SIR: Yours of the 26th ult. addressed to the attorney general has been referred to me for reply.

Your question briefly stated, is whether or not the superintendents of dragging are required to enter into a formal contract with persons employed to drag the roads before such person would be entitled to receive payment for dragging done.

I have carefully examined sections 2 and 3 of chapter 70 of the acts of the thirty-fourth general assembly, and while the latter section contains some language which seems to contemplate a written contract, for instance: "The superintendent may at any time cancel such contract, or contracts, for dragging the roads when the stipulations therein contained have not been properly complied with," yet there is no direct requirement that the contract be in writing, and I am inclined to the view that where the record book is kept, as required by section 2, showing the names of persons entitled to compensation for dragging the roads, that no formal or other contract is required.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

COUNTY AND MOTOR VEHICLE ROAD FUND—CONTROL BY BOARD OF SUPERVISORS.—The county motor vehicle road fund is under absolute control of the board of supervisors except that it must be used for certain specified purposes and outside the limits of cities and towns.

April 1, 1912.

MR. W. F. TRIPP,
Kent, Iowa.

DEAR SIR: Yours of the 18th ult. addressed to the attorney general has been referred to me for reply.

Your question is, whether or not the board of supervisors has absolute control over the expenditure of the fund arising from

automobile taxes, or whether the same must be divided among the different townships of a particular county.

Section 33 of chapter 72 of the acts of the thirty-fourth general assembly provides for the apportionment of this tax among the respective counties of the state in the same ratio as the number of townships in the several counties bears to the total number of townships in the state, and further provides:

> "When such apportionment has been made the state treasurer shall forthwith remit to the county treasurers of the several counties of the state the amount of money so apportioned to the respective counties, and the county treasurer of each county immediately upon the receipt of such money shall charge himself therewith and credit the same to a fund to be designated as the 'county motor vehicle road fund,' and he shall forthwith give notice to the county auditor of the amount of money so received. The said county motor vehicle road fund shall be expended for the following purposes only: the crowning, draining, dragging, graveling or macadamizing of public highways outside of the limits of cities and towns, and for the building of permanent culverts on such highways. Such culverts shall be constructed of concrete or stone, and said fund shall be under the control of the board of supervisors for said purposes only, and shall be paid out on warrants on said fund drawn by the county auditor, duly authorized by the board of supervisors entered on record."

Inasmuch as there is no provision expressly requiring the money to be expended in the several townships of the county, I am inclined to the view that the legislature intended to leave the entire matter as to where the fund should be expended to the discretion of the board of supervisors. As to the number of townships in a particular county, it is only material for the purpose of determining the amount of money which goes to that particular county.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

DELINQUENT TAX—COLLECTION OF.—The three-fourths of one per cent allowed the county treasurer for the collection of delinquent taxes should be collected from the delinquent and not deducted from the amount collected.

April 3, 1912.

B. J. GIBSON, *County Attorney,*
Corning, Iowa.

DEAR SIR: Your letter of the 22nd ultimo addressed to the attorney general has been referred to me for reply.

Your question briefly stated is, whether or not the county treasurer is entitled to deduct a commission from the amount of tax collected under special assessment paving certificates.

Code section 490 provides:

> "Each county treasurer shall receive for his services the following compensation:
>
> "1. Three-fourths of one per cent of all money collected by him as taxes due any city or town, to be paid out of the same."

In construing this section, our supreme court has said that this percentage cannot be added to nor included in the assessment. *Higman vs. Sioux City,* 129 Iowa, at 293.

Hence, it follows that the percentage, if a proper charge, must come out of the tax collected, as directed by the section above quoted.

While in the strict sense of the word, the money is not at the time it is collected due the city or town, it is the same thing in substance, for if the city had not turned over the paving certificate to the contractor, then the money due on the certificate at the time of its maturity would be due the city or town. The tax is for the benefit of the city or town, and I see no reason why the compensation should not be allowed, whether the certificate is held by the town or by the contractor or other person.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

FARM PRODUCTS—WHEN EXEMPT FROM ASSESSMENT.—In order to have farm products exempt from assessment it must be harvested by the landlord, and where harvested by the tenant the exemption is not available.

April 3, 1912.

H. N. WRIGHT, *County Auditor,*
Mount Pleasant, Iowa.

DEAR SIR: Yours of the 1st instant addressed to the attorney general has been referred to me for reply.

Your question briefly stated is, whether or not corn received as rent is taxable.

I have been unable to find the supreme court decision to which you refer, and whether or not it has been passed upon by the supreme court, I am unable to state. However, I call your attention to lines 1 and 2 of subdivision 3 of section 1304 of the supplement to the code, 1907, which read as follows:

> "The farm produce of the person assessed, *harvested by him,* and all wool shorn from his sheep, within one year previous to the listing * * * * are not to be taxed."

I am inclined to the view that where the landlord harvests the crop, or his share of it, that he would be entitled to this exemption, but where the same is harvested by the tenant, that he would not be entitled to the exemption.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

LOTTERIES DISCUSSED.

April 5, 1912.

JOHN J. LUDESCHER, *President,*
Retail Grocers' Association,
Dubuque, Iowa.

DEAR SIR: Your letter of the 23rd ult. addressed to the attorney general in which you enclose certain advertisements by the Sperry & Hutchinson Company with reference to the giving away of S. & H. green trading stamps, has been referred to me for reply.

Inasmuch as only one concern seems to be involved in the enterprise, I am inclined to think that this would not be a gift enter-

prise, within the meaning of section 2 of chapter 226 of the thirty-third general assembly. However, in view of your statement that the "distribution of these stamps is conducted by a drawing on the stage of the theater mentioned in the advertisements," I am inclined to the view that the transaction would amount to a lottery and is punishable under code section 5000. While this section does not undertake to define a lottery, yet our supreme court has said: "Where a pecuniary condition is paid (which in this case would be the admission to the theater) and it is determined by lot or chance, according to some scheme held out to the public, what the party who pays the money is to have for it, or whether he is to have anything, it is a lottery within the meaning of the statute."

Chancy Park Land Co. vs. Hart, 104 Iowa, 592, at 596.

This is a matter which should be first submitted to the county attorney or other local prosecuting officers for attention.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

FREE PASSES—CITY OFFICERS MAY NOT LAWFULLY ACCEPT.—No officer, including members of the city council, is permitted to accept from any railway company operating within the city any free pass.

April 5, 1912.

F. DOYLE, *Agent,*
Neola, Iowa.

DEAR SIR: Your letter of the 19th ultimo addressed to the attorney general has been referred to me for reply.

Your question briefly stated is, whether or not a railway employe, who is also the holder of a municipal office, can make use of free transportation furnished by the railway company employing him or other companies over whose lines he desires to travel.

Code supplement section 879-q provides:

> "No officer, including members of the city council shall be interested, directly or indirectly in any contract or job of work or material or the profits thereof or services to be furnished or performed for the city or town. No such officer shall accept or receive, directly or indirectly, from any per-

son, firm or corporation operating within the said city or town, any railway, inter-urban railway, street railway, gas works, water works, electric light or power plants, telegraph line or telephone exchange or other business using a public franchise, any frank, free pass or ticket or other service upon terms more favorable than is granted to the public generally, except where, by franchise granted by the municipality to any such person or corporation, any officers of said municipality are granted such privileges as part of such franchise, and except that members of the police and fire departments of any city or town shall be carried without charge. Any violation of the provision of this section shall be a misdemeanor."

Hence, your inquiry must be answered in the negative.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

PRIZE FIGHTS.—Exhibition by photograph or other means unlawful.

April 6, 1912.

MR. W. A. PARKINS,
Clearfield, Iowa.

DEAR SIR: I am in receipt of your communication of the 5th instant requesting to be advised as to whether members of a club may lawfully exhibit pictures of any prize fight or glove contest.

Section 4973 of the code provides that:

"It shall be unlawful for any person, persons or corporation to exhibit in this state by means of the photograph, kinetograph, or any kindred device or machine, any picture of any prize fight, glove contest, or other match between men or animals, that is prohibited by the laws of this state."

And section 4974 of the code provides that:

"Any person, persons or corporation who shall grant, lease, let or hire any theater, hall, room, building, roof-garden or park for the exhibition of pictures such as are prohibited by the preceding section shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than five hundred dollars nor more than one thousand dollars, or by imprison-

ment in the county jail not less than thirty days nor more than one year, or by both fine and imprisonment, in the discretion of the court."

Section 4975 of the code prescribes a punishment of not less than fifty dollars nor more than one hundred dollars, or by imprisonment in the county jail not more than thirty days, for any one aiding or assisting in making the exhibits.

You will notice by the wording of the law that it does not say those who exhibit for hire, or where an entrance fee is charged, but that the prohibition is absolute. If it is detrimental to the morals of persons witnessing pictures of a prize fight for hire, it is just as injurious for them to witness it without paying an entrance fee.

Yours very truly,

GEORGE COSSON,
Attorney General.

LAND CONTRACTS—ASSESSMENT AND TAXATION OF.—Land contracts which are not merely options to purchase but are binding on both the seller and purchaser are taxable, and one indebted on such contract may deduct the amount of such indebtedness from his moneys and credits when being assessed.

April 6, 1912.

A. RAY MAXWELL, *City Solicitor*,
Corning, Iowa.

DEAR SIR: Your letter of the 5th instant addressed to the attorney general has been referred to me for reply.

Your question briefly stated is, whether or not a citizen of a taxing district in Iowa being assessed on moneys and credits may deduct therefrom indebtedness owing on a land contract for land purchased in Canada.

Code section 1311 provides, with reference to this matter:

"He will be entitled to deduct from the actual value thereof the gross amount of *all debts in good faith owing by him,*"

and there will not be found in this section anything which tends to limit the indebtedness to be deducted to indebtedness held within the taxing district, or even within the state.

Our supreme court has held that land contracts which were not merely options to purchase, but which were mutually obligatory,

binding the former owner of the land to sell and the purchaser to pay the agreed purchase price, were credits within the meaning of the law, and should be assessed to the vendor of the land. This being true, it necessarily follows that the same contract would constitute an indebtedness owing by the purchaser.

Clark vs. Horn, 122 Iowa, 375;

Cross vs. Snakenburg, 126 Iowa, 336.

The question here presented is, whether or not the indebtedness to be deducted is limited to that held by persons residing within the taxing district, and I am inclined to think this question should be answered in the negative. It seems to me that a little clear thinking will show it could not be otherwise. For instance, on January 1st, 1912, I am indebted on a thousand dollar note due in five years held by a bank in my own taxing district. There will be no question but what I would have the right to deduct such indebtedness from any assessment made against me on account of moneys and credits owned by me. By the time I am again assessed on my moneys and credits, this thousand dollar note owed by me has been transferred by the bank in my taxing district to a bank in Chicago. The indebtedness remains the same, but I would still be entitled to deduct it from my assessment in 1913, and by the next year when I am again assessed on my moneys and credits my note is still outstanding, but instead of being held by the bank in Chicago, is owned and held by a bank in Winnipeg. Certainly I would still be entitled to have the deduction made, for the indebtedness is still in good faith owing by me. If this were not the rule, a person being assessed on moneys and credits would be required to know, before being entitled to have the deduction made for indebtedness which he owes, and be able to show where his obligations are held. For aught that the person being assessed may know, the land contract to which you refer, while perhaps given to some person in Canada, may in fact be owned and held by some person in his own taxing district.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

INCOMPATIBLE OFFICES.—The offices of treasurer of the board of education and town clerk are not incompatible and may be held by the same person at the same time.

April 6, 1912.

CHAS. F. FISHER, *Editor*,
West Burlington, Iowa.

DEAR SIR: Your letter of the 3rd instant addressed to the attorney general has been referred to me for reply.

Your question briefly stated is, whether or not one person may hold the office of treasurer of the board of education and also the office of town clerk at the same time and draw compensation for his services in each office.

The general rule is, that a person may perform the duties of and enjoy the emoluments of two offices at the same time unless the duties of the offices are incompatible. I can see no reason why the offices in question might be deemed incompatible, and hence believe that your inquiry should be answered in the affirmative.

Yours very truly,
C. A. ROBBINS,
Assistant Attorney General.

PUBLIC OFFICE—ELIGIBILITY.—One who was a resident of South Dakota until January 1st is not eligible to the office of city assessor at an election held in March of the same year. He must be a resident of the state for six months.

April 8, 1912.

C. V. FORD, *City Clerk*,
Coon Rapids, Iowa.

DEAR SIR: I have yours of the 6th instant making further statement of the facts with reference to the question which you submitted a few days ago, and your inquiry now is, whether or not a person who was formerly a resident of this state, but later on acquired a residence in the state of South Dakota, and about January 1st of this year returned to this state and received votes for the office of assessor at the city election in March of this year is eligible to such office.

This question should be answered in the negative. Our supreme court has decided that except where otherwise provided, no person except a qualified elector is eligible to an elective office.

State vs. Van Beek, 87 Iowa, 569.

The constitution of the state, section 1, article II, provides:

> "Every male citizen of the United States of the age of twenty-one years who shall have been a resident of this state *six months* next preceding the election in the county in which he claims his vote, sixty days, shall be entitled to vote at all elections which are now or hereafter may be authorized by law."

Hence, it follows that such person would not be a qualified elector until after he had remained in this state for six months.

Your next question is: "If he cannot qualify, can the defeated candidate hold the office?"

This question should be answered in the negative.

Your remaining question is: "Should the city council appoint an assessor?"

This question should be answered in the affirmative. Code supplement section 1272 provides with reference to filling vacancies in various offices, and the portion which would apply to the case in hand reads as follows:

> "And all other elective city offices, the council may appoint any qualified elector to fill such vacancy, who shall qualify in the same manner as persons regularly elected to fill such office and shall hold office until the qualification of the officer elected to fill such vacancy, who shall be elected at the next regular municipal election."

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

HIGHWAYS.—It is a misdemeanor to place or leave any broken glass or glass bottles, glassware or glass of any kind upon highways, streets or alleys in such a manner as to injure horses or vehicles.

April 8, 1912.

MR. C. E. KLUVER,
Ventura, Iowa.

DEAR SIR: Yours of the 5th instant addressed to the attorney general has been referred to me for reply.

Your question is: "Is there any penalty on breaking glass bottles in the road, such as beer bottles," etc.?

This question should be answered in the affirmative. Chapter 210 of the acts of the thirty-third general assembly provides:

> "It shall be unlawful for any person or persons, to place or leave any broken glass, glass bottles, glassware, or glass of any kind in the highways, or in the streets and alleys of any city or town in such a manner as to interfere with safe travel, or in such manner as to injure horses or vehicles, while being used or driven on said streets, alleys and highways."

Prosecutions for violation of this chapter should be carried on by the county attorney, and I have no doubt that if you have the evidence of such violations he will be glad to assist in such prosecutions.

The penalty is imposed by section 2 of this chapter and is from one to ten dollars for the first offense and from five to twenty dollars for subsequent offenses.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

COLLEGES.—Endowment property exempt from taxation.

April 9, 1912.

I. F. MEYER, *President*,
Ellsworth College,
Iowa Falls, Iowa.

DEAR SIR: Yours of the 5th instant addressed to the attorney general has been referred to me for reply.

Your first question is: "When did the statute exempting college endowment property from taxation go into effect in Iowa?"

This exemption was first provided for in chapter 54 of the acts of the thirty-second general assembly which became effective July 4, 1907.

Your second question is: "When did the new tax law with reference to land held by colleges go into effect?"

This provision is first found in chapter 61 of the acts of the thirty-fourth general assembly and became effective July 4, 1911.

Your next inquiry is, whether or not there is specifically any law to prevent an independent academy from receiving students from the country schools on the same conditions as they are received by the high schools,—that is, whether their home district would be compelled to pay tuition to such academy the same as to high schools which they attend outside their home district.

Section 1 of chapter 146 of the acts of the thirty-fourth general assembly provides:

> "Any person of school age who is a resident of a school corporation not offering a four year high school course and who has completed the course of study offered in such school corporation shall be permitted to attend any *high school* that will receive him, provided the average cost of tuition allowed shall not exceed the average cost of tuition in the nearest high school," etc.

It would scarcely be contended that the term "any high school" would be sufficiently elastic to include an academy. In fact, this department has construed this term "any high school" in such a way as to exclude the private high school from the provisions of this chapter, and on the same theory and for a greater reason, the words should not be held to include an academy.

You ask the further question: "Why should not the country student here at Iowa Falls elect to attend the Ellsworth college academy and have the district pay his tuition the same as it would if he attended the high school?"

This inquiry is one that might well be put to the members of the general assembly, but until it has changed the language of chapter 146, the chapter itself will stand in the way of such action.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

ELECTIONS.—Candidate should not judge his own election.

April 9, 1912.

MR. L. A. KOETHE,
Sheffield, Iowa.

DEAR SIR: Yours of the 8th instant addressed to the attorney general has been referred to me for reply.

Your question briefly stated is, whether or not it is legal for a candidate for office to judge his own election, regardless of whether there is any fraud committed in connection with such election.

It is not proper for a candidate for office to judge his own election, and if timely objection has been made, his place should have been supplied by the appointment of some disinterested person. A failure to do this, however, would not render the entire election illegal.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

ELECTIONS.—One duly elected to office is entitled to hold the same and his acts would be legal even though his nomination paper was not certified to.

April 9, 1912.

MR. J. W. MEADOWS,
Kellerton, Iowa.

DEAR SIR: Yours of the 8th instant addressed to the attorney general has been referred to me for reply.

Your question is: "Is an officer duly elected whose nomination papers are not certified to, and will his acts be binding?"

In my judgment, this question should be answered in the affirmative. The last sentence of section 1087-a12 provides:

> "The county auditor shall correct any errors or omissions in the names of candidates and any other errors brought to his knowledge before the printing of the ballots,"

and where the nomination papers have been treated as sufficient and no objection made and the names duly printed on the ballot, and where the election itself has been regular, I do not think

the mere failure to certify to a nomination paper would be sufficient to affect the validity of the election.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

P. S.—Since writing the foregoing, it has occurred to me that perhaps the case you had in mind arose at your last city election and not in a case where the primary election law heretofore cited would apply. However, it would not change the result, for under code section 1103, all objections or other questions arising in relation to certificates of nomination or nomination papers shall be filed (in case of cities) not less than eight days before the election and the objections heard and determined, as provided by this section, and if this was not done, the election would be legal, notwithstanding the fact that the nomination paper was not properly certified.

Yours truly,

C. A. R.

BANKS.—The words "savings bank" or "savings institution" should not be used by any banking concern not incorporated as a savings bank.

April 9, 1912.

J. P. HERTERT, *County Attorney,*
Harlan, Iowa.

DEAR SIR: Your letter of the 6th instant addressed to the attorney general has been referred to me for reply.

You enclose an advertisement by a state bank headed, "A Savings Bank," which term also again appears in the advertisement, and you inquire whether or not such a publication is a violation of section 1859 of the code.

The section to which you call attention provides:

> "Any bank, banking association, private banker or person, not incorporated under the provisions of this chapter (savings bank chapter), who shall advertise, issue or circulate any card or other paper or exhibit any sign as a savings bank or savings institution * * * shall forfeit and pay one hundred dollars for each day the offense is continued, to be

recovered in a suit brought in the name of the state, by the county attorney, of and for the use of the school fund of the county where such bank is located, and in addition thereto, shall be guilty of a misdemeanor for each day the same is done or continued."

Hence, I am of the opinion that your question should be answered in the affirmative.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

COUNTY SUPERINTENDENT—POWERS OF ON APPEAL.—Where an appeal is taken to the county superintendent he is not limited to affirming or reversing the order appealed from but may render such decision as may be just and equitable.

April 10, 1912.

FRANK L. MAY, *County Attorney,*
Lansing, Iowa.

DEAR SIR: Yours of the 8th instant addressed to the attorney general has been referred to me for reply.

Your question briefly stated is, whether or not, when an appeal is taken to the county superintendent, he may try the case de novo and decide the matter as seems in his judgment best, or whether he is restricted to either affirming or reversing the order appealed from.

The answer to this inquiry is found in code section 2819, the latter part of which provides:

> "At the time fixed for the hearing, he (the county superintendent) shall hear testimony for either party, and he shall make such decision as may be *just and equitable*, which shall be final, unless appealed from as hereinafter provided."

If he were limited to determining the question of whether or not there was error in the order appealed from, there would be no necessity for his hearing testimony, and the statute expressly authorizes him to make such decision as may be just and equitable.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

DRAGGING OF ROADS.—An automobile club may be employed to drag the public highways the same as an individual or firm.

April 12, 1912.

GEO. S. ALLYN, *Cashier*,
Mount Ayr, Iowa.

DEAR SIR: Yours of the 9th instant addressed to the attorney general has been referred to me for reply.

Your inquiry briefly stated is, whether or not the township trustees might employ a road dragging club to drag the roads.

I see no legal objection to this being done if the club is a legal entity, such as an incorporated company or a partnership firm doing business under a firm name, and even if this be not true, the contract could be made with some representative of the club, and then let the members of the club assist in doing the work or in having it done.

Yours very truly,
C. A. ROBBINS,
Assistant Attorney General.

MILLAGE TAX—HOW APPORTIONED.—The millage tax collected on moneys and credits should be apportioned among the various funds according to the rate of levy fixed for the year following such levy.

April 12, 1912.

SAM C. SMITH, *County Attorney*,
Winterset, Iowa.

DEAR SIR: Yours of the 9th instant addressed to the attorney general has been referred to me for reply.

You call attention to section 4 of chapter 98 of the acts of the thirty-third general assembly, also to section 1 of chapter 63 of the acts of the thirty-fourth general assembly. You then make the following statement:

> "As the township clerk could not determine the proportionate amount of the millage tax assessed for the present year available for the road fund until after the levy is made by the board in September, I have advised the county auditor that in my judgment the property road tax at the disposal of the road superintendents in the townships working under

the old system this year would have to be determined without reference to the assessment for the present year on moneys and credits.

"We would be glad to have your opinion as to the construction to be placed on these statutes."

I am inclined to concur with you in the advice given as set forth in said statement, but am not sure that I fully understand the reasoning by which the conclusion was reached. It seems there must have been some misapprehension of chapter 63, or you would not propound the following question:

"Is the millage tax to be apportioned among the several funds so as to give the road tax its share of the same, and if so, how will it be done?"

While section 6 of chapter 63 makes the chapter applicable to the assessment made in the year 1911, yet by section 8 of the same chapter it is provided:

"The provisions of this act as to the assessment and taxation of moneys and credits other than moneyed capital and shares of stock of state, savings and national banks and loan and trust companies, shall not apply to taxes levied for the year 1911."

As the taxes are collected one year following the assessment, there would be no tax collected on the five mill basis during the year 1912, and the first collection made on that basis would be in the year 1913, and the levy made by the board of supervisors in September, 1912, would furnish the basis for the apportionment of this tax among the several funds in the year 1913.

If under the erroneous assumption that the five mill tax applied on the assessment for 1911, the tax has been or is being collected on that theory this year, then my suggestion would be that it be apportioned in accordance with the levy made in September, 1911.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

INTOXICATING LIQUORS—CORPORATIONS MAY NOT SELL.—A corporation may not hold a permit to sell intoxicating liquors at retail.

April 12, 1912.

MR. W. M. BROUILLARD,
Charles City, Iowa.

DEAR SIR: Yours of the 2nd instant addressed to the attorney general has been referred to me for reply.

Your question briefly stated is, whether or not a member of a firm or stockholder in a corporation or an actual employe of the corporation may hold a permit to sell intoxicating liquors.

This question in all its phases should be answered in the negative. By chapter 143 of the acts of the thirty-third general assembly, the right to sell intoxicating liquors was restricted to qualified electors, and our supreme court, in construing this section, held that a woman was not a qualified elector, and hence, could not hold a permit. Following this decision, Judge DeGraff has held that neither member of a partnership firm had a right to have a permit to sell intoxicating liquors for and on behalf of the firm; also that an incorporated company had no right to be engaged in the sale of intoxicating liquors. It follows that what the firm or corporation could not lawfully do it could not employ another to do for it, and hence, the employe would be excluded.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

SCHOOL BUILDINGS—COUNTY SUPERINTENDENT MUST APPROVE.—A school board is without power to erect a school building without having plans first approved by the county superintendent.

April 12, 1912.

MR. P. H. VAN WYK,
Hull, Iowa.

DEAR SIR: Yours of the 9th instant addressed to the attorney general has been referred to me for reply.

Your question briefly stated is, whether or not a school board may erect a school house without first having the plans approved by the county superintendent, or whether his recommendation with reference to the plans is simply to be taken as advisory.

The section to which you refer, No. 2779, provides with reference to the power of the school board as follows:

> "It *shall not* erect a school house without first consulting with the county superintendent as to the most approved plan for such building and *securing his approval* of the plan submitted."

This language seems to be plain, and I am inclined to the view that the board is without power to erect a school house without first having the plan approved by the county superintendent.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

CITIES AND TOWNS--POWERS OF.—Cities have no power to donate or make concessions in favor of charitable institutions such as Y. M. C. A. in the matter of rates on water and light where plants are owned by city.

April 12, 1912.

MR. W. B. SEELEY,
Mount Pleasant, Iowa.

DEAR SIR: Your letter of the 30th ult. addressed to the attorney general has been referred to me for reply.

Your question briefly stated is, whether or not a city council, where the city owns the water plant and the light plant, has authority to make concessions in favor of charitable institutions such as the Y. M. C. A. in the matter of rates for water and light.

I am inclined to think that this inquiry should be answered in the negative. Our supreme court has frequently held that cities and towns have only such powers as are expressly delegated or necessarily implied. In the case of *Brockman vs. The City of Creston,* 79 Iowa, 589, the city was enjoined from conveying certain property to the county in consideration of the location of the county seat at that place. There are other cases where it has been held that the city is without power to exempt manufacturing institutions from taxation, or to make them other concessions or inducements in order to have them locate in a particular town. Our supreme court has held that where the city has power to fix the rates to be charged by public service corporations, they may

make a contract with such water company or light company, by the terms of which, water and light are to be furnished free to schools or other institutions. *Independent District vs. LeMars Light & Power Company*, 131 Iowa, 14, and in the course of the opinion of that case, the supreme court said:

> "If the city were now attempting to establish the rate contended for by the appellant, there would be force in the appellee's several points (which were to the effect that it was unconstitutional to require the water company to furnish the water and light free), but such is not the present case."

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

CITIES AND TOWNS—POWER TO GRANT FRANCHISES.—A city or town is without power to grant franchises to a light and power company or the right to set poles in the street where such proposition has been voted down by the voters of the city or town.

April 12, 1912.

C. V. FORD, *City Clerk*,
Coon Rapids, Iowa.

DEAR SIR: Yours of the 9th instant addressed to the attorney general has been referred to me for reply.

You call attention to the fact that at the city election the proposition to grant a franchise to the Coon Rapids Light & Power Company was voted down, and then you propound the following questions:

> "Can the town council grant the Coon Rapids Light & Power Company the right to set poles and extend their lines?
>
> "If any damage was done by said company, does it place the liability upon the town, where the company hasn't a franchise any more than before?"

With reference to the first question, will say that code supplement section 720 provides that "no such works or plants shall be authorized, established, erected, purchased, leased or sold or a franchise extended or renewed unless a majority of the legal electors voting thereon vote in favor of the same at a general or special election."

Hence, it follows that the council would have no right to permit an extension of the lines after the proposition had been voted down.

With reference to your second question, will say that the city of Fort Dodge was held liable to a person who was injured by permitting an exhibition to take place in and over the street in what was known as the "Slide for life" case, and if the poles are negligently set in the street, I am inclined to think that the city might be liable whether there is or is not a franchise. On the other hand, if they are not negligently placed in the street, the city would not be liable, whether there was or was not a franchise.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

BURIAL ASSOCIATIONS.—The business of a burial association conducted according to the by-laws of the Harrison Burial Association of Keokuk amounts to an insurance business and such concern should comply with the insurance laws of the state.

April 13, 1912.

HON. JOHN L. BLEAKLY,
Auditor of State,
State House.

SIR: You ask whether or not the nature of the business such as is now being transacted by the Harrison Burial Association of Keokuk, Iowa, and the Fort Madison Mutual and Co-operative Burial Association of Fort Madison, Iowa, is such as to bring it within the provisions of the insurance laws of the state of Iowa. To determine this question, it is only necessary for us to decide whether or not the business of these associations is a form of insurance, for if it is, then in that event, they must comply with the requirements of our statutes before they can do business or exercise any authority or power in the state of Iowa.

We have carefully examined the by-laws of the Fort Madison Mutual and Co-operative Burial Association and find that section 2 thereof provides:

> "This association is founded for the purpose of furnishing necessary funds for the burial of its members by voluntary

contributions of the other surviving members, as hereinafter provided."

Section 9 of the same by-laws provides:

"Every member of the association * * * shall be entitled, at his or her death, to the sum of one hundred dollars from the treasury of the association for funeral and burial expenses, and said sum of one hundred dollars to be paid to the association's undertaker for conducting said funeral and burial."

Section 12 of the same by-laws provides:

"The monthly assessments of twelve (12) cents collected from members over ten years of age shall be placed in the funeral benefit fund. The monthly assessment of seven (7) cents collected from members ten years of age and under shall be placed in the funeral benefit fund. * * *"

It appears, therefore, from the by-laws that every member of the association is entitled to one hundred dollars at his or her death. It is true that this one hundred dollars is to be used for funeral and burial expenses, and is to be paid to the undertaker of the association, but it is our opinion that the contract is not on this account any less an insurance contract. An examination of the definitions of insurance which have been most frequently approved by the courts and writers satisfy us that the contracts of these associations clearly come within the definitions of insurance. Perhaps the one most frequently approved by the courts is that of Justice Gray in the case of *Commonwealth vs. Wetherbee,* 105 Mass., 149, which is as follows:

"A contract of insurance is an agreement by which one party for a consideration, which is usually paid in money, either in one sum or at different times during the continuation of the risk, promises to make a certain payment of money, on the destruction or injury of something in which the other party is interested. * * * * All that is requisite to constitute such a contract is the payment of the consideration by the one and the promise of the other to pay the amount of the insurance upon the happening of injury to the subject by the contingency contemplated in the contract."

Other definitions varying somewhat in language, but identical in substance with that of Justice Gray, may be found in the

opinions of many of the state and federal courts. Judge Beck of the Iowa supreme bench, speaking for the court in the case of *State vs. Nichols,* 78 Iowa, 748, defined insurance as, "An institution which undertakes to pay a sum of money upon the death of the insured, or at another fixed time, in consideration of premiums, assessments or payments made in any other way."

It has been claimed that these associations had successfully escaped the statutory provisions regulating insurance in Iowa by making the insurance of one hundred dollars payable direct to the undertaker who buried the insured, but this proposition is met by Judge Collins in the case of *State vs. Beardsley,* 92 N. W. (Minn.) 472, in which he said:

> "If he becomes disabled, the company promises to do an act of value to him. If he dies, the promise is to do an act of value to his widow or to his heirs; that is, an act equivalent to, and actually involving, the payment of money, conditioned upon the cessation of human life. The real character of this promise, or of the act to be performed, cannot be concealed or changed by the use or absence of words in the contract itself; and it is wholly immaterial that on its face this contract does not expressly purport to be one of insurance, and that this word nowhere appears in it. Its nature is to be determined by an examination of its contents, and not by the terms used. The performance of the contract may be enforced by the holder in case of disability, or by his widow or heirs in case of his decease. If it does not come within the definition of an insurance contract, as found in section 3 (that is, if it is not an agreement by which one party, for a consideration, promises to pay money or its equivalent, or to do some act of value to the assured, upon the destruction or injury of something in which the other party has an interest), it involves the payment of money or something else of value to the family or representatives of the holder, conditioned upon the continuance or cessation of human life, and is covered by the definition found in section 63. It is an agreement involving, and providing, in effect, for the indirect payment of money by the relinquishment of a debt; and there is no substantial distinction between such an agreement or obligation and the ordinary life insurance policy. The obligation in each case is conditioned upon the cessation of human life."

Some contend that these organizations are benevolent associations, and that the certificates of membership cannot be regarded as contracts of insurance. The supreme court of Iowa has answered this contention in the case of *McConnell vs. Iowa Mutual Aid Association*, 79 Iowa, 757, where the same contention was being urged by the defendant company. The court said, page 760:

> "But counsel for defendant insist that the system of insurance to which the policy involved in this suit belongs is 'purely benevolent,' and, therefore, ought not to be subject to the legislation applicable to other classes of insurance. We think the 'benevolence' in the case is purchased for, at least, a fair, if not a liberal, consideration, and rests upon a contract which must be regarded and enforced by the law as all other contracts. It will not do to recognize a rule which requires courts to consider the purposes of contracts, or to be guided in their interpretation and the application of remedies for enforcing them, by the benefits conferred upon the contracting parties, and the benevolent purposes they had in view when they assumed the obligations of the contract."

In the leading case of *State vs. Merchants Exchange Mutual Benefit Society*, 72 Mo., 146, it was contended that defendant society was a benevolent one and not an insurance company, but the court held that the contract was one of insurance, saying that all insurance was originally based on the idea of benevolence; that the benevolence in this case does not flow from mere good will, but from legal obligation; that its gifts are not bestowed without consideration, but depend on mutual promises; that if defendants are exercising charity and benevolence by means of contracts for the payment of money on the death of a member, they are doing an insurance business.

See also:

State vs. Miller, 23 N. W. (Iowa), 241;

Berry vs. K. T. & M. L. I. Co., 46 Fed., 439;

National Union vs. Marlow, 74 Fed., 775;

Commonwealth vs. Wetherbee, 105 Mass., 149;

Holland vs. Order of Chosen Friends, 54 N. J. Law, 490.

The writer is satisfied after an examination of the authorities that the contracts of these associations constitute insurance con-

tracts, and that the associations themselves are insurance organizations.

In view of the foregoing conclusion, it is not inappropriate to quote the following from the opinion of Judge Beck, rendered in the case of *State vs. Nichols*, 78 Iowa, 747. He said:

> "If it be an insurance company,—that is, an institution which undertakes to pay a sum of money upon the death of the assured, or at another fixed time, in consideration of premiums, assessments or payments made in any other way, it must comply with the requirements of our statutes before it can do business or exercise any authority or power in the state."

It is perhaps unnecessary to say that only such risks as are recognized and authorized by code section 1709, as amended, can be written by insurance companies in the state of Iowa; also that under the provisions of section 1798-a of the 1907 supplement to the code, as amended by chapter 18 of the acts of the thirty-fourth general assembly, life insurance associations, such as are described in section 1284 of the 1907 supplement to the code, are no longer authorized to do business in the state of Iowa.

The foregoing opinion is the result of an independent and thorough examination of the authorities, and is in harmony with an opinion rendered March 25th, 1910, by former Attorney General H. W. Byers, and also in harmony with the position taken by your department. I have submitted the opinion to Attorney General Cosson and he concurs with me in the conclusion set forth herein.

Respectfully,
HENRY E. SAMPSON,
Special Counsel.

JUSTICE OF THE PEACE.—Not entitled to office supplies.

April 18, 1912.

C. F. DAVIS, *J. P.*,
Bloomfield, Iowa.

DEAR SIR: Yours of the 8th instant addressed to the attorney general has been referred to me for reply.

Your question is, whether or not, under code section 1073, a justice of the peace is a county officer in such a sense as to be entitled to have his office rent, etc., furnished by the board of supervisors.

While the section to which you refer states that the justice "shall be a county officer," yet it is not all county officers who are thus supplied. Code section 468 provides:

> "The board of supervisors shall furnish the clerk of the district court, sheriff, recorder, treasurer, auditor, county attorney and county superintendent with offices at the county seat, together with fuel, lights, blanks, books and stationery necessary and proper to enable them to discharge the duties of their respective offices."

Inasmuch as justices are not included in this enumeration, the legislative intent must have been not to allow them this benefit.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

REGISTRATION OF VOTERS—WHEN REQUIRED.—No registration of voters is required for primary election.

April 18, 1912.

A. B. MAXWELL, *City Clerk,*
Ames, Iowa.

DEAR SIR: Yours of yesterday addressed to the attorney general has been referred to me for reply.

Your question briefly stated is, whether or not registration of voters is required for the primary election the same as for general and city elections.

This inquiry should be answered in the negative.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

EMINENT DOMAIN—STATE MAY CONDEMN LANDS UNDER.—The state may condemn additional lands for fair ground purposes under code supplement section 2024-d.

April 19, 1912.

HON. EXECUTIVE COUNCIL,
State House.

GENTLEMEN: Yours of the 17th instant has been referred to me for reply.

You call attention to code section 2024 and to code supplement section 2024-d, and inquire whether either of these statutes provides authority for the state obtaining a good title to the property where the same is desired for the purpose of additions to the state fair grounds.

The first section to which you call attention, 2024, provides:

> "Whenever, in the opinion of the governor, the public interest requires the taking of any real estate for the making or construction of any drains, sewers, yards, walls, buildings or other improvements or conveniences for the use or benefit of the penitentiaries, hospitals for the insane or other *institutions* of the state, upon or across private property, the same proceedings may be had in the name of the state as provided in this chapter, and the proceedings shall be conducted by the county attorney of the county in which the land is situated, whenever directed by the governor, or he may appoint some other person for that purpose."

Thus the question is presented as to whether or not the state fair grounds or the state agricultural society, for whose convenience, use and benefit the property is desired, is an "institution of the state." Our supreme court, in the case of *Hern vs. The State Agricultural Society,* 91 Iowa, 97, made use of the following language with reference to such society:

> "It is an agency of the state; it exists for the sole purpose of promoting the public interests in the business of agriculture. Its public character more fully appears when we consider that the organization is provided for by statute; that it has no stockholders; that by law the president of each county agricultural society in the state, or their delegate therefrom duly authorized is made a member of the board of directors; that said board is required to make annual reports to the governor.
>
> "The society is an arm or agency of the state, organized for the promotion of the public good and for the advancement of the agricultural interests of the state."

In the case of *Dodge vs. Williams,* 50 N. W. Reporter, at page 1107, the supreme court of Wisconsin, in passing upon the meaning of the word "institution," said:

> A private school or college may by courtesy be called an 'institution' according to the American fashion of promoting people and things by brevet names, but in legal parlance, an institution implies foundation by law, enactment or prescription. One may open and equip a private school; he cannot properly be said to institute it."

Inasmuch as the state agricultural society (now department of agriculture) is provided for and created by statute, it would seem to be clear that it is an institution of the state within the meaning of this section.

However this may be, it would seem that the state, with reference to the matter in hand, would not be compelled to rest its right on this section alone, for code supplement section 2024-d provides:

> "Whenever, in the opinion of the executive council of the state, public interest requires the taking of real estate as a site for any state building, or as additional grounds for any existing state building, or for any other state purpose, the state may take and hold under its right of eminent domain so much real estate as is necessary for the purpose for which the same is taken; and proceedings may be instituted in the name of the state of Iowa for the condemnation of such real estate under the provisions of chapter four (4) of title ten (X) of the code, which proceedings shall be conducted by some person appointed by the governor of the state."

From this section it will be seen that the state is not limited to instances where the real estate is required for the convenience or improvement of a state institution, but the language is,

> "Whenever, in the opinion of the executive council of the state, public interest requires the taking of real estate as a site for any *state building* * * * or for any other *state purpose*, the state may take and hold, under its right of eminent domain, so much real estate as is necessary for the purpose for which the same is taken."

The title to the state fair grounds is required by law to be, and is, in fact, in the name of the state, and as the lands in this instance are sought for the purpose of an addition to such fair grounds, it would clearly be for a state purpose, within the meaning of this section, and if any buildings are to be erected thereon, it would as clearly be a site for state buildings, within the meaning of this section.

Hence, I am of the opinion that either of these sections would furnish sufficient authority for the proposed action of the executive council.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

MOVING PICTURE SHOWS—PROTECTION FROM FIRE.—There are no special provisions applicable to moving picture shows with reference to protection against danger from fire. The provisions concerning fire escapes and exits from other buildings and theaters apply.

April 19, 1912.

ALEX. CRAWFORD, M. D.,
Mt. Vernon, Iowa.

DEAR SIR: Yours of the 14th instant addressed to the attorney general has been referred to me for reply.

Your question is: "Is there a state law providing for the protection of the public against danger from fire in buildings used for moving picture shows?"

The last general assembly had before it a measure especially designed to provide better fire protection in buildings of this kind, but this measure failed to pass. The state law now in force covering this question is found in code supplement sections 4999-a6 to 4999-a14 inclusive. The first section referred to provides:

> "The owners, proprietors and lessees of all buildings, structures or enclosures of three or more stories in height, now constructed or hereafter to be erected, shall provide for and equip said buildings and structures with such protection against fire and means of escape from such buildings as shall hereafter be set forth in this bill."

Subdivision 3 of the following section covers "buildings, used as opera houses, theatres or public halls, of a seating capacity exceeding three hundred (300)," and in the following section it is provided that buildings in this class "shall be provided with at least one of the above described outside stairways, or such a number of exits or such a number of above described stairways as may be determined by the chief of fire department, or the mayor of each city or town where no such chief of fire department exists." You

are referred to this section for the character of outside stairways mentioned.

In all probability, your case is not in the three story building class and possibly the seating capacity does not exceed 300, in either of which event, this statute would not apply, in which event the situation would be limited to such regulation as your city might provide under the authority of code section 711 which provides:

> "They (cities and towns) shall have power to make regulations against danger from accidents by fire or electrical apparatus, to establish fire limits, to prohibit within such limits the erection of any building or addition thereto, unless the outer walls be made of brick, iron, stone, mortar or other non-combustible material, with fire proof roofs, and to provide for the removal of any structure erected contrary to such prohibition,"

and under the following section:

> "to require the construction of fire escapes to buildings, and to regulate and control same."

Yours very truly,
C. A. ROBBINS,
Assistant Attorney General.

SPECIAL ASSESSMENTS—COLLECTION OF—POWER OF BOARD OF SUPERVISORS.—The board of supervisors have no power to instruct the county treasurer to make special assessments without collecting the charge of three-fourths of one per cent of such collections.

April 19, 1912.

J. P. HERTERT, *County Attorney,*
Harlan, Iowa.

DEAR SIR: Yours of the 13th instant addressed to the attorney general has been referred to me for reply.

Your question, as stated by you, is:

> "Can the board of supervisors instruct the county treasurer to make collection of a special assessment *with* making the charge of ¾ of one per cent of the money so collected?"

I assume that the word "with" in the above question was intended to read "without," and with this understanding, I think the inquiry should be answered in the negative.

With reference to the last part of your letter, I am enclosing you an extract from a letter written County Attorney Gibson on the 3rd instant covering the same question.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

SCHOOL GROUNDS—FENCES SURROUNDING—DISTRICT TO MAINTAIN. —It is the duty of the school board to maintain all, not simply half, of the fences between the school house site and the cultivated or improved lands of the adjoining owner, and where the owner has the adjoining lands fenced hog tight the school house fence must also be hog tight.

April 20, 1912.

MR. A. E. OLSON,
Burnside, Iowa.

DEAR SIR: Yours of April 18th addressed to the attorney general has been referred to me for reply.

Your question briefly stated is, whether or not the school district is required to fence with woven wire the school house lot where the adjoining farm land is so fenced.

Code supplement section 2745-a provides:

> "It shall be the duty of all boards of school directors in school districts where the school house site joins the *cultivated or improved* lands of another, to build and maintain a lawful fence between said site and cultivated or improved land."

Hence, it is clear that the burden is on the school district to build all, and not simply half of the fence, between the school lot and such lands.

By chapter 138 of the acts of the thirty-third general assembly, a lawful fence is defined and may be constructed in numerous ways of rails, boards, wire, etc. Then comes the following:

> "Provided however that all partition fences may be made tight by the party desiring it, and when his portion is so completed, and securely fastened to good substantial posts set

firmly in the ground, not more than twenty (20) feet apart, the adjoining property owner shall construct his portion of the adjoining fence, in a like tight manner, same to be securely fastened to good substantial posts set firmly in the ground, not more than twenty (20) feet apart. All tight partition fences shall consist of no less than twenty-four (24) inches of substantial woven wire on the bottom."

Then follow provisions with reference to the number of wires on top, also other provisions allowing different widths of woven wire and the correspondingly greater number of barb wires on top.

Hence, I am of the opinion that it is the duty of the school district, not only to build the entire portion of the lawful fence, but also to make the entire portion between the school lot and the cultivated or improved lands of another tight in some one of the several ways mentioned in chapter 138. They would not be required, however, to use the same width of woven wire, but might use any one of the several widths provided for in this section.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

HIGHWAYS—CHANGE OF PLAN.—The petition required by section 1 of chapter 98, acts of the thirty-third general assembly authorizing a return to the subdistrict plan need only be signed by sixty-five per cent of the voters who voted at the last preceding election and who still reside in the district.

INCOMPATIBLE OFFICES.—Township trustees may not act as dragging superintendents.

April 22, 1912.

C. B. CLOVIS, *County Attorney,*
Atlantic, Iowa.

DEAR SIR: Yours of the 2d instant addressed to the attorney general has been referred to me for reply.

You call attention to chapter 98 of the acts of the thirty-third general assembly, and you then state: "Over a year ago one township in county returned to the subdistrict plan *without* the petition provided for and no superintendents were elected," and you then propound the following question:

"May the trustees appoint road superintendents to work the roads until superintendents can be elected?"

I am inclined to think that the following language contained in section 1 of the act to which you refer: "When a written petition is presented to them, signed by at least sixty-five per cent of the voters of such township residing outside of incorporated towns who voted at the last preceding general election," is a necessary prerequisite required to authorize the board to change to the subdistrict plan, and that, hence, the action taken over a year ago without such petition is void, and it would be the duty of the township trustees to direct the expenditure of the road funds and labor, or they might let by contract to the lowest responsible bidder any part or all of the work on the roads for the current year, as pro vided by code supplement section 1533.

State vs. York, 131 Iowa, 635.

Your second question is: "If they may appoint such supervisor, must he be a resident of the county?"

The same section, 1533, provides: "or may appoint not to exceed four superintendents of roads, to oversee, subject to the direction of the board, all or any part of the work." As no qualifications are required, and as the office is an appointive one under this section, instead of an elective one under section 1532-a as amended, such appointee need not be a resident of the county.

Your third question is: "In case the trustees employ a road supervisor as above, may such appointee employ a man who resides outside of the county to perform all the labor of road supervisor?"

In my judgment, this inquiry should be answered in the affirmative.

Your fourth question is: "May the three township trustees act as and perform the duties of dragging superintendent if they make no charge for their work?"

Mr. Lee of this department has rendered an opinion to the effect that there would be a conflict in the duties of the two offices, and while the offer to perform the service without pay would avoid the effect of the decision in the case of *State vs. York* above cited, yet this would not do away with the conflict referred to. (See page 7 of enclosed pamphlet.) Hence, I am of the opinion that this interrogatory should be answered in the negative.

Your fifth and last interrogatory is as follows: "Is it necessary that the subdraggers employed to drag the roads under a superintendent of dragging shall reside in the township, or even in the county?"

This question should be answered in the negative.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

VETERINARY SURGEONS.—Graduating after registration may advertise as such.

April 23, 1912.

A. M. WRIGHT, *V. S.*,
Emmetsburg, Iowa.

DEAR SIR: Yours of the 20th instant addressed to the attorney general has been referred to me for reply, on account of his being absent from the city.

Your question briefly stated is, whether or not a veterinarian who is registered as such and as a non-graduate, and who, after being registered, is duly graduated, may advertise as a graduate veterinarian.

I am inclined to think that this question should be answered in the affirmative. There is no distinction known to the law between non-graduates and graduates, except that the graduate is entitled, under section 2538-c of the supplement to the code, to be registered upon presentation of his diploma duly verified, and if, when such diploma is received, the party is already registered, there would be no necessity for another registration in my judgment.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

TOY PISTOLS—TOY REVOLVERS—CAPS CONTAINING DYNAMITE—BLANK CARTRIDGES.—Fire crackers more than three-fourths inch in diameter and five inches in length may not be sold except for mining purposes or for danger signals or other necessary uses.

April 23, 1912.

E. W. COBURN & SON,
Waterloo, Iowa.

GENTLEMEN: Yours of the 22d instant addressed to the attorney general asking for the law with reference to the use of blank cartridges, has been referred to me for reply.

The law governing this matter is found in code supplement section 5028-p, and reads as follows:

> "No person shall use, sell, offer for sale or keep for sale within this state any toy pistols, toy revolvers, caps containing dynamite, blank cartridges for toy revolvers or toy pistols, or fire crackers more than five inches in length and more than three-fourths of an inch in diameter; providing caps containing dynamite may be used, kept for sale or sold when needed for mining purposes or for danger signals, or for other necessary uses."

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

AUTOMOBILES—TAXATION OF UNREGISTERED.

April 25, 1912.

E. E. EVERETT, *County Auditor*,
Independence, Iowa.

DEAR SIR: Yours of the 15th instant addressed to the attorney general has been referred to me for reply.

Your question is, whether or not a dealer who carried over two automobiles was properly assessed with such machines as merchandise in view of the fact that he had a dealer's certificate of registration and duplicate number plates, and in view of the further fact that when sold the purchaser will have to pay the state license which you say will make a double assessment.

This department has ruled that two methods are open to the dealer: He may either list his entire stock on hand as merchandise,

or he may register each individual machine, in which event, he would not need the dealer's license. By registering each individual machine, he could, when he sells the machine, transfer the certificate of registration by the payment of a one dollar fee, and the amount of this registration fee he could add to the price of the machine.

There are many instances where double taxation occurs, but in the case supposed by you, unless the dealer is taxed with the property, it might escape entirely, for he may not sell the machine during the year.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

SOLDIERS' EXEMPTIONS—SPECIAL ASSESSMENTS.—The property of a soldier is liable for special assessments levied for payment of local improvements even though otherwise exempt.

April 25, 1912.

MR. W. H. MCCUNE,
500 Dewitt St.,
Clinton, Iowa.

DEAR SIR: Yours of the 15th instant addressed to the attorney general has been referred to me for reply.

Your question briefly stated is, whether or not your house and lot in the city of Clinton is liable for special assessments levied for sewer and other improvements in view of the fact that you are a soldier and the property is otherwise exempt from taxation.

This department has ruled that the soldiers' exemption laws do not apply to special assessments levied for the payment of local improvements. Hence, it follows that your inquiry must be answered in the affirmative.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

POLICEMEN'S PENSION.—The amount of policemen's pension is one-half the amount of his salary at the date of his retirement.

April 25, 1912.

MR. JOHN W. LAWLER,
Secretary Police and Fire Commission,
Dubuque, Iowa.

DEAR SIR: Yours of the 15th instant addressed to the attorney general has been referred to me for reply.

Your questions are:

"First. In the event of his not being appointed chief by the present mayor's successor, would he be entitled to position on the force?

"Second. Would his two years' service as chief be considered as part of the five consecutive years which must be his final record before being entitled to a pension?

"Third. If so, would his pension be one-half his salary as chief or of the salary he now earns?"

Your first question should be answered in the negative; the second in the affirmative.

With reference to your third question, the amount of the pension would be one-half of his salary at the date of his retirement. See section 5, chapter 62, acts of the thirty-third general assembly.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

WEIGHTS AND MEASURES.—A bushel of potatoes consists of sixty pounds.

April 25, 1912.

MR. BERNARD B. JONES,
Mason City, Iowa.

DEAR SIR: Yours of the 23d instant addressed to the attorney general has been referred to me for reply.

Your question briefly stated involves the meaning of the term "bushel" as applied to potatoes, and while this matter is a private one upon which this department would not be authorized to give an opinion, I may call your attention to the provisions of code section 3015, which reads as follows:

> "All contracts hereafter made within this state for work to be done, or for anything to be sold or delivered, by weight or measure, shall be taken and construed according to the standards of weight and measure hereby adopted as the standard of this state."

and to code supplement section 3016 which reads as follows:

> "A bushel of the respective articles hereinafter mentioned will mean the amount of weight in this section specified: * * * Potatoes.....60 pounds."

Hence, it follows that where potatoes are bought by the bushel the purchaser is entitled to 60 pounds and is not required to accept potatoes by measure rather than by weight.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

BRIDGES AND CULVERTS—CONSTRUCTION OF BY COUNTIES AND TOWNSHIPS DISCUSSED.

April 25, 1912.

HON. A. L. AMES,
Traer, Iowa.

DEAR SIR: I have examined the index of opinions given out by this department and fail to find any that is in conflict with the views set forth in your letter of the 30th ultimo.

With reference to the distinction between a bridge and a culvert, I call your attention to the following:

> "A bridge denotes a structure of wood, iron, brick, or stone, ordinarily erected over a river, creek, pond or lake, or over a ravine, railroad, canal or other obstruction in the highway, so as to make a continuous roadway and afford to travelers a convenient passageway from one bank to the other. A culvert for draining *surface water* is not a bridge."
>
> *Carroll County Commissioners vs. Baily,* 122 Ind., 46.

A culvert is defined by Worcester as an arched passage or drain for water beneath a road, canal or railway.

The word "culvert" in its ordinary and common meaning, is a waterway or water passage, whether of wood or stone, square or arched.

Oursler vs. B. & O., 60 Md., 358.

"A culvert is an arched and covered drain running across and under the road to carry the surface water across from one side to the other of the road."

Kowalka vs. Common Council of St. Joe, 73 Mich., 322.

From these authorities I am of the opinion that the word "culvert," as used in the Iowa statutes, should be confined to those waterways constructed under the highway which are designed for the purpose of carrying off surface water, as distinguished from structures built across streams, ravines, railroad tracks or other obstructions, and that the mere size of the waterway should not alone determine whether it be a culvert or a bridge.

With reference to the authority of the township trustees to build culverts, you will notice that subdivision 1 of section 1528 of the code supplement provides:

"At the April meeting said trustees shall determine the rate of property tax to be levied for the succeeding year for roads, bridges, guide boards, plows, scrapers, tools and machinery adapted to the *construction* and repair of roads and for the payment of any indebtedness previously incurred for road purposes and levy the same."

As a culvert is constructed under and is practically a part of the road, the power to construct the same might be included in the word "construction" as used in this section. However, the substitute enacted for this paragraph and found in section 8 of chapter 24 of the thirty-fourth general assembly eliminates the word "construction" and inserts the word culverts," so as to make the section read:

"The rate of property tax to be levied for the succeeding year for the repair of the roads, culverts and bridges and for guide boards, plows, scrapers, road drags, tools and machinery adapted to the repair of the roads, culverts and bridges."

By section 2 of the same chapter, which becomes paragraph 24 of code supplement section 422, it is provided with reference to the powers of the board of supervisors, as follows: "To employ a competent person who shall perform all of the duties now belonging to the office of county surveyor and who may be employed by them (county supervisors) for the purpose of making general specifications for the grading, repairing and building of roads, bridges and culverts."

It will be seen that this section is not clear in that it is uncertain whether the repairing and building of roads, bridges and culverts is to be done by the county board or simply the specifications furnished by the board in order that the repair of the roads and culverts might be properly done by the trustees.

While I have no doubt that the intent of the legislature was to change the division of work, the line of division is not very clearly established by these sections.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

AUTOMOBILES—OPERATION OF WITHOUT A NUMBER PLATE.—The owner of an automobile who has applied for registration may operate same under a duplicate of the dealer's number for a period of fifteen days only after taking possession of the same.

April 25, 1912.

O. A. HAMMAND, *County Attorney,*
Spencer, Iowa.

DEAR SIR: Your letter of the 19th instant addressed to the attorney general has been referred to me for reply.

Your question briefly stated is, whether or not the purchaser of an automobile may be allowed to operate the same without the regulation number plate and without a duplicate dealer's number plate described in section 15 of chapter 72 of the acts of the thirty-fourth general assembly and with merely a pasteboard bearing the registration number of the dealer.

Section 15 of this chapter provides: "Upon the sale of a motor vehicle by a manufacturer or dealer, the vendee shall be allowed to operate the same upon the public highways for a period of *fifteen* days after taking possession thereof, provided that during such period the motor vehicle shall have attached thereto a *placard* bearing the registration number of the manufacturer or dealer under which it might previously have been operated; and provided further, that the application for registration shall be made by mail or otherwise before such vehicle shall be so used." Hence, it

follows that the above inquiry should be answered in the affirmative.

Yours truly,

C. A. ROBBINS,

Assistant Attorney General.

ELECTION BOARDS—HOW CONSTITUTED.—Election boards shall consist of three judges and two clerks, not more than two judges nor more than one clerk shall belong to the same political party.

April 25, 1912.

MR. CARY O. ANDREW,
Grand River, Iowa.

DEAR SIR: Yours of the 15th instant addressed to the attorney general has been referred to me for reply.

You call attention to the fact that there is but one voting precinct in Grand River township of your county, and that two of the trustees are republicans and one a democrat, and to the fact that the county board named a democrat to act as judge at the primary and general elections to be held this year, and you inquire whether or not this action of the board is legal.

I am inclined to think your inquiry should be answered in the affirmative. Code section 1093 provides:

> "Election boards shall consist of three judges and two clerks; not more than two judges and not more than one clerk shall belong to the same political party,"

so in the case referred to, the board as now constituted would have two democrats and one republican, whereas, if no change had been made, there would have been two republicans and one democrat. While it would not have been necessary for the board to make any change, and they might legally have left the two republicans and one democrat to act as election judges, yet there is no legal objection to their naming a democrat in place of one of the republicans so long as not more than two judges are from the same political party.

Yours truly,

C. A. ROBBINS,

Assistant Attorney General.

LOCAL MILK INSPECTORS.—The food and dairy commissioner may appoint local milk inspectors in cities having ten thousand inhabitants.

April 26, 1912.

MR. W. B. BARNEY,
Dairy and Food Commissioner,
City.

DEAR SIR: Yours of the 8th instant addressed to the attorney general has been referred to me for reply.

Your first question is, whether or not the dairy commissioner has authority to make an appointment of a local inspector in cities having less than 10,000 population.

I am inclined to think that this question should be answered in the affirmative. While code section 2524 provides:

> "The commissioner may appoint agents in any city having over 10,000 inhabitants to collect from each dealer, not more than four times each month, samples of milk offered for sale therein."

yet by section 2 of chapter 174, acts of the thirty-fourth general assembly, it is further provided:

> "He (dairy commissioner) may, with the approval of the executive council, appoint such *assistants* as he may deem necessary who may exercise the powers now provided by law in the case of milk inspectors, together with those conferred by this act, and they shall perform such duties as may be assigned to them by the state dairy and food commissioner."

so that it would appear that the commissioner, with the approval of the executive council, might appoint agents or assistants in cities of less than 10,000 population.

Your second question is with reference to the power of city and town councils with reference to milk inspection.

In the case of *Bear vs. City of Cedar Rapids,* 147 Iowa, 341, it was held that neither the statutes then in force nor the rules of the state board of health furnished any authority, either express or by implication, for a city to adopt an ordinance requiring that dealers in milk and cream procure a license, or that they be required to have their dairies or dairy cattle inspected, and the enforcement of the ordinance of the city in that case was enjoined

by the court on the ground that the same was void for want of power in the city to enact the same.

I know of no subsequent statute that would confer the power which was held to be lacking in that case.

I am enclosing a duplicate of this letter in order that you may mail a copy to Mr. R. J. Johnston of Humboldt.

Yours very truly,
C. A. ROBBINS,
Assistant Attorney General.

LAKES AND STATE WATERS.—Buildings, dancing pavilions and the like may not be placed upon the lakes or other public waters of the state or upon the shores thereof between high and low water mark against the objection of the state.

April 27, 1912.

WILEY S. RANKIN, *Lawyer,*
Mason City, Iowa.

DEAR SIR: Your question, as stated by you, is: "Can a building be placed on state property, that is on the shore of a lake or out in the water, when the same is placed permanently during the open season?"

You also call attention to an opinion rendered by Attorney General Byers with reference to what is known as the Whitaker Dancing Pavilion at Clear Lake, which you say was removed on account of this ruling.

Our supreme court, in the case of *State vs. Jones,* 143 Iowa, at 409, made use of the following language:

> "It is enough to dispose of the case at bar to decide, as we do, that the state has such an interest in Goose Lake as will support an action to restrain defendants, who are without title, from draining the waters therefrom, or otherwise *exercising proprietary control* over the same."

Hence, I am of the opinion that the building such as you describe could not be erected against the objection of the state. Whether or not others might have any legal ground of objection, I am unable to state. I have given the matter considerable in-

vestigation and have been unable to find any authorities throwing any light on this question.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

PRIMARY ELECTIONS—ALPHABETICAL LISTS—NAMES TO BE INCLUDED.

April 29, 1912.

FRANK WISE, *Deputy County Auditor,*
Council Bluffs, Iowa.

DEAR SIR: I have at hand your letter of recent date in which you ask the following question:

> "Under section 1087-a7 in making alphabetical lists to be furnished election boards for the primary election, is making an alphabetical list of those who voted at the last preceding primary election sufficient, or should the list include the names of those who voted at any preceding primary election?"

I believe the statute only contemplates that the auditor should furnish the clerks with a list of names of those who participated in the last preceding primary, as there is no provision in the law for revising the voting lists in each precinct, and the only burden this method imposes is upon the voter who participated in the 1908 primaries, but who did not vote in the 1910, and all that is necessary for him to do to procure a ballot is to call for his party ballot the same as it was necessary for him to do in the first primary in which he participated.

Yours very truly,

JOHN FLETCHER,
Assistant Attorney General.

PRIMARY ELECTIONS.—Political party defined.

May 2, 1912.

COUNTY ATTORNEY W. H. WINEGAR,
Perry, Iowa.

DEAR SIR: I am in receipt of your communication of the 27th ultimo in which you express doubt as to the right of a candidate to cause his name to be placed upon the primary ballot considering that his political party cast less than two per cent of the

vote cast for governor in that particular subdivision at the last preceding general election.

The reply to this question would be determined as to whether or not the particular party cast at least two per cent for governor at the last preceding general election of the total vote cast at said election.

I am advised by the secretary of state that the Socialist party did cast at least two per cent of the total vote cast for governor at the last preceding election.

Construing section 1087-a1, section 1087-a3 of the supplement to the code, 1907, and section 1098 of the code, I think it is clearly the legislative intent that where a party casts the two per cent for governor at the last preceding election, that then, and in that event, it is not necessary in order for a candidate to have his name placed upon the primary ballot that his party should have cast two per cent in any particular subdivision of the state.

Yours very truly,
GEORGE COSSON,
Attorney General.

PRIMARY ELECTIONS.—Representative not county officer.

May 3, 1912.

MR. JOHN A. HUGLIN,
Fairfield, Iowa.

DEAR SIR: I am in receipt of your communication of the 29th ultimo advising that Mr. Lamson, who is a candidate for representative in the legislature, failed to file his nomination papers in the office of the secretary of state as by law provided. You request to be advised as to whether these papers may be filed in the county auditor's office, or what can be done to permit him to get his name upon the ballot.

In my opinion the filing of the nomination papers in any county office would be of absolutely no avail.

Section 1087-a10 provides among other things that:

> "No candidate for nomination for an elective state office, or member of the general assembly, shall have his name printed upon the official primary ballot of his party unless at least

forty days prior to such primary election a nomination paper shall have been filed in his behalf in the office of the secretary of state."

It is clear that a representative is not included in the term "county officer."

Section 1087-a19 in providing for the canvass by the board of supervisors after the primary, provides in part that:

"Such canvass and certificate shall be final as to all candidates for nomination to any elective county office," etc.

But this does not include a representative for the evident reason that section 1087-a20 provides that the board of canvassers shall make a separate abstract of the canvass as to senators and representatives in the general assembly, together with other state, district and federal offices; and section 1087-a22 provides that the canvass and certificate of the state board shall be final as to all candidates named in section 1087-a20, which includes a representative in the general assembly.

A county office as defined in Words & Phrases is held to include an officer whose duties are confined to the county, and a state officer is held to include those whose duties concern the state at large or the general public.

With reference to the right to secure pasters I could not give you an official opinion as official opinions can only be given to state departments and branches of the general assembly. You should also bear in mind that the canvass is made by the state board of canvassers and they would not be legally compelled to request an opinion from this office; however, I may say to you that the secretary of state, who is a member of the state board of canvassers, has already given an opinion to the effect that pasters could be used. If used, however, they must be placed upon the ballot by the voter himself and the X must be marked in the square after the paster is placed upon the ballot and after the voter enters the booth. That, however, would be but little trouble. A small paster could be used with the man's name and a square to the left of his name, and each man could be instructed how to use the same. Of course any one can write in the name of another if he is not satisfied with the names printed on the official ballot.

I regret very much the oversight but of course there is nothing more that I can do for you except these suggestions.

Yours very truly,
GEORGE COSSON,
Attorney General.

SUPERVISORS.—How nominated.

May 4, 1912.

MR. J. W. HOSPERS,
Orange City, Iowa.

DEAR SIR: I am in receipt of your communication of the 3d instant requesting an opinion as to whether it is necessary for a candidate for a member of the board of supervisors, in a county where the county is divided into supervisor districts, to file nomination papers in the office of the county auditor; or whether an affidavit as prescribed by section 1087-a10 is sufficient, and advising that in some counties they are filing such nomination papers, whereas in others they are not.

It is not at all surprising that the law is being construed two different ways for the reason that there are two conflicting provisions in the section. A member of the board of supervisors, even if elected from a supervisor district, is a county officer because his duties pertain to the county. See the cases cited in Words & Phrases under the title "County officer."

The section, however, also contains the provision that "a candidate for an office to be filled by the voters of a subdivision of a county" etc., "shall not be required to file any nomination paper or papers," and farther on provides that "each and every candidate shall file an affidavit stating that he is eligible to the office for which he is a candidate."

A candidate for a member of the board of supervisors when the county is divided into supervisor districts is undoubtedly a candidate for an office to be filled by the voters of a subdivision of a county. Inasmuch then as there are two conflicting provisions, perhaps the latter provision ought to govern; however this may be, a construction should not be placed upon the act which would tend to disqualify a large number of candidates in view of these conflicting provisions, and therefore I should say that a candidate would, if he complied with either provision, be entitled to have

his name placed upon the ballot although it might be the safer thing for any candidate to circulate a nomination paper inasmuch as he is to be properly considered an elective county officer.

Yours very truly,

GEORGE COSSON,
Attorney General.

PRIMARY ELECTIONS.—When convention may nominate.

May 9, 1912.

MR. G. P. LINVILLE,
Cedar Rapids, Iowa.

DEAR SIR: I am in receipt of your communication of the 4th instant submitting the question as to whether a county convention can make nomination only in the event that a candidate received at least ten per centum of the whole number of votes cast for governor at the last general election on the party ticket with which he affiliates, which would result in limiting the county convention to acting only in such cases where a candidate for county office received ten per centum of the whole number of votes cast in the county for governor on his party ticket, as before stated, but failed to receive the highest number of votes for that office and at least thirty-five per centum of all the votes cast for such office by his political party; and directing my attention to that part of chapter 59, acts of the thirty-fourth general assembly, which reads as follows:

> "Provided, however, that no candidate whose name is not printed on the official ballot but receives less than ten per centum of the whole number of votes cast in the county for governor on the party ticket with which he affiliates at the last general election shall be declared to have been nominated to any such office."

and also that part of section 1087-a24, as amended, which reads as follows:

> "Vacancies occurring in nominations made in the primary election before the holding of the county, district or state convention, shall be filled by the county convention if the office in which the vacancy in nomination occurs is to be filled by the voters of the county;" etc.

It is certain that a vacancy *occurring* in a nomination made in the primary election is something different than a vacancy *existing* at and before the holding of a county convention.

State ex rel Pratt vs. Secretary of State, 141 Iowa, 196.

Were it not that section 1087-a25 in defining the duties of the county convention provides in part that:

> "The said county convention shall make nominations of candidates for the party for any office to be filled by the voters of a county when no candidate for such office has been nominated at the preceding primary election, by reason of the failure of any candidate for any such office to receive thirty-five per centum of all votes cast by such party therefor, as shown by the canvass of the returns provided for in section 19 of this act,"

and that it is also provided in said section that:

> "But in no case shall the county convention make a nomination for an office for which no person was voted for in the primary election of such party, except for judges of the superior and district courts."

I should say that a county convention had no authority to make a nomination at all unless some one had previously been nominated and a vacancy thereafter occurred before the holding of the county convention because, strictly speaking, a vacancy cannot *occur* in a nomination made in the primary election unless a nomination was actually made in the primary election. The language, however, must be read in connection with the whole primary act, and while it was undoubtedly the intention of the general assembly to prevent political conventions and party committees from making "original" nominations, it was the intention of the general assembly to permit conventions to nominate in the event that candidates had been voted for at the primary but had failed to receive thirty-five per centum of all the votes cast by the party, because such was expressly provided in the primary act. In view then of this provision, viz.: that the county convention could make nominations in the event that a candidate was voted for but did not receive thirty-five per centum of all the votes cast by his party for such office, and in view of the language of section 1087-a24 heretofore quoted, and the decision in the case of *Pratt vs. Secretary of State*, supra, I am of the opinion that a county convention cannot make a nomination to fill a vacancy unless some one is voted for at the primary

for the office in question, but that if some one is voted for at the primary for the office in question, but fails of nomination because no one received the highest number of votes and also receives thirty-five per centum of all votes cast by his party for such office, that then and in that event, the county convention has authority to make a nomination to fill said vacancy even though the candidate fails to receive ten per cent of the total number of votes for governor at the last general election by his party.

What is here stated with reference to county conventions would likewise be true with reference to district and state conventions. I have previously given an opinion to the effect that the ten per cent requirement in section 1087-a19 does not apply to a member of the house of representatives nor to a state senator in a senatorial district composed of one county, for the reason that neither a member of the house of representatives nor a state senator in a senatorial district composed of one county is an elective county officer in the sense in which the phrase is used in section 1087-a19.

Yours very truly,

GEORGE COSSON,
Attorney General.

TAXATION—LODGE PROPERTY—WHEN EXEMPT.

May 10, 1912.

MR. J. C. STOUP,
Inwood, Iowa.

DEAR SIR: Yours of the 9th instant addressed to the attorney general has been referred to me for reply.

Your first question briefly stated is whether or not shares of building and loan stock owned by I. O. O. F. lodge is exempt from taxation.

Code supplement section 1304, paragraph 2, provides that the following classes of property are not to be taxed: "Grounds and buildings belonging to benevolent institutions and societies devoted solely to the appropriate object of these institutions; * * * * moneys and credits belonging exclusively to such institutions and devoted solely to sustaining them, but not exceeding in amount or income the amount prescribed by their charters or articles of incorporation."

Assuming that your lodge is a benevolent institution, the shares of stock would come within the definition of moneys and credits and should not be assessed.

Your second question is: "Is building and loan stock taxable?"

This question should be answered in the affirmative. See code section 1326.

Your third question is: "What is the penalty, if any, for running an auto on last year's license?"

This penalty is provided by section 22 of chapter 72 of the acts of the thirty-fourth general assembly which reads as follows:

> "The violation of any of the provisions of sections from three to fifteen both inclusive of this act shall constitute a misdemeanor punishable by a fine not exceeding fifty dollars."

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

RESIDENCE—LEGAL—HOW ACQUIRED AND LOST.

May 10, 1912.

MR. F. T. HANSEN,
Forest City, Iowa.

DEAR SIR: I am in receipt of your communication of the 6th inst. advising that you are a candidate for the office of superintendent of schools of Winnebago county; that Winnebago county has always been your home; that you were, however, temporarily absent for some months while you were superintendent of schools of Emmet county; that you are again living in Winnebago county, and that you have not at any time abandoned or intended to abandon Winnebago county as your legal residence. You request an opinion in view of these facts as to whether you can properly consider Winnebago county your legal residence.

If Winnebago county was your home and you have never in fact or intentionally obtained a new legal residence nor abandoned your residence in Winnebago county, the mere fact that you were away from there for some months, or even a year, would not result in depriving you of your legal residence in Winnebago county.

Where one has a legal residence and does not actually intend to or in fact acquire a new residence by voting and exercising the

rights of citizenship elsewhere, he may retain his old residence. This is constantly being done by men holding political office and who are living at the county seat or state capital and voting at their old homes although they may have their families with them.

Yours very truly,

GEORGE COSSON,
Attorney General.

PRIMARY ELECTIONS—TIME OF FILING PAPERS—HOW COMPUTED.

May 10, 1912.

MR. E. J. RIEGEL,
County Auditor Lyon County,
Rock Rapids, Iowa.

DEAR SIR: I am in receipt of your communication of the 4th inst. advising that a candidate for county office presented affidavit and nomination papers for filing in your office at 4:30 P. M. Saturday. You request to be advised as to whether you can properly file the paper or, in other words, whether there was thirty days before the time of filing and the holding of the primary on June 3d.

The law does not recognize parts of days in the absence of some specific requirement. Paragraph 23, section 48 of the code, which gives direction for construing our statute provides that:

> "In computing time, the first day shall be excluded and the last day included, unless the last falls on Sunday, in which case the time prescribed shall be extended so as to include the whole of the following Monday."

That being true a filing on Saturday was a filing thirty days before the primary and, as before stated, the particular hour is of no consequence. When the statute provides "clear" days or so many days between, then the day of filing and the day in question must be excluded but otherwise the first day is excluded and the last day included in counting the time.

Yours very truly,

GEORGE COSSON,
Attorney General.

PRIMARY ELECTIONS—ALPHABETICAL LISTS—ARRANGEMENT OF.

May 10, 1912.

MR. ROSS MCLAUGHLIN,
Missouri Valley, Iowa.

DEAR SIR: Your letter of the 4th instant addressed to the attorney general has been referred to me for reply.

Your question briefly stated is, whether or not, in placing the names upon the ballot in alphabetical order as required by the statute, the name of McLaughlin should precede or follow the name of Murray.

There seems to be no uniform practice with reference to this matter. For instance: The Iowa Telephone Company in the preparation of their directory in this city have placed all names commencing with Mc before any of the other names commencing with the letter M, while the dockets in the office of the clerk of the supreme court and the auditor of state have all names commencing with Mc following all the other names commencing with the letter M; whereas, in the office of the secretary of state the names commencing with Mc immediately follow names commencing with the letters Ma and precede the names commencing with the letters Mad. It would seem that different blankbook manufacturers have had different ideas with reference to which should take precedence, and hence the lack of uniformity. I am inclined to the view, however, that a strict compliance with the law would require that a name commencing with Mc should immediately follow names commencing with the letters Ma, and that in reality Mc is the equivalent of Mac, and that, whether it is such equivalent or not, in any event the name of McLaughlin should precede the name of Murray.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

INTOXICATING LIQUORS.—Dispensing of to club members illegal.

May 16, 1912.

MR. T. R. PRICE,
207 East 5th St.,
Muscatine, Iowa.

DEAR SIR: Yours of the 13th ult. addressed to the attorney general has been referred to me for reply.

Your question briefly stated is whether or not the dispensing of liquors among the members of a social club is contrary to law where each club member furnishes his own liquor and the same is kept in a locker, but the custodian of the building dispenses the same to the member by punching a ticket corresponding to the amount of liquor dispensed and receiving a compensation for services.

In my judgment this question should be answered in the affirmative. It was held by our supreme court in the case of *State vs. Mercer,* 32 Iowa, 405, that a person who acts as the agent or employe of a social club to keep and deal out its liquors to members purchasing and presenting tickets may be indicted and punished for a violation of the prohibitory liquor law.

See also *Cantril vs. Sainer,* 59 Iowa, at page 27;

23 Cyc., page 205.

Yours truly,

C. A. ROBBINS,

Assistant Attorney General.

PAVING—ASSESSING COST TO RAILWAY.—A railway is chargeable with its share of cost of paving adjacent to property.

May 20, 1912.

A. H. BIERKAMP, *Cashier,*
Durant Savings Bank,
Durant, Iowa.

DEAR SIR: Yours of the 17th instant addressed to the attorney general has been referred to me for reply.

Your question briefly stated is, whether or not a city or town may properly assess one-half the expense of paving a street to a railway company where the company *owns* one-half of the street.

The property owned by the railway company is properly chargeable with its share of the cost,—not necessarily an equal division, but according to actual benefits received by the property. See *M. & St. L. Ry. Co. vs. Lindquist,* 119 Iowa, at 146. This rule, however, seems to apply only where the fee title of the adjacent property is in the railway company. See page 148 of the same opinion.

It was held by a divided court in the case of *C., R. I. & P. Ry. Co. vs. City of Ottumwa,* 112 Iowa, 300, that where the title was not owned by the railway company, but it simply had a right of way

or easement over the land, that such right of way or easement was not liable to such special assessment.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

PRIMARY—PUBLICATION OF PROCLAMATION.—The law only requires that notice be published in one newspaper.

May 21, 1912.

E. S. MORCOMBE, *Publisher,*
Storm Lake, Iowa.

DEAR SIR: Yours of the 20th instant addressed to the attorney general has been referred to me for reply.

Your question briefly stated is, whether or not the primary election proclamation must be published in two newspapers.

The answer to this question calls for the construction of code supplement section 1087-a12, which provides:

> "Such auditor shall forthwith publish a proclamation of the time of holding the primary election. * * * Such notice shall be published once each week for two consecutive weeks before the primary election, in *not to exceed two* newspapers of general circulation in the county. One of such newspapers shall represent the political party which cast the largest vote in such county at the last preceding general election, and the other, *if any,* shall represent the political party which cast the next largest vote in such county at such general election."

In my opinion this language makes it mandatory that the notice be published in one newspaper representing the dominant political party, and that, while it is perfectly proper to publish said notice in the second newspaper representing the next largest party, as shown by the vote, yet the publication in the second newspaper is at the option of the auditor rather than being a mandatory requirement.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

COUNTY OFFICERS—CHANGE OF SALARY DURING TERM OF OFFICE.—Supervisors have no authority to raise or lower salary during an officer's term.

May 22, 1912.

O. W. WITHAM, *County Attorney*,
Greenfield, Iowa.

DEAR SIR: Your two letters of the 15th instant addressed to the attorney general have been referred to me for reply.

In one letter you propound the question as to whether or not it is within the power of the board of supervisors of the county to raise, lower or change the salary of a county officer during his term of office, and you call attention to the Whitaker case reported in 81 Iowa, 527.

The doctrine of this case is still the law, and hence, it follows that this question must be answered in the negative.

In the other letter you propound the following question:

> "Have the voters residing in Walnut township outside the corporate limits of that portion of the town of Casey, located in Adair County, a right to have a polling place outside said corporate limits? And if so, would the polling place have to be designated by the board of supervisors?"

Code section 1090, as amended by chapter 70 of the acts of the thirty-third general assembly, provides:

> "Each township, or in case a township contains a city or a portion thereof, such portion of the township as is outside the limits of the city * * * shall constitute an election precinct, but the board of supervisors shall have power to divide a township or a part thereof into two or more precincts or the board of supervisors and the council of any city of less than three thousand five hundred inhabitants may combine any part of the township outside of such city with any or all of the wards thereof as one election precinct, except that where an incorporated town embraces within itself territory situated in different townships of any county, the board of supervisors *may*, for the convenience of the electors, constitute such town, and if desired, additional territory thereto abutting, into an election precinct, and shall define its boundaries and may change the same, if, in their judgment, occasion arises."

The substitute for code section 1091 found in chapter 71 of the acts of the thirty-third general assembly provides:

"Polling places for precincts outside the limits of a city, but within the township, or originally within and set off as a separate township from the township in which the city is in whole or in part situated, *may,* for the convenience of the voters, be fixed at some room or rooms in the court house or in some other building within the limits of the city as the board of supervisors may provide."

Hence, it would appear that that portion of Walnut township outside the corporate limits of Casey might be combined with that portion of Casey which is within the township as one precinct or the portion outside might constitute one precinct and the portion inside the corporate limits of Casey and in Adair county might constitute another precinct, and even though the portion outside the corporate limits be constituted a separate precinct, that the voting place might be established within the limits of the town of Casey.

In my judgment, it would be unwise to attempt to make any change in the precincts for the ensuing primary election.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

SCHOOLS—PUPILS ATTENDING IN ANOTHER DISTRICT.—Pupils passing examination in home district not required to have certificate from county superintendent. Pupil must complete course provided by home district before taking work in adjacent district.

May 22, 1912.

MR. GEORGE A. CONARD,
R. R. No. 1, Box 8, Lenox, Iowa.

DEAR SIR: Your of the 15th instant addressed to the attorney general has been referred to me for reply

Your question briefly stated is, whether or not a school corporation is liable for the tuition of scholars attending high school in another district where they so attend without having procured the certificate of the county superintendent showing their proficiency in the common branches, as required by section 2 of chapter 146.

This department has held that where the pupil is accepted by the district other than his home district after having passed a satisfac-

tory examination before or under the direction of the officers of such district, as provided in the latter part of section 2, that this examination dispenses with the necessity of the certificate from the county superintendent. The pupil should, however, procure a certificate from the president or secretary of the school corporation in which he resides, showing that he is of school age and a resident of the school corporation, and it is immaterial that the one, two or three years' high school study which the pupil may have had in his home district was had prior to the taking effect of this law.

Your second question briefly stated is, What kind of an order shall the school board pay the tuition on?

I hardly know what thought you had in mind in asking this question, but I assume that you want to know what evidence should be required by the home district of the fact that the pupil whose tuition is in question has in fact attended the other district and the length of time he has so attended. The law is silent upon this question, but the home district should be able to satisfy itself upon these questions, especially if the home district officers have given the certificate which entitles him to go to the other district. They should make a record of that and know when he enters the other district and when he completes the high school course in the other district, and from that they should be able to determine the amount of tuition to which they are liable.

Your third question is: "Supposing a scholar attending the grammar room this year passes an examination and enters high school next year, is he entitled to have the school corporation pay his tuition?"

This question should be answered in the affirmative, with the understanding, however, that there is no high school course in his home district. If there is a high school course of one, two or three years in his home district, he must first complete that before taking high school work in the adjoining district at the expense of his home district.

Your remaining inquiries have been fully answered by the foregoing.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

SUNDAY—BUSINESS TRANSACTED ON.—Cities and towns have authority by ordinance to require the closing of places of business not engaged in works of charity or necessity.

May 22, 1912.

MR. G. A. CRAIG,
Pleasanton, Iowa.

DEAR SIR: Yours of the 21st instant addressed to the attorney general has been referred to me for reply.

Your question briefly stated is, whether or not the town council have authority by ordinance to close on Sunday meat markets and lunch counters.

Code section 5040 prohibits the ordinary secular business transactions on Sunday except those of necessity and charity. The serving of meals by hotels, restaurants and lunch counters is generally considered to be of necessity, and hence, not prohibited by this section.

The authority of the town to regulate and close places on Sunday would be limited to those not engaged in works of charity or necessity. However, it has been held by our supreme court that the ordinance of a city which sought to require the closing of saloons on election day and impose a punishment therefor other and different from a state law covering the same subject was beyond the power of the city to enact, the same being in conflict with the state law.

Iowa City vs. McInnerny, 114 Iowa, 586.

And in my judgment the same rule would apply to the ordinances to which you refer. In other words, if the regulation is not other or different from that prescribed by section 5040 of the code, it would be legal; otherwise, illegal.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

PRIMARY—WITHDRAWAL OF CANDIDATE.—A person filing an affidavit as a candidate should not be permitted to withdraw same.

May 22, 1912.

C. K. NELSON, *County Auditor*,
Forest City, Iowa.

DEAR SIR: Yours of the 20th instant addressed to the attorney general has been referred to me for reply.

Your question briefly stated is, whether or not a person filing an affidavit for an office to be voted for by the voters of a subdivision of a county, and where no other nomination papers are required may thereafter file a withdrawal which would have the effect of cancelling said affidavit and of relieving the officer from printing the name on the ballot, and if so, whether or not the same party at a still later date may cancel such withdrawal and thereby restore the affidavit so as to require the printing of his name upon the ballot.

Code supplement section 1087-a10, providing for nomination papers, provides:

> "A nomination paper, when filed, *shall not be withdrawn* nor added to, nor any signature thereon revoked."

The same section further provides:

> "Each and every candidate shall make and file his affidavit stating that he is eligible to the office and that he will be a bona fide candidate for nomination for said office, and shall file such affidavit with the said nomination paper or papers when such paper or papers are required."

While the affidavit is in one sense distinguishable from nomination papers, yet where the office is one to be filled by the voters of a subdivision of a county, such affidavit takes the place of, and in fact, becomes the nomination paper and the same reasons why a nomination paper should not be withdrawn would apply equally to the affidavit.

While the question is not entirely free from doubt, there are some reasons why the party ought to be permitted to restore his name after having attempted to cancel the affidavit, in view of the fact that the same had not been acted upon and no action was required until the time arrived for printing the ballot, and in view of the whole situation, the doubt should be resolved in favor of the candidate's right to have his name printed upon the ballot, leaving to other parties adversely interested their right to contest.

Yours truly,

C. A. ROBBINS,

Assistant Attorney General.

CITIES AND TOWNS — WATERWORKS — INSTALLATION OF WATER METERS WHERE PLANT IS OWNED BY THE CITY.—City owning water plant may require use of meters by consumers.

May 24, 1912.

MR. GEO. P. CHASE,
Lake City, Iowa.

DEAR SIR: Yours of recent date addressed to the attorney general has been referred to me for investigation and reply.

Your question briefly stated is, whether or not the town council, where the water works is owned by the town, has the legal right to install water meters and require the patrons to furnish such meters or to cut them off from the use of the city water.

Code supplement section 725, speaking of cities and towns, provides:

> "They shall have power to require every individual or private corporation operating such works (water, gas, heat, light or power) to furnish any person applying therefor, along the line of its pipes, mains, wires or other conduits, with gas, heat, water, light or power, and to supply said city or town with water for fire protection and with gas, heat, light, water or power for other necessary public purposes, and to regulate and fix the rent or rate for water, gas, heat, light or power; * * *; to regulate and fix the charges for *water meters,* gas meters, electric light or power, and these powers shall not be abridged by ordinance, resolution or contract."

Section 724 provides:

> "They shall have power, when operating such works or plants to assess from time to time, in such manner as they shall deem equitable, upon each tenement or other place supplied with water, gas, heat, light or power, reasonable rents or rates fixed by ordinance," etc.

A municipal corporation may require consumers of water to use meters and keep them in repair at their own expense.

State vs. Gosnell, 116 Wis., 606; 93 N. W., 542.

A water meter is not so exclusively for the benefit of the one furnishing the water that the duty to furnish it cannot be imposed upon the consumer.

State vs. Gosnell, supra.

An ordinance for the protection of water works is not void for unreasonableness which requires all consumers using large service pipes to provide meters while it gives other consumers an option to do so.

State vs. Gosnell, supra.

A requirement that a water company shall furnish meters to those who desire to have the water used by them measured, is not unreasonable.

Spring Valley Water Works vs. San Francisco, 82 Cal., 286; 6 L. R. A., 756.

Hence, it would follow that your question should be answered in the affirmative. In other words, the town would have the right to require the use of meters and to require that they be furnished by the consumer or by the city, and to fix the rates for the water used accordingly,—that is, if the consumer furnished the meter, the rate he would be required to pay for water should be less than if the meter were furnished by the city.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

CITIES AND TOWNS—PURCHASE OF SUPPLIES FROM MEMBERS OF COUNCIL—HEALTH OFFICER.—Under section 658, code supplement, the mayor is member of council so as to act within statute prohibiting purchase of supplies by city from members of council. Member of council may be appointed health officer.

May 24, 1912.

MR. F. G. PIERCE,
Marshalltown, Iowa.

DEAR SIR: Yours of the 18th instant addressed to the attorney general in which you enclose several inquiries has been referred to me for reply.

Your first question is propounded by O. E. Shanck of Swan, Iowa, and the inquiry is, whether or not it is legal for the town to purchase lumber, cement, etc., from a firm of which the mayor is a member.

Subdivision 14 of code supplement section 668 provides:

> "No member of any *council* shall, during the time for which he is elected * * * be interested, directly or indirectly, in any contract or job for work or the profits thereof or services to be performed for the corporation."

The question immediately arises as to whether or not the mayor is a member of the council. Our supreme court held in the case of *Griffin vs. Messenger,* 114 Iowa, 99, that the mayor was a member of the council, the language of subdivision 5 of code section 658 being, "He shall be a *member* and a presiding officer of the council." By subdivision 5 of code supplement section 658, this language was eliminated so that it now reads: "He shall be the presiding officer of the council with the right to vote only in case of a tie."

Hence, in my judgment, the mayor at the present time would not be regarded as a member of the council so as to come within the foregoing statutory prohibition with reference to councilmen. However, aside from statute, the general rule is: "A public office is a public trust, and a trustee may not contract with himself personally; nor may a member of the council or board vote upon a contract in which he is personally interested. Municipal contracts entered into with officers of the corporation in violation of these fundamental doctrines are void and no action lies thereon."

28th Cyc., 650.

In this case, as we have seen, the mayor is no longer a member of the council, yet he has the right to vote in case of a tie, and if the question should come up as to whether or not the town should buy from his firm the lumber or other materials in question and there should be a tie vote pro and con among the other members of the council, the question as to whether the contract would or would not be made would be determined by the vote of the mayor, and hence, would fall directly within the law above quoted.

Cases are numerous wherein the municipality was brought into contractual relation with firms or companies of which a councilman or other city officer was a member, share holder or employe, and the courts have usually applied the general doctrines to the undoing of such contracts just as though the officers were individually interested.

28th Cyc., 653.

Furthermore it is provided by code supplement section 879-q:

> "No officer, including members of the city council, shall be interested, directly or indirectly in any contract, or job of work,

or material, or the profits thereof, or services to be furnished or performed for the city or town."

Hence, it follows that this question should be answered in the negative. The town, however, might contract with some other person to furnish the materials required, and then it would be immaterial whether such person purchased the required materials from the firm of which the mayor was a member or from some other concern.

Your next question is propounded by the mayor of Humeston and is as follows:

"Is there any reason why a member of the council who is an M. D. should not be appointed health officer?"

Our supreme court has answered this question in the negative, in the case of *Dewitt vs. Mills County*, 126 Iowa, 169, wherein it was held that a board of health of a city may legally contract with a member of the city council, who was also health officer of the city, to attend persons who are a county charge and afflicted with a contagious disease. The supreme court further said:

"The contract was not invalidated by section 943 of the code prohibiting any member of the council from being interested, directly or indirectly, in any contract for work or service to be performed for the corporation."

The corporation referred to is the *city*, and as the service was not to be rendered for it, but at the expense of the county, the stat ute does not apply.

Yours truly,

C. A. ROBBINS,

Assistant Attorney General.

CITIES AND TOWNS.—May vote tax in aid of railway. May not issue bonds.

May 24, 1912.

MR. S. G. DURANT,
Care Hotel Julien,
Dubuque, Iowa.

DEAR SIR: Yours of the 15th instant addressed to the state auditor has been referred to this department for reply.

Your question briefly stated is, whether or not an incorporated town in Iowa may vote a tax in aid of the construction of a steam

railroad, and in addition thereto, vote a bond issue and use the tax to liquidate the bonds and interest each year, where the object is to have the money ready to turn over to the railroad company upon completion of the road to the town.

This question should be answered in the negative. Code supplement section 2084 provides:

> "Taxes not exceeding five per cent on the assessed value of any township, town or city may be voted to aid any railway company, trolley or electric railway which is or may become incorporated under the laws of the state, to aid in the construction of a projected railroad or any trolley or electric railway within the state, as hereinafter provided."

There is no provision for voting bonds for such purpose. The procedure is provided for by code supplement sections 2085 and 2086, and the first step required is a petition signed by a majority of the resident freeholders of the town, asking that the question of aiding the railway company be submitted to the voters thereof. It then becomes the duty of the council to give notice of a special election. Then, if the proposition carries, the board of supervisors, upon receipt of a certificate to that effect, levies the tax and the same is collected in the same manner as the other taxes. There would be no necessity for borrowing the money on bonds because if the tax is voted, the money will be paid in, in all probability, by the time the railway is completed.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

PUBLIC OFFICERS—HOLDING ILLEGALLY.—One who illegally holds an office and performs its duties is a de facto officer and his acts are legal.

May 24, 1912.

HON. R. W. STEPHENSON, *Mayor,*
Forest City, Iowa.

DEAR SIR: Your letter of the 23d instant addressed to the attorney general has been referred to me for reply.

Your inquiry is, whether or not the ordinances of your town passed during the time when Mr. Anderson illegally held the office of mayor, as determined by the late decision of our supreme court in the case of *State vs. Anderson*, were invalidated by such decision.

I enclose you a copy of the opinion from an examination of which you will see that the court did not undertake to determine any such question. The rule is, that one who is actually in possession of an office under some color of title and under such conditions as indicate the acquiescence of the public, is a de facto officer and his official acts are valid.

29th Cyc., 1389.

Our own supreme court held in the case of *Stickney vs. Stickney,* 77 Iowa, 699, that the service of a writ of attachment by an officer de facto is valid as to the rights of other persons; and in the case of *State vs. Powell,* 101 Iowa, 383, it was held that directors of an independent school district who were duly elected, but sworn by persons having no authority to administer oaths, were officers de facto and their acts were valid; and in the case of *Metropolitan National Bank vs. The Commercial State Bank,* 104 Iowa, 682, it was held that where the clerk of the district court had acted in the capacity of a receiver of an insolvent bank and filed papers and made docket entries, that he was nevertheless a de facto officer, and that third persons dealing with him had a right to rely on his acts so performed as being legal.

In the case of *Buck vs. Hawley and Others,* 129 Iowa, 406, it was held that the acts of a person who was performing the duties of a deputy sheriff, even though the supervisors' minutes failed to show any record of his appointment, was a de facto officer, and that his acts were valid.

In your case, at the time of his election and taking possession of the office, Mr. Anderson was the rightful mayor and his right to hold the office was lost by his subsequent acceptance of the office of justice of the peace, but having continued to hold the office and perform its duties with the acquiescence of the public until the institution of the suit, he was a de facto officer and all his official acts were legal and binding.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

FOREIGN CORPORATIONS.—When required to file papers in this state.

May 25, 1912.

WHIPP & BERGHOFF, *Attorneys,*
606-7 Ashland Blk.,
Chicago, Ill.

GENTLEMEN: Yours of the 22d instant addressed to the attorney general has been referred to me for reply.

Your question briefly stated is, whether or not an Illinois corporation carrying on a mercantile or manufacturing business must first comply with the laws of this state with reference to filing articles of incorporation before being permitted to transact business in this state.

Section 1637 of our code provides, in part, as follows:

> "Any corporation for pecuniary profit other than for carrying on mercantile or manufacturing business, *as clearly defined and restricted by its articles of incorporation,* organized under the laws of another state or of any foreign country which * * * desires hereafter to transact business in this state and which has not a permit to do such business, shall file with the secretary of the state a certified copy of its articles of incorporation duly attested by the secretary of state or other state officer in whose office the original articles were filed, accompanied by resolution of its board of directors or stockholders authorizing the filing thereof, and also authorizing service of process to be made upon any of its officers or agents in this state engaged in transacting its business, and requesting the issuance to such corporation of a permit to transact business in this state."

Hence, it follows that your question should be answered in the negative if the business of said company is clearly defined and restricted by its articles of incorporation to mercantile or manufacturing business. If not so restricted, a foreign corporation would be required to comply with this law.

Yours very truly,
C. A. ROBBINS,
Assistant Attorney General.

CANDIDATES FOR OFFICE—GIVING AWAY SOUVENIRS.—It is illegal for candidates for office to give away lead pencils containing matter advertising their candidacy.

May 27, 1912.

BLANCHARD BROS.,
Davenport, Iowa.

GENTLEMEN: Your letter of May 18th, together with yours of the 11th ult. addressed to the attorney general, has been referred to me for reply. I note the opinion of former Attorney General Byers, copy of which you enclose.

Your question briefly stated is, whether or not a candidate for office may lawfully make use of advertising pencils such as the sample enclosed which has printed upon it the following:

> "Vote for Henry Eshbaugh, Democratic Candidate for Sheriff, Montgomery County, Ohio. I will appreciate your Support."

The pencil also bears a likeness of someone, presumably the candidate named.

Our statute, code section 4914, provides:

> "Any person offering or giving a bribe to any elector for the purpose of influencing his vote at any election authorized by law, or any elector entitled to vote at such election receiving such bribe, shall be fined not exceeding five hundred dollars, or imprisoned in the county jail not exceeding one year, or both."

Code supplement section 1087-a33 provides:

> "Any person offering or giving a bribe, either in money or *other consideration,* to any elector for the purpose of influencing his vote at a primary election, or any elector entitled to vote at such primary election, receiving and accepting such bribe shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than one hundred dollars, nor more than five hundred dollars, or be imprisoned in the county jail not less than thirty days nor more than six months."
>
> "The word 'bribe' signifies anything of value or advantage given or accepted with a corrupt intent to influence unlawfully the person to whom it is given in his action, vote or opinion."

Vol. 1, Words and Phrases, page 867, under the heading "Bribe."

While the value of a pencil is insignificant in amount, and this fact doubtless led former Attorney General Byers to give the opinion which he did, yet the pencil has some value, and as you say in your letter of the 11th ult., "They take the place of an announcement card and give the candidate a hundred times more advertising value." If a candidate might lawfully give away one such pencil for the purpose of influencing the voter, he might also by the same rule give away a box of such pencils, and in view of the foregoing statutory provision, I am unable to concur with the holding of former Attorney General Byers, and am inclined to the view that the use of such pencils for the purpose of influencing voters would be illegal.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

JUDGES OF ELECTION—APPOINTMENT BY BOARD OF SUPERVISORS—AUTHORITY OF AUDITOR.—An auditor cannot make change in judges selected by board but would have power to fill vacancy when board is not in session.

May 28, 1912.

MR. HENRY POWELL,
105 South Whitney St.,
Carroll, Iowa.

DEAR SIR: Yours of yesterday addressed to the attorney general has been referred to me for reply.

Your inquiry is as to whether or not the county auditor is authorized by law to change the judges of election appointed by the board of supervisors.

Code section 1093 provides:

> "The county board of supervisors may designate which of them shall serve as judges. The membership of such election board shall be made up or completed by the board of supervisors from parties which cast the largest and next largest number of votes in said precinct at the last general election."

The section further provides:

> "In case of vacancies happening therein the county auditor may make the appointment to fill same when the board of supervisors is not in session."

Hence it follows that the auditor would not have power to make a change in the selection of judges made by the board but he would have power to fill a vacancy when the board is not in session, and this may be what has occurred.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

INTOXICATING LIQUORS—GOVERNMENT LICENSES.—The holding of government licenses by druggists not having permit to sell is prima facie evidence of the keeping with intent to sell liquor in violation of law.

May 29, 1912.

MR. H. B. SCOLES,
Keota, Iowa.

DEAR SIR: Yours of the 23d inst. addressed to the attorney general has been referred to me for reply.

You call attention to the fact that you have two druggists without permits to sell liquor, but that each has a government stamp tax, and you then inquire, does the holding of such stamp from the government by them constitute in the intent of the law prima facie evidence that they are keeping with intent to sell in violation of law.

Chapter 105 of the acts of the thirty-fourth general assembly requires the several county attorneys of the state to secure from the federal internal revenue collectors of Iowa quarterly each year a certified copy of the names of all persons who have paid to the federal government special taxes imposed upon the business of selling intoxicating liquors, and it makes it the duty of said county attorney to file said list with the auditor of the county who shall record the same in a book kept therefor.

Section 3 of the act provides:

> "The certified copy furnished by the internal revenue collector of the name of any person who has paid to the federal government the special tax imposed upon the business of selling intoxicating liquors shall be prima facie evidence that said person is engaged in the sale of, or keeping with intent to sell, intoxicating liquors in violation of law, unless said person by way of defense shows that he has complied with all the

terms and conditions of the mulct law, or that he is a registered pharmacist, actually engaged in business as such and said certified copy shall be competent evidence in any court within this state."

Hence it follows that your inquiry should be answered in the affirmative.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

PRIMARY ELECTIONS—SUPERVISORS.—Ballot should designate long and short term candidates.

May 31, 1912.

MR. E. W. CUBBAGE,
Ida Grove, Iowa.

DEAR SIR: Yours of the 29th instant addressed to the attorney general has been referred to me for reply.

Your first question is, whether or not it is necessary for a candidate for supervisor to designate upon his nomination papers which of the terms he is a candidate for when there are two terms to be filled,—one expiring in 1913 and the other in 1914.

This question should be answered in the affirmative.

Your next question is: "Is it necessary in making up the primary ballot that it be designated on said ballot the office each candidate is running for by inserting the year in which the term expires."

This question should also be answered in the affirmative. That is to say, I believe the uniform custom is to distinguish between these offices by printing upon the ballot a statement in parenthesis: "For the term commencing on ———," inserting such date rather than designating it by the expiration of the term.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

PRIMARY ELECTIONS.—Township Committeemen.—Names of may be printed on primary ballot.

May 31, 1912.

T. W. NAPIER, *Auditor*,
Mt. Ayr, Iowa.

DEAR SIR: Yours of the 13th instant addressed to the attorney general has been referred to me for reply.

Your question is, whether the names of candidates for township committeemen should be printed on the primary ballot or must they be written or pasted in with uniform white pasters.

By examination of code supplement section 1087-a14, prescribing the form of the ballot, you will find under the heading for party committeemen the names of John Doe and Richard Roe printed thereon, also a blank line to give the voter an opportunity to write or paste in the name of anyone whom he may desire for party committeeman in case he does not desire to vote for either John Doe or Richard Roe. From this it would appear to be perfectly proper to print in the names of candidates for party committeemen, but the blank line should also be left as indicated on the form of ballot prescribed.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

INTOXICATING LIQUORS—POISONS.—By whom sold.

May 31, 1912.

MR. F. H. ANSELME,
524 Oak St.,
Quincy, Ills.

DEAR SIR: Yours of the 24th instant addressed to the attorney general has been referred to me for reply.

Your inquiry is as to whether or not you have a right to sell a medicine manufactured by yourself in Iowa without license, and if not, what the license would be.

Our code section 2594 provides for a license fee of $100 per year to be paid by any itinerant vendor of any drug, nostrum, ointment or appliance of any kind for the treatment of any disease or injury, and it is further provided that none but registered

pharmacists may lawfully sell medicines containing intoxicating liquor or poison.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

INCOMPATIBLE OFFICES.—Office of Mayor and Justice of the Peace incompatible.

June 1, 1912.

MR. W. H. MASON,
Shell Rock, Iowa.

DEAR SIR: Yours of the 14th ult. addressed to the attorney general has been referred to me for reply.

You call attention to the fact that you have been holding the office of justice of the peace, also that of mayor of the town of Shell Rock, and you ask which of these offices you may legally hold in view of the fact that you were elected to the office of justice of the peace in November, 1910, and to that of mayor in March, 1912.

I am enclosing you a copy of the opinion of the supreme court in the case to which you refer. You will notice that the holding of the court is, that the two offices are incompatible, and at the top of page 2 the portion of the opinion which I have underscored provides in effect that the acceptance of the second office terminates the first without any other act or proceeding. Hence, under your statement, the office which you may rightfully continue to hold is that of mayor and you should surrender the office of justice of the peace.

You propound also the following question:

"Have my acts as such been legal or valid?"

This department has recently passed upon this question also and has held that during the time the office was held the person holding the same was a de facto officer and his acts are legal and valid.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

PRIMARY ELECTION—COUNTY SUPERINTENDENT.—Person should be the holder of first grade certificate before his name can be printed upon primary ballot as candidate for county superintendent.

June 1, 1912.

MARY E. HOSTETLER, *Supt. of Schools,*
Marshalltown, Iowa.

DEAR MADAM: Yours of the 11th ult. addressed to the attorney general has been referred to me for reply.

Your question as propounded by you is:

> "Is a teacher holding a second grade uniform county certificate at the time of the primary eligible to the office of county superintendent of schools?"

This question should be answered in the negative. Code supplement section 2734-b provides:

> "The county superintendent, who may be of either sex, shall be the holder of a *first grade* certificate, as provided for in this act, or of a state certificate or a life diploma."

See *State vs. Huegle,* 112 N. W., 234.

Your second question is:

> "Has such a person a right to have his name printed upon the primary ballot?"

If such a person has filed the affidavit provided for by code supplement section 1087-a10 to the effect that "he is eligible to the office," his name would doubtless be printed upon the ballot, but such person would have no right in the first instance to make or file such an affidavit. Hence, your question should be answered in the negative.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

OPTOMETRY—PRACTICE OF BY PHYSICIANS AND OSTEOPATHS—REVOCATION OF CERTIFICATE.—Physicians have right to practice optometry without securing license from optometry examiners. Osteopaths must obtain a license. One practicing medicine under the exemption provisions may be suspended from practice for violation of the statute.

June 4, 1912.

STATE BOARD OF OPTOMETRY EXAMINERS,
Des Moines, Iowa.

GENTLEMEN: Your letter mailed on April 9th addressed to the attorney general was referred to me this mornnig with the information that an opinion was desired by 10 a. m.

Your first question is:

> "Do physicians and osteopaths have a right to practice optometry in this state without a license from the optometry examiners? If so, state the reason."

This question should be answered in the affirmative in so far as physicians are concerned, our court having decided they may practice without this license. Section 5 of chapter 167, acts of the thirty-third general assembly, provides for the issuance of such license. The following section provides for an examination and for the issuance of a license to certain persons without examination, and section 12 of the same chapter provides:

> "Any person who shall practice optometry in this state in violation of the provisions of this act shall be guilty of a misdemeanor and upon conviction thereof shall be punished," etc.

Hence it follows that osteopaths should not practice optometry without this license.

Your second question is:

> "May the State Association of Optometrists place someone in charge to investigate and bring actions against offenders of the optomery law?"

This question should be answered in the affirmative, but such appointee would have no more power or authority to prosecute violations of the law than any other person having knowledge of such violation.

Your third question is:

> "Must charges be filed with the county attorney and costs guaranteed before he will proceed with action? Is it neces-

sary for one who files charges to appear against the charged in the courts? Is it the duty of the county attorney to bring action against parties when he observes they are offending the law, even though charges have not been filed by any other party?''

Complaint may be made to the county attorney, but any information charging a violation of the statute should be filed before a justice of the peace or other magistrate. The person filing the complaint would be expected to appear and prosecute the charge, and if he failed to do so, the costs of the action might be taxed to him. It is the duty of the county attorney to prosecute all violations of the law of which he has personal knowledge, and all others where the proper information has been filed. No complainant is required to guarantee costs.

Your fourth question is:

''Kindly explain the procedure in detail necessary in filing charges, and to what extent evidence must be submitted.''

The complainant should appear before the county attorney and ask him to draw the information charging the offense, or the complainant may have the same drawn by any other person and signed and sworn to and filed before the justice of the peace or other magistrate. It is not necessary in advance to submit the evidence to the justice of the peace or other magistrate, but it is a wise plan to submit the evidence to the prosecuting attorney in order that he may determine the sufficiency thereof and thus avoid the commencement of groundless prosecutions. If a complainant institutes prosecutions without submitting the evidence and fails to produce evidence sufficient to show that he had reasonable cause for believing the offense to have been committed, the action may be dismissed and the costs taxed to such complainant.

Your fifth question is:

''May an exemption certificate be revoked by the board of examiners if sufficient evidence is obtained to show the owner thereof to be an incompetent practitioner?''

There is no provision in the law for the revocation of an exemption certificate, but there is the following provision in section 7:

''Any license issued by said board of examiners may be revoked by said board for violation of the law, incompetency, immorality or inebriety'' after the filing of charges in writing and a hearing and determination against such licensee,

and I take this provision to apply to any licensee, whether he obtained his license by examination or on account of the fact that he was exempt from such examination, as provided in the latter part of section 6 of this act."

Your sixth question is:

"If a man gets drunk and is arrested, may his certificate be revoked and his drunkenness considered inebriety?"

This question should be answered in the negative. The fact that a person becomes intoxicated or drunk on a single occasion or is arrested on account thereof does not constitute him an inebriate nor render him guilty of inebriety.

"An inebriate is a person who habitually, whether continuously or periodically, indulges in the use of intoxicating liquors to such an extent as to stupify his mind and to render him incompetent to transact ordinary business with safety to his estate."

In re Anderson, 43 S. E., 649.

Your seventh question is:

"Advertising of the character of enclosed copy; is this sufficient to bring charges against a man?"

Section 11 of the act provides:

"Nor shall he advertise himself in such a manner as to lead the public to believe him to be different than an optometrist as defined in this section."

I see nothing in the enclosed advertisement that violates this provision.

Your eighth question is:

"May anyone not having a certificate to practice optometry furnish prescription lenses?"

This question should be answered in the affirmative.

Your ninth question is:

"Is one conviction a bar by contempt to further practice without obtaining a state license? Can we proceed by injunction restraining any person not so qualified from engaging in the profession?"

The first subdivision of this question should be answered in the negative, but subsequent acts would be a new violation of the law for which a new prosecution and conviction might be had. The

second subdivision should also be answered in the negative. Unless the remedy of an injunction is especially provided by statute, which is not the case in this instance, the remedy is only available to prevent the commission of such crimes as in and of themselves would constitute a public nuisance.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

CITIZENS—CHILDREN OF FOREIGN-BORN PARENTS.—A person whose parents are residents of the United States although not citizens at the time of his birth is a citizen of the United States.

June 5, 1912.

MR. FRANK YOUNGDALE,
Harcourt, Iowa.

DEAR SIR: Replying to yours of the 27th ult. addressed to the attorney general, will say that section 1992 of the revised statutes of the United States, to which you refer, has uniformly been interpreted to mean that a person born within the United States is a citizen thereof provided the parents are residents of the United States. In other words, they need not have been naturalized citizens in order to make the native born child a citizen. It is only the children of people who are subject to a foreign power, such as ministers to this country from some foreign country and here only temporarily who do not become citizens of the United States when born within its limits; hence you would have the right to vote.

Yours truly,

C. A. ROBBINS.
Assistant Attorney General.

PRIMARY ELECTION—ADVERTISING AT POLLS.—It is not illegal to place advertising matter within one hundred feet of primary election polls.

June 5, 1912.

MR. CHARLES N. DAHLBERG,
Storm Lake, Iowa.

DEAR SIR: Yours of the 4th instant addressed to the attorney general has been referred to me for reply.

You call attention to the fact that at the primary election recently held bills, posters and other advertising matter in the interest of various candidates were displayed in the polling places along side the cards of instruction to voters, and inquire whether or not there is anything illegal in connection with such practice. You say, "It seems to me like electioneering indirectly."

While the practice is one which perhaps should not be countenanced or approved, yet I find no statute which directly prohibits the same. The statute which you doubtless have in mind which prevents electioneering within any polling place or within one hundred feet thereof is code supplement section 1134, and applies to the general election only, and not to the primary election.

Yours very truly,
C. A. ROBBINS,
Assistant Attorney General.

SUPERIOR COURT—NOMINATION OF JUDGES.—Judges before the superior court should be nominated by delegates representing precincts of the city in which the court is held.

June 6, 1912.

MR. G. B. JENNINGS,
Shenandoah, Iowa.

DEAR SIR: Yours of recent date addressed to the attorney general with reference to the proper method of nominating a judge of the superior court has been referred to me for investigation and reply.

I find that former Attorney General Byers in June, 1910, rendered to Judge C. B. Robbins of Cedar Rapids an opinion from which I quote as follows:

> "In one or two other counties the interested parties propose to have the superior judge nomination made by the delegates to the county convention who represent the city precincts and who were selected at the recent primary. This method is, in my judgment, entirely legal. The words 'of the superior' found in section 14, chapter 69, acts of the thirty-third general assembly, were undoubtedly inadvertently included in the amendment."

I note your suggestion that on account of the fact that the county pays half the salary of the superior judge, that it might

not be out of the way to have the nomination made by the county convention, yet it seems to me that when the superior judge must be elected by the voters of the city, there would be no occasion for having a nomination participated in by electors or delegates from outside territory. I call your attention to the following language found in code supplement section 256-a:

> "The names of candidates for judge (of the superior court) shall be placed upon the same ballot as used in the city for the state, county and township officers. * * * Certificates of nomination of candidates for judge by conventions or primaries of political parties and nominations by petition shall be fixed (filed) with the auditor of the county in which said city is situated within the same time provided by law for the filing of certificate of nomination and nominations by petition for offices to be filled by the electors of counties."

On the whole, I think the most simple and legal method would be to have the nomination made by a convention composed of the delegates representing the various precincts of the city or town over which such court would have jurisdiction.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

ACKNOWLEDGMENTS.—By whom taken.

June 8, 1912.

MR. W. J. STEWART,
c|o Grimes Savings Bank,
Grimes, Iowa.

DEAR SIR: Yours of recent date addressed to the attorney general has been referred to me for reply.

Your question briefly stated, is, whether or not your private secretary, who at times assists with the bank work and who is not a stockholder and draws no interest from the bank, may, if a notary public, lawfully take acknowledgments of papers in which the bank is interested in view of the fact that she has also been elected assistant cashier with a right to sign certificates of deposit only.

In my judgment this inquiry should be answered in favor of her authority to take such acknowledgments. However, the fact

that she is an assistant cashier would probably cast upon the bank the burden of proof to show the want of interest at the time the acknowledgment was taken if the same were questioned.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

JUSTICE OF THE PEACE.—Cost and compensation of.

June 10, 1912.

MR. L. A. MCINTOSH, JUSTICE OF THE PEACE,
Muscatine, Iowa.

DEAR SIR: Yours of the 8th inst. addressed to the attorney general has been referred to me for reply.

You call attention to code section 4597, and propound the following question:

> "Under the law of Iowa is it lawful for a justice of the peace, doing a general collection business, to sue claims in his hands for collection in his own court, charging the customary costs and the usual percentage of say 25% to the plaintiff, the plaintiff consenting to the 25%, of course."

Subdivision 22 of the section to which you call attention provides:

> "For all money collected and paid over without action 5%; and for all money collected and paid over after action brought without judgment, 2%, which shall be added to the costs."

In the case of *Hawkeye Insurance Co. vs. Brainard,* 72 Iowa, 130, it is stated by our supreme court:

> "A justice of the peace is a public officer, whose emoluments are fixed and prescribed by law for all acts done by him by virtue of his office and it is conceded by counsel for the appellant as we understand, that the agreement deprives the justice of certain fees charged and for which he could compel plaintiff to pay. If by contract he may take less, why may not the parties contract for an enlarged compensation? We think a contract whereby an officer agrees to accept a less or greater compensation than is prescribed by statute * * * is contrary to public policy and void and that the contract in question is of that character."

In the case of *Daniels vs. City of Des Moines*, 108 Iowa, 484, the compensation of the police matron was fixed and the supreme court said:

> "If the plaintiff was appointed police matron then as the statute fixes her compensation, a contract whereby she agreed to accept less than the amount fixed by statute would be contrary to public policy and void."

Inasmuch as your proposed agreement for 25% of the amount collected exceeds the amount prescribed by law I am inclined to think under the authorities above cited that your question should be answered in the negative.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

PRIMARY ELECTIONS.—County convention not confined in nominations to persons voted for at the primary.

June 10, 1912.

SIMON FISHER, *County Attorney,*
Rock Rapids, Iowa.

DEAR SIR: Yours of the 8th inst. addressed to the attorney general has been referred to me for reply.

Your question has reference to the power of the county convention to nominate county officers where the primary has failed to result such nomination.

In my judgment the county convention may make such nominations where votes were cast for the office at the primary whether the name of the candidates were printed upon the ballot or not, and that in such cases the county convention is not limited to persons receiving votes in the primary but may nominate a person who received votes at the primary or a person who did not receive votes at the primary for such office.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

RESIDENCE—LEGAL.—One's legal residence is his permanent residence even though he may be temporarily absent.

June 10, 1912.

MR. G. M. MILLER,
Lock Box 13, Hazleton, Iowa.

DEAR SIR: Yours of the 4th inst. addressed to the attorney general has been referred to me for reply.

Your question briefly stated is, whether or not a former resident or citizen of Buchanan County, who is and has been in the employ of the state weighing coal for seven or eight years, and has bought a home and moved his family to Polk County, where his place of employment is located, should vote in Polk or in Buchanan County.

It very frequently occurs that a person may have a domicile in one county to which he intends at some future time to return even though he has had for several years his residence in another county, and the question depends so largely upon the intention of the particular person that it is hard to lay down any definite rule. For instance, Governor Carroll has lived in Des Moines for a number of years and owns his home on Ninth street in which he lives, and yet he returns every year to Bloomfield in Davis county to vote because he claims that as his home and it is his intention to return there when his official duties are completed. The Attorney General also owns his home in Des Moines and while he has lived here several years always returns to Audubon county to vote because he claims that as his domicile. So that in the case about which you inquire if the party still has an intention of returning to Buchanan county when his employment with the state is terminated he would doubtless have a right to vote in that county. On the other hand if he has no intention to return to Buchanan county but intends to remain in Polk county even after his employment with the state is terminated then the proper place for him to vote would be in Polk county rather than Buchanan county.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

CITIES AND TOWNS—CROSSINGS—USE OF BY TRACTION ENGINES.—Cities and towns cannot prohibit traction engines from using crossings.

June 11, 1912.

AMANDUS SKOG, CLERK,
Albert City, Iowa.

DEAR SIR: Yours of the 8th instant addressed to the attorney general has been referred to me for reply.

You inquire as to the law with reference to traction engines running across town crossings and damaging them, and inquire whether or not you can refuse the use of crossings to parties desiring to cross with engines, and also whether or not you can hold them for damages.

Prior to the acts of the thirty-third general assembly, code supplement section 1571 provided:

> "Whenever any engine driven in whole or in part by steam power is being propelled upon a public road, in crossing any bridge or culvert in the public road, or plank street crossings in any city or town, four sound strong planks not less than twelve feet long, each one foot in width and two inches thick shall be used by placing and keeping continuously two of them under the wheels.
>
> "A failure to comply with either of the provisions of this section shall be a misdemeanor punishable by imprisonment in the county jail not more than thirty days, or by a fine of not more than one hundred dollars, and in addition, all damages sustained may be recovered in a civil action against the violator."

By chapter 102 of the acts of the thirty-third general assembly the section above quoted was repealed and the clause authorizing the recovery of damages was entirely eliminated and the clause with reference to planking the bridge was made to read as follows:

> "Until the first day of November, 1910, no traction engine shall cross any bridge crossing or culvert in the public highway or street unless sound strong planks not less than one foot wide and two inches thick be placed and kept continuously under the wheels."

The evident thought of this provision was to give the road authorities until the first day of November, 1910, in which to

construct their bridges and culverts in such a manner and of such strength as that the same would not require planking, as there is no provision whatever for planking after November 1st, 1910.

This law was sought to be changed in the thirty-fourth general assembly but the effort failed. Hence, it follows that in your case you could not deprive the owner of the engine of the right to use the crossings, nor would you be entitled to recover damages for injury to the same, in my judgment.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

STATE.—Not required to give bond.

June 11, 1912.

J. W. ANDERSON, *County Attorney,*
Onawa, Iowa.

DEAR SIR: I am returning herewith your petition in the case of *State of Iowa vs. B. F. Swanson, et al,* with slight changes noted, and I would like to have you forward to this department a copy of the petition as finally filed.

With reference to the question of the necessity of the state giving a bond in actions of this sort, I call your attention to code section 2475 which provides:

> "The state may maintain actions in the same manner as natural persons, but no security shall be required in such cases."

I think this provision would supersede the necessity of giving such bond.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

SOLDIERS—EXEMPTION FROM TAXATION.—Where the legal title to property is in the wife but the equitable title in soldier, soldier is entitled to exemption.

June 12, 1912.

MR. A. J. SHAW,
Pocahontas, Iowa.

DEAR SIR: Yours of the 6th inst. addressed to the attorney general has been referred to me for reply.

Your question briefly stated is whether or not property owned by the wife of a soldier, the title being in her name and the property being in fact hers, is exempt under title 62 of the acts of the thirty-fourth general assembly if the same constitutes the homestead of the soldier and his wife.

Under the statute as it primarily read, the exemption only applied to the homestead of the soldier and in construing the statute the place where the soldier and his family lived was his homestead whether in his name or in the name of his wife, but the wording of the statute has now been changed so that it applies to any property of the soldier or of his widow, remaining unmarried. This department has held that where the legal title was in the wife but the equitable title in the soldier that the soldier was entitled to the exemption. But I do not believe that the exemption is authorized by this chapter in a case where the equitable as well as the legal title is in the wife.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

INTOXICATING LIQUORS.—When purchase price may be collected.

June 12, 1912.

MR. B. F. STAUFFER,
Perry, Iowa.

DEAR SIR: Yours of the 8th instant addressed to the attorney general has been referred to me for reply.

Your first question is:

> "If a party living in Iowa orders beer in cask from a brewery outside the state, can the brewery collect for the same by law?"

This question should be answered in the affirmative, as such a sale would be interstate commerce and the Iowa law would not render the same an unlawful sale, and it is only where the sale is unlawful that the purchase price cannot be collected or recovered back under the Iowa law when it has been paid.

Your second question is:

"Has the brewery a right to send around collectors to collect these accounts after the beer has been shipped?"

This question should also be answered in the affirmative.

Your third question is, whether or not there are any charges for this information.

This question should be answered in the negative.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

INTOXICATING LIQUORS.—Defined.

June 12, 1912.

MR. J. J. MEYERS,
Carroll, Iowa.

DEAR SIR: I am in receipt of your communication of the 8th instant requesting an opinion as to whether Schuster's Malt and Hop Liquid, which is manufactured by Schuster's Brewing Company of Rochester, may be sold except by one who operates a retail saloon under the mulct law.

No one has the right to sell any malt liquor in this state except a person who regularly operates a retail place under the mulct law or does business under the law prescribed for manufactures.

Our supreme court has so many times held that any liquor which contains alcohol may not be sold as a beverage by a registered pharmacist or permit holder, or any one else except a person operating under the mulct law, that citations are unnecessary; and this is true even though the percentage of alcohol is very slight, in some cases only one-half of one per cent.

As to whether a registered pharmacist or druggist may sell patent medicine which contains alcohol depends upon whether or not there is sufficient alcohol to destroy the characteristic of a medicine and make it either suitable or possible for a beverage; in

other words, they have no right to sell patent medicine which contains alcohol as a beverage or which is actually bought and used as a beverage. They must know at their peril that the purchaser is buying it only as a medicine to be used only as a medicine.

Yours very truly,

GEORGE COSSON,
Attorney General.

FEES.—Amount sheriff may charge for summoning grand or petit jury.

June 18, 1912.

C. J. CASH, *County Attorney,*
Anamosa, Iowa.

DEAR SIR: Yours of the 15th instant addressed to the attorney general has been referred to me for reply.

You call attention to the provisions of subdivision 5 of code supplement section 511 and then make the following statement:

> "Many of the sheriffs contend that the sixty cents for each person is to compensate them for all expenses in summoning jurors and as they are allowed no mileage for this particular item, they should be allowed to retain the sixty cents and not apply it on the salary. Other officers contend that no mileage or expenses were allowed on this item because it was assumed by the legislature that the sheriffs could summon these jurors in connection with other work and that the salary now takes the place of the sixty cents formerly paid."

and request copy of any opinion that may have been rendered by this department on this question, and if none has been rendered, you ask for our view as to the proper construction of the section in view of the fact that the sheriff is now a salaried officer.

So far as I have been able to find, no opinion has been given covering this question. The subdivision to which you refer provides:

> "Each sheriff is entitled to charge and receive the following fees:
>
> "For summoning a grand or trial jury for each person served, sixty cents, *to be paid out of the county treasury;* and such sum shall be *in full compensation* for such service."

Code supplement section 508 now provides:

> "Quarterly itemized reports under oath * * * shall be made to the board of supervisors by the sheriff, of *all fees and mileage* charged or taxed, and all that are collected by him and his deputies, including all sums for which the county is liable, except for dieting and lodging prisoners; and at the time of making such quarterly reports he shall make full settlement with said board, filing therewith the receipts of the county treasurer for all moneys paid over to him."

Code supplement section 510-a provides:

> "In all counties, the expenses necessarily incurred and actually paid while engaged in the performance of official duties in serving criminal process or commitments to the penitentiaries, industrial schools or asylums, shall be allowed by the board of supervisors, and paid as other claims against the county and he shall be allowed to retain all mileage collected by him in the service of civil process."

In the case of *Bybee vs. Marion County*, 128 Iowa, 610, our supreme court considered a similar question which they stated as follows:

> "The question presented in this case is whether the board is required to allow the sheriff as expenses the amounts necessarily paid out by him for railroad fare, livery hire and hotel bills, while traveling for the purpose of serving criminal process,"

and in passing upon it they made use of the following language:

> "It is conceded for the sheriff that the mileage in the service of civil process covers his expenses incurred in connection with such services, but it is claimed that as no mileage is allowed him in the service of criminal process, the expenses incident to such service are to be allowed the sheriff as reasonable expenses of his office. It is difficult to interpret code supplement 1902, sections 510-a, 510-b, as applied to the previous provisions found in code section 511, but we think the effect of the subsequent statute was to appropriate to the benefit of the county, all the fees provided for in code, section 511, except the mileage for service of process in civil cases, and to allow the sheriff a salary in lieu of such compensation, which salary is made to depend to some extent on the amount of fees received by him. As no provision is made for reimbursing

him for his traveling expenses in the service of criminal process, it must have been intended by the legislature that such expenses shall be allowed as 'expenses necessarily incurred and actually paid while engaged in the performance of official duties in the service of criminal process,' etc., as provided in code supplement 1902, section 510-a.

"It seems to us that it could not have been the intention of the legislature that, in fixing his compensation, the mileage for the service of criminal process should be appropriated by the county as a part of the receipts of the office, while the traveling expenses in making such service should be borne by the officer."

In view of this opinion I am inclined to the belief that if the question were ever presented to our supreme court it would either hold that the sheriff would be entitled to this sixty cents provided for in subdivision 5, or that the sheriff should be entitled to charge his "expenses necessarily incurred and actually paid" while engaged in summoning such jurors, and in view of the provisions of code section 508 already quoted herein, I am inclined to think that the court would not hold that the officer would be entitled to retain the sixty cents, for it requires him to account for all fees and mileage charged or taxed, including *all* sums for which the county is liable. Hence, the only conclusion left would be that the sheriff would be required to account for the sixty cents, but would be entitled to have allowed him his expenses necessarily incurred and actually paid while summoning such jurors.

While the question is not entirely free from doubt, yet I think this the more reasonable construction.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

MARRIAGE OF COUSINS.—Illegal under chapter 212, acts of the thirty-third general assembly.

June 18, 1912.

MR. W. H. NUNEMAKER,
Conner, Mont.

DEAR SIR: Yours of the 6th instant addressed to the governor of Iowa has been referred to this department for reply.

You ask to be advised if the laws of this state prohibit the marriage of first cousins. This inquiry should be answered in the affirmative.

By chapter 212 of the acts of the thirty-third general assembly, which took effect July 4, 1909, the marriage of first cousins was prohibited and the violators of such law made guilty of incest.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

REPRESENTATIVE—NOMINATION OF—HOW MADE.

June 19, 1912.

J. J. RAINBOW, *Auditor,*
Waterloo, Iowa.

DEAR SIR: Yours of the 18th instant addressed to the attorney general has been referred to me for reply.

You say that for representative you had three candidates and were entitled to nominate two, and that one received 1,460 votes, one 1,950 votes and one 1,436 votes, and state that you would like to know who are nominated.

If there were no other votes cast for the office of representative other than for the three whose votes you have given, then the one receiving 1,460 and the one receiving 1,950 votes should be declared the nominees.

The rule is, to divide the whole number of votes cast for the office by the number of officers to be nominated for that office, and take this result as the 100%, the 35% of which a person must have before he could be nominated, and in this case you should take the 1,950 votes, the 1,460 votes and the 1,436 votes and all other votes cast for that office, add the same together and divide the total by two, and if each of the two highest, that is, the one having the 1,460 votes and the one having the 1,950 votes, have 35% of the quotient, then such parties should be declared the nominees.

I will say, however, that as this is a state office it lies with the state canvassing board rather than with the county board of canvassers to determine who is nominated. See code supplement sections 1087-a19 and 1087-a20.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

SCHOOL TREASURER—ELECTION—QUALIFICATION.—School treasurer should qualify within ten days after July 1st following his election.

June 19, 1912.

MR. ALVIN C. SCHAFER,
Sheffield, Iowa.

DEAR SIR: Yours of the 15th instant addressed to the attorney general has been referred to me for reply.

Your question briefly stated is as to when the school treasurer should be elected and when must he qualify.

By code supplement section 2754 it is provided:

> "In districts composed in whole or in part of cities or towns, a treasurer shall be chosen in like manner, whose term shall begin on the first day of July, unless that date falls on Sunday, in which case on the day following and continue for two years, or until his successor is elected and qualified."

The words "in like manner" refer to the manner of election previously mentioned in the section. Code supplement section 2757 provides:

> "On the first day of July, unless the date falls on Sunday, in which case on the day following, the board of all independent city, town and village corporations and the retiring board in all other school corporations shall meet, examine the books of and settle with the secretary and treasurer for the year ending on the thirtieth day of June preceding, and for the transaction of such other business as may properly come before it. On the same day the board of each independent city, town and village corporation, except as provided in section 2754 of this chapter, and the new board of every other school corporation shall elect from outside the board a secretary and treasurer."

By code section 2760 it is provided:

> "The secretary and treasurer shall each give bond to the school corporation in such penalty as the board may require. * * * * Each shall take the oath required of civil officers which shall be endorsed upon the bond, and shall complete his qualifications within ten days."

In my judgment the school treasurer should qualify within ten days after July first following his election.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

COUNTY CENTRAL COMMITTEE—VACANCIES IN MEMBERSHIP—HOW FILLED.

June 20, 1912.

MR. D. H. BAUMAN,
Webster City, Iowa.

DEAR SIR: Yours of this date addressed to the attorney general has been referred to me for reply.

Your inquiry is with reference to the proper steps to be taken to fill vacancies occasioned by the failure to elect township or precinct committeemen at the June primaries, and you ask whether or not this department recently ruled that the old committeemen held over.

I know of no such ruling and if such a ruling has been made I am inclined to think it is erroneous in view of the following provision found in code supplement section 1087-a25 as now amended:

> "The county central committee elected in the primary election shall organize on the day of the (county) convention, immediately following the same. Vacancies in such committee may be filled by a majority vote of the committee."

In my judgment this provision authorizes vacancies to be filled by the committee after its organization on the day of the county convention by a majority vote as stated in the law.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

PEDDLERS.—The peddlers' license law does not apply to persons selling goods of their own production.

June 22, 1912.

OCTAVE PROTEAU,
517 N. Clark St.,
Chicago, Ill.

DEAR MADAM: Yours of the 20th instant addressed to the comptroller of state has been referred to this department for reply.

Your question briefly stated is, whether or not a license is required of a person traveling and selling his own personally manufactured goods.

Our peddlers' license law does not apply to persons selling goods of their own manufacture or production, either by themselves or employes, but this section does not apply to a traveling vendor of drugs. He is required by a different section to pay a license.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

PRIMARY ELECTIONS—COUNTY CHAIRMAN.—Must be member of the delegation.

June 25, 1912.

MR. OLE LANGLAND,
Cambridge, Iowa.

DEAR SIR: Yours of the 22d inst. addressed to the attorney general has been referred to me for reply.

Your question is, "Can a man, not a delegate to the county convention, be elected chairman of the county convention?"

There is no direct provision of the primary law specifying the qualifications of the chairman of the county convention. However, the chairman of such convention is surely a component part thereof and it is provided in code supplement section 1087-a25:

> "Said convention shall be composed of delegates elected at the last preceding primary election."

Hence, a county convention presided over by a chairman who was not a delegate would not be a "convention composed of delegates elected at the last preceding primary election."

Furthermore, it is usual to allow the presiding officer a right to vote, especially in case of a tie, and if this office were awarded to one not a delegate instances might arise where the number of votes cast would exceed the number of delegates in the convention. While the question as to whether or not such a chairman would be a legal chairman is a close one yet in my judgment the practice should not be encouraged.

You say in the latter part of your letter "such is the case in Story county," and I hardly know what you mean by this remark

as there could be no permanent chairman of the county convention until after that convention had met and organized. The observances heretofore made have been made with reference to the permanent chairman and the same objection would not apply to a temporary chairman.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

UNION SOLDIERS.—Burial of.

June 26, 1912.

MR. CHAS. E. SCHOLZ, *County Attorney,*
Guttenberg, Iowa.

DEAR SIR: Yours of the 22d inst. addressed to the attorney general has been referred to me for reply.

You call attention to code section 430 as amended by chapter 25 of the acts of the thirty-fourth general assembly, and say,

> "A portion of this cemetery has been set apart for burial of Union soldiers. There have been more than fifty interments in the cemetery but not in this portion set apart. Now the question is whether the fifty interments refer to the interments in the whole cemetery or to the portion set apart for said Union soldiers."

The portion added to the section by the last general assembly provides:

> "Or for the erection of a monument in any cemetery in the county, a portion of which (cemetery) has been set apart for the burial of Union soldiers, sailors and marines, in which (cemetery) there have been not less than fifty interments."

It is not clear whether the second word "which," quoted above, refers to the cemetery or to the portion set apart, but I think the more natural and usual construction of this language requires that the second word "which" be construed to have reference to the cemetery as a whole rather than to the portion set apart for the burial of Union soldiers. There would be no greater reason for authorizing the erection of a soldiers' monument in a cemetery having fifty soldiers buried in the portion thereof set apart for the burial of soldiers than there would be for the erection of a like

monument in another cemetery having a like portion set apart for the burial of soldiers and fifty soldiers buried in the cemetery but a less number in the portion so set apart.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

FOREST RESERVATION—TAXATION OF.—Land planted to trees can only be taxed one dollar per acre without reference to the real value.

June 26, 1912.

MR. E. C. FARREN,
Kansas City, Mo.

DEAR SIR: Yours of the 21st inst. addressed to the attorney general has been referred to me for reply.

You ask to be advised as to whether or not a premium is offered by the state of Iowa to the planter of trees, or a remission of taxes on acreage so planted, or anything of that sort.

Forest reserves from two acres up, containing 200 growing trees on each acre are by law required to be assessed at the taxable value of $1.00 per acre without reference to the real value. Fruit tree reservations from one to five acres in extent, containing at least 70 fruit trees on each acre are required to be assessed at $1.00 per acre without reference to the real value. Where other fruit, forest or ornamental trees are planted, the assessed value of the land upon which they are planted is not to be increased on account thereof. (See code supplement sections 1400-c to 1400-l inclusive.)

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

COUNTY CONVENTION.—Delegates hold over.

June 26, 1912.

SHERWOOD A. CLOCK, *County Attorney,*
Hampton, Iowa.

DEAR SIR: Yours of the 25th inst. addressed to the attorney general has been referred to me for reply.

Your first question is whether or not the old delegates to the county convention, elected two years ago, hold over in instances where their successors are not elected at the last primary election.

Code supplement section 1087-a25 provides that the term of office of such delegates shall begin on the day following the final canvass of the votes of the board of supervisors and shall continue for two years and *until their successors are elected.* This department has heretofore held this provision entitled the old delegates to hold over.

In your second question you call attention to the provisions of code supplement sections 1084-a24 and 1084-a25 and inquire how a person can be nominated, if at all, for an office for which no candidate's name was printed upon the ticket and for which no person received votes at the primary election.

This department has held that where no person was voted for for a particular office at the primary election, the county convention was without power to make a nomination for such office and the only way by which such office could be filled is by petition in accordance with section 1087-a29.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

TAX LISTS.—Taxes should be carried out separately on each separate description of land.

June 28, 1912.

MR. E. B. STILES, *County Attorney,*
Manchester, Iowa.

DEAR SIR: Yours of the 24th inst. addressed to the attorney general has been referred to me for reply.

You call attention to section 1383 of the code supplement and also call attention to the conflict between the county auditor's office and the county treasurer's office with reference to the proper manner of making up the tax list and then say:

> "The question which I desire to ask your opinion on is, whether or not under section 1383 of the code, or any other section, it is the duty of the auditor in making up his tax list to show the amount of taxes assessed against each description of land?"

This section provides:

> "The first day of January in each year the county auditor shall *transcribe* the assessments of the several townships, towns, or cities into a book to be known as the 'Tax List,' properly ruled and headed with distinct columns, in which shall be entered the names of tax payers, *descriptions of lands.*"

The word "transcribe" as defined by Webster means, "A rewriting of a composition consisting of the same words as the original. A written copy." (See *In re Evingson*, 49 N. W., 733, and *Anderson's Law Dictionary.*)

In my judgment it would be the duty of the auditor to carry out the amount of taxes opposite each separate description of real estate as the same is returned by the assessor. He should not be required to further subdivide the same into lesser descriptions, nor should he be permitted to add the same together and compute the amount of taxes on a number of descriptions in a lump sum.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

REFUND—BY STATE.—Person deprived of land patented by the state is entitled to refund of the amount paid the state.

June 28, 1912.

HONORABLE EXECUTIVE COUNCIL,
State House.

GENTLEMEN: With reference to the right of R. W. Benton to have refunded to him certain moneys paid on account of lands patented by the state to him, which was covered to some extent by my letter of May 29th, will say that I have given the question further consideration in obedience to your request of June 4th and have examined the petition and answer enclosed by McCormick under date of June 3d. I have also examined the record in the case of *Dumbarton Realty Co. vs. Erickson*, and five other cases which were consolidated and in one of which cases the claimant, R. W. Benton, was a defendant.

The petitions in the five cases referred to were filed December 12, 1905; whereas the patent to Benton was not issued until March 21st, 1906. The answers were filed January 23d, 1906, prior to

the time Benton had received the patent. The petition of intervention on behalf of the state of Iowa was filed on the 27th of August, 1906, and on the 30th day of November, 1907, the decree was entered holding that the land was accretion land belonging to the plaintiff and the defendants, city of Sioux City and Paul King, as riparian owners and that the other defendants and the intervenor had no right, title or interest therein and the title was quieted in the riparian owners against all the adverse parties. (See appellant's abstract of record, page 7, found on page 96 of abstracts and arguments in civil cases for the years 1907 to 1910.)

In paragraph 3 of the copy of the petition enclosed by Mr. McCormick, it is alleged,

> "That the defendants are W. R. Benton and J. J. Keefe, *although adjudged by this court* in its decree dated November 30, 1907, and found in the district court record, volume 50 on pages 265 to 274 *to have no interest in the property,* are still making claim thereto."

The decree of date November 30, 1907, was never appealed from. It is true that the state of Iowa, as intervenor, and some of the defendants filed in said court a petition for a new trial. This new trial was granted and an appeal was taken from the order granting the new trial and the supreme court held that the new trial was erroneously granted. Hence, the first mentioned decree of November 30, 1907, became and was at all times the final decree in said case. And in view of this final decree the defendant, R. W. Benton, was not a necessary party defendant in the action brought in May, 1911, upon which the decree of date December 13, 1911, was based. The said R. W. Benton was as effectually deprived of the land by the first decree as by the second, hence it would appear that the claim for refund should have been made within one year from the date of the first mentioned decree.

Furthermore, it is provided by code supplement section 2900-a13:

> "If the grantee of the state, or his successor, administrator, or assigns, shall be deprived of the land conveyed by the state *under this act* by the final decree of a court of record * * * then the money so paid the state for the said land shall be refunded by the state to the person, or persons entitled thereto."

It will be observed that this act, chapter 212 of the acts of the thirty-first general assembly, was approved April 6th, 1906, and

took effect by publication April 9th, 1906; whereas, the patent attached to the papers, as heretofore stated, bears date March 21st, 1906. And hence, the land described in said patent was not conveyed by the state under this act, for the act had not yet taken effect when the conveyance was made. Hence, this act has no application thereto and does not furnish authority for the making of the refund claimed.

Whether the claimant would have any other remedy for the recovery of the money paid for the real estate, I have not undertaken to determine, but it would seem that if in equity he is entitled to such a refund that the same should be made at the hands of the legislature.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

PRIMARY ELECTIONS.—County convention should nominate when no candidate received thirty-five per cent in the primary.

June 29, 1912.

W. H. PALMER, *County Attorney,*
Maquoketa, Iowa.

DEAR SIR: Yours of the 27th instant addressed to the attorney general has been referred to me for reply.

You call attention to the fact that your county comprises one senatorial district, and that at the primary election there were four candidates for the office of state senator, no one of which received the required 35 per cent of the total vote cast, and then you ask:

> "Can the one who received the largest vote be declared nominee without the action of the county convention?"

This question should be answered in the negative. Code supplement section 1087-a26 provides:

> "The said county convention shall make nominations of candidates for the party for any office to be filled by the voters of a county when no candidate for such office has been nominated at the preceding primary election by reason of the failure of any candidate for any such office to receive 35 per centum of all the votes cast by such party therefor."

This department has further held that in making such nominations the county convention is not restricted to those candidates who received votes at the primary election, but may nominate a candidate for whom no vote was cast at the primary election.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

PRIMARY ELECTIONS.—A candidate nominated on more than one ticket must designate party ticket on which his name is to appear.

July 6, 1912.

MR. SAMUEL U. BOSWORTH,
Mt. Pleasant, Iowa.

DEAR SIR: Yours of the 30th ult. duly received, and will say that in my judgment the legality of the election of the delegates should not be affected by the fact that they had voted the ticket of, or were members of another political party.

By the last sentence of code supplement section 1087-a6 it is provided in case the person is nominated upon more than one ticket he shall forthwith file with the proper officer a written declaration indicating the party under which his name is to be printed on the official ballot. And I think the same rule should apply to delegates where they are elected by more than one political party.

With reference to the question where only one delegate was elected who voted the prohibition ticket, this department has held that where there is a failure to elect delegates that the old delegates hold over, and hence the old prohibition delegates, together with the one elected, should have met and held their county convention. I am inclined to think, however, that the county convention could not be lawfully convened at this time but that under the following provisions found in code supplement section 1087-a24,

> "Vacancies in nominations in such offices occurring after the holding of county, district or state convention, or on *failure of any such convention* to fill the vacancy in a nomination as aforesaid, then it shall be filled by the *party committee* for the county, district or state as the case may be."

it would be the right and duty of your committee to fill the vacancies in these offices.

Your last question is whether or not the county committee may elect delegates to the state convention. In my judgment this question should be answered in the negative, and that in all probability the failure to hold a county convention would result in that county being unrepresented in the state convention.

I will return your letter as requested.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

SCHOOLS—NON-USER OF SCHOOL PROPERTY.—Where there has been "non-user" for school purposes for two years continuously the school district has the right to sell the land and buildings.

July 6, 1912.

MR. A. M. FAGAN,
Casey, Iowa.

DEAR SIR: Yours of the 1st inst. addressed to the attorney general has been referred to me for reply.

You call attention to the fact that certain real estate, acquired for school purposes ceased to be used for school purposes some time this summer, and you state that it is now the desire of the district to dispose of the land and the building providing the same belongs to them to do so, the land having been deeded to the school corporation by straight deed without conditions some thirty years ago, and you inquire "Have they the right to sell it or does it come under the provisions of chapter 144 laws of the thirty-fourth general assembly."

This section provides:

> "In any school district wholly outside any city or incorporated town, in the case of non-user for school purposes for two years continuously of any real estate acquired for a school house site it shall revert, with improvements thereon, to the owner of the tract from which it was taken, upon repayment of the purchase price without interest, together with the value of the improvements, to be determined by arbitration, and upon such payment the school corporation shall make

formal conveyance to such owner. During its use the owner of the right of reversion shall have no interest in or control over the premises."

In my judgment this section would not become applicable until as stated in the section there have been "non-user for school purposes for two years continuously," and that the school district would have the right to sell the land and buildings and doubtless the purchaser would have the right to remove the buildings. I do not believe, however, that the school corporation could so convey this property as that the purchaser would obtain a perfect title to the land and in my judgment the owner of a tract of land from which a school house site was taken would have the right to avail himself, under the provisions of this chapter, whenever the two year period of non-user matured.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

SCHOOLS.—Interest on school building bonds—How paid.

July 6th, 1912.

DR. E. H. CRANE,
Odebolt, Iowa.

DEAR SIR: Your telegram of this date addressed to the attorney general, has been referred to me for reply.

Your question briefly stated is, whether or not it was erroneous to pay interest on school building bonds from the contingent fund, and if so the proper method of correcting such an error where the same has already been made.

While this matter is one upon which this department could not render an official opinion, except to certain state officers, and should have been submitted to the county attorney, yet I may say that this department has held in an opinion given the superintendent of public instruction, that the interest on school-building bonds should be paid from the school building bond fund, provided for by code supplement sections 2768 and 2813, and that the same should not be paid from the contingent fund, which is available for the purposes enumerated in code supplement section 2783.

The only method of correcting this error that I could suggest, would be to transfer by an order of the board, the required amount from the school building bond fund to the contingent fund.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

CONVENTION—COUNTY.—Delegates required to hold same.

July 6, 1912.

MR. G. H. GETTY, *County Auditor,*
Boone, Iowa.

DEAR SIR: Your letters of the 1st and 2d inst. addressed to the attorney general have been referred to me for reply.

Your first question is:

> "At the primary election held June 3d, 1912, the prohibition party had no candidates filed before the primary but a few persons were voted for ranging from three to twelve votes for various persons for each office. Now at a convention that met Saturday afternoon, June 29th, 1912, this party selected candidates for the various offices and asked to have them placed on the prohibition ticket as regularly nominated candidates of the party. The question in this case, should these names so selected be placed on the ballot at the general election?"

This department has held that where any person was voted for for an office to be filled at the primary election even though the name of the person voted was not printed upon the primary ballot and that such votes did not result in the nomination of the person thus voted for, the county convention might nominate for that office. Hence this question should be answered in the affirmative.

Your second question is in substance the same as the first except that it applies to different political party and it should also be answered in the affirmative.

Your third question briefly stated is, with reference to the number of delegates required to enable a county convention to lawfully convene and transact business.

It is provided in code supplement section 1087-a25:

> "When the delegates, or a majority thereof, or when *delegates* representing a *majority* of the precincts thus elected shall

have assembled in the county convention, at the time herein prescribed and at the county seat, the county convention shall be called to order'' etc.

Hence it would appear that if there is a majority of the whole number of delegates elected to the convention or if one or more delegates representing a majority of the precincts are thus assembled, the convention would be lawful.

Your fourth question is:

''What showing of the organization must be made at this office in order to give any of its actions credence?''

In my judgment no showing would be required further than the ordinary certificate as to the nominations made by the convention signed by the officers thereof as required.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

COUNTY WARRANTS—ORDER OF PAYMENT.—Where a warrant is stamped ''unpaid for want of funds'' and thereafter partially paid and new warrant issued for balance, the new warrant should take precedence in time of payment over warrants issued after the original warrant.

July 9, 1912.

CEMENT PRODUCTS CO.,
Estherville, Iowa.

GENTLEMEN: Yours of the 29th ult. addressed to the attorney general has been referred to me for reply.

You call attention to the different methods that have been followed by the various county treasurers with reference to the payment of county warrants and your question briefly stated is, whether or not when a county warrant has been presented for payment and stamped ''unpaid for want of funds'' and thereafter a partial payment of the warrant made and a new warrant issued for the unpaid balance such new warrant should be paid prior to the payment of the warrants issued subsequently to the presentation of the first warrant.

Code supplement section 483 provides:

"When a warrant drawn by the auditor on the treasurer is presented for payment, and not paid for want of money, the treasurer shall indorse thereon a note of that fact and the date of presentation, and sign it, and thenceforth it shall draw interest at the rate of five per cent. He shall keep a record of the number and amount of the warrants presented and indorsed for non-payment, *which shall be paid in the order of such presentation.*"

Code section 485 provides:

"When a person wishing to make a payment into the treasury presents a warrant of an amount greater than such payment, or presents for payment a warrant in excess of the funds in the treasury, the treasurer shall cancel the same and give the holder a certificate of the overplus, upon the presentation of which to the county auditor he shall file it, and issue a new warrant of that amount, and charge the treasurer therewith; and such certificate is transferable by delivery, and will entitle the holder to the new warrant, payable to his order, *and containing reference to the original warrant.*"

There is no doubt but that the first section quoted entitled the warrant to be paid in the order of its presentation and, in my judgment, the new warrant should be paid in the same order as the old, otherwise there would be no necessity or purpose in having the new warrant contain a "reference to the original notice" as provided in the last section quoted.

I am returning herewith the correspondence as requested.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

SCHOOLS—FUNDS.—Should be separately kept.

July 9, 1912.

HONORABLE JOSEPH MATTES,
Odebolt, Iowa.

DEAR SIR: Yours of the 6th instant duly received.

Your question briefly stated is whether or not interest on outstanding school house bonds may lawfully be paid from the contingent fund.

This question has heretofore been passed upon by this department, and I quote you from an opinion rendered the superintendent of public instruction on January 2d of this year:

"Your first question is: 'From what fund should the interest on the bonded indebtedness be paid? Is it legal to pay any part or all of this interest from the contingent fund?'

"Code supplement section 2768 provides:

" 'The money collected by tax for the erection of school houses and the payment of debts contracted therefor shall be called the *school house fund;* that collected for the payment of school buildings bonds shall be called the *school building bond fund;* that for *rent, fuel, repairs* and other *contingent* expenses necessary for keeping the school in operation, the *contingent fund;* and that received for the payment of *teachers,* the *teachers' fund;*'

"Code supplement section 2813 provides:

" 'The board of each school corporation shall, at the same time and in the same manner as provided with reference to other taxes, fix the amount of tax necessary to be levied to pay any amount of principal *or interest due or to become due* during the next year in the lawful bonded indebtedness which amount shall be certified to the board of supervisors as other taxes, and levied by them on the property therein as other school taxes are levied, but such tax shall not exceed five mills upon the dollar of the assessed valuation of such property for money borrowed for improvements.'

"Code supplement section 2783 provides:

" 'It may provide and pay out of the contingent fund to *insure school property* such sum as may be necessary, and may purchase *dictionaries, library books,* including books for the purpose of teaching *vocal music, maps, charts and apparatus* for the use of the schools thereof to an amount not exceeding twenty-five dollars in any one year for each school room under its charge;'

"From an examination of these sections, I am of the opinion that the interest on the bonded indebtedness should be paid from the school building bond fund, and that no part of the same could legally be paid from the contingent fund."

In addition to the foregoing I call your attention to the decision of our supreme court in the case of *Wolfe vs. School District*, 51 Iowa, 432, wherein it is held that a warrant drawn upon the treasurer of a school district for the payment of lightning rods out of the contingent fund was on its face invalid, an expense for that purpose not being indispensable to the operation of the school.

In the course of the opinion in that case the supreme court construes the word "necessary," found in code supplement section 2768, to mean "indispensably requisite," and that a lightning rod was not an "indispensable requisite" for keeping the school in operation.

In other words, the sections heretofore quoted clearly specify that the money collected for the payment of school building bonds shall be called the *school building bond fund* and that the only things that can be paid from the contingent fund are "rent, fuel, repairs and other contingent expenses necessary for keeping the school house in operation."

Section 2783 enumerates other matters which may be paid for out of the contingent fund but there is no provision for the payment of interest from the contingent fund. Interest on the school building bonds is in no sense a contingent expense but is a fixed charge the same as the bonds themselves.

While there is no statute making the school officials guilty of embezzlement for a diversion of these funds as is provided by section 904 of the code where a city councilman or other officer of a city participates in, advises, consents to, permits or allows funds to be diverted yet, in my judgment, the law clearly contemplates that these funds should be kept separate and distinct.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

SCHOOLS.—Contracts based on bids made by mistake not enforcible.

July 10, 1912.

MR. W. J. BALDWIN,
President of School Board,
Crescent Block, Iowa City, Iowa.

DEAR SIR: Your letter of the 9th inst. addressed to the attorney general has been referred to me for reply.

You call attention to the fact that a certain bidder on school construction work made a mistake of $2,340 in the amount of his bid, making his bid that amount less than he intended to make it. You state that the bid as made was $27,900 and that by correcting the mistake it would be $30,240; and that the next lowest bid was $33,324. You then inquire whether it would be legal to enter into a contract with the man who made the lowest bid and add thereto the amount of the mistake, $2,340, making the corrected bid $30,240; or should the contract be made with the next lowest bidder at $33,324, or should the school district re-advertise for bids.

You state that there is no doubt in the minds of the members of the board but that the party acted in good faith and that there was in fact the mistake claimed.

Under these circumstances the court would not enforce specific performance of such a contract but would cancel the same on the grounds that there was no meeting of minds, and hence no legal contract. And in my judgment the party should be permitted to correct the amount of his bid, and if it is still the lowest bid that the board might lawfully contract with him at the amount of his bid as thus corrected. Or it might re-advertise for bids but would not be required to do so.

I doubt if it would be legal for the board to contract with the next lowest bidder at $33,324.

You say that the party prefers to forfeit the amount of his check rather than enter into the contract at the amount of the erroneous bid and inquire whether or not, if the board re-advertises for bids, or if it awards the contract to the second lowest bidder you would be compelled under the law to declare a forfeiture of the check, or could it be returned to the party legally.

As we have heretofore seen, if there was in fact a mistake, no meeting of the minds, and hence no binding contract, in my judgment, the party could recover the amount of his check less any damage the district may have incurred on account of the mistake up to the time the mistake was discovered and reported, and hence the board would not be required to declare it forfeited but might lawfully return it to the party.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

ALCOHOL—USE OF BY PHYSICIANS.—Physicians may not sell alcohol to patients but have a right to prescribe it in course of treatment.

July 12, 1912.

MR. G. E. MCFARLAND,
Stanhope, Iowa.

DEAR SIR: Yours of the 9th inst. addressed to the attorney general has been referred to me for reply.

You state that you are a registered physician and inquire with reference to what your rights are in prescribing and dispensing alcohol and alcoholic liquors. As I understand the law you are not entitled to make a direct sale of alcohol or other intoxicating liquors even to a patient under treatment by you, but that you have the right to administer to a patient actually under your treatment alcohol or medicines containing alcohol as a part of the course of treatment for such patient whether for external or internal uses.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

POLL TAX—AMOUNT COLLECTIBLE.—Total poll tax might exceed three dollars but not to exceed six dollars and fifty cents.

July 12, 1912.

MR. F. F. HAIGHT,
Peterson, Iowa.

DEAR SIR: Yours of the 10th inst. addressed to the attorney general has been referred to me for reply.

Your question is, can more than $3.00 be collected for poll tax? This question should be answered in the affirmative.

By subdivision 2 of code supplement section 1303, a poll tax of 50c on each male resident over twenty-one years of age is provided for.

By code supplement section 1550, it is further provided that the road supervisors shall require all able bodied male residents of their district between the ages of twenty-one and forty-five to perform two days' labor on the roads between the 1st day of April and October of each year.

By code section 1552 each person liable to perform labor on the roads as poll tax and who fails to attend is liable to forfeit and pay the sum of $3.00 *for each day's* delinquency.

And by code sections 1554 and 1555 this delinquency is required to be reported and collected as other taxes.

Hence, the total poll tax might exceed $3.00 but could not exceed $6.50.

Your tax receipt is herewith returned as requested.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

SCHOOLS.—Sites not fenced with barbed wire.

July 12, 1912.

MR. F. W. COATES,
617-619 Bank & Ins. Bldg.,
Dubuque, Iowa.

DEAR SIR: Yours of the 10th inst. addressed to the attorney general has been referred to me for reply.

Your first question is:

> "Is it illegal or unlawful to erect or have a barbed wire fence along a public road or highway throughout the farming district of the state of Iowa?"

This should be answered in the negative. Chapter 138 of the acts of the thirty-third general assembly defines a lawful fence and specifically provides for the use of barbed wire in the construction of such fences.

By code section 741 it is provided:

> "Cities and towns may, by ordinance, prohibit the use of barbed wire to enclose in whole or in part a lot or lots within the incorporated limits thereof and to provide for the removal of such wire."

And by code supplement section 958, this provision is made applicable to special charter cities.

The only prohibition known to the writer against the use of barbed wire in fences in rural districts is code section 2817, which reads as follows:

"Barbed wire shall not be used to enclose any school buildings or grounds, nor for any fence or other purpose within ten feet of any such grounds. Any person violating the provisions of this section shall be punished by a fine not to exceed $25.00."

In view of the foregoing, it is unnecessary to answer your last question.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

SCHOOL DIRECTOR—VACANCY IN OFFICE.—Where a director leaves the district with intention of making his home elsewhere and another is elected to fill the vacancy, the person elected is entitled to hold the office although the old member may return.

July 13, 1912.

MR. D. G. WILEY,
Orient, Iowa.

DEAR SIR: You called at this office yesterday and requested an opinion of this department upon the following state of facts:

George Pritcher, a member of the school board of the Independent District of Orient, who was regularly elected for a term of three years in either the spring of 1910 or 1911, left Orient in October, 1911, and remained away until after the regular spring election in 1912, the general impression being that it was not his intention to again take up his residence within the Independent District of Orient. At the 1912 election a director was elected to fill the vacancy which the board considered existed by reason of the continued absence of Mr. Pritcher. Mr. Pritcher returned to Orient some time after the spring election but laid no claim to membership upon the school board nor has he up to this time taken any action indicating that he considered himself a member of the board. The person elected as a director to fill the vacancy at the regular spring election of this year at the proper time assumed the duties of his office and is still continuing to act as a director.

Upon these premises you ask an opinion as to which of the two men, Mr. Pritcher or the person elected to fill the vacancy, is now entitled to membership on the board.

Without going into an extended discussion of the proposition I will say that in my judgment the person elected to fill the vacancy

which the board considered existed is a legal member of the board. That when Mr. Pritcher left Orient, as he says, for the purpose of looking up a new business location with the intention of remaining away if a suitable one was found, and absented himself from the meetings of the board for a period of six months prior to the regular spring election and was absent at the time of the call for such election with no intimation from him or indication that he intended to return, the board was justified in declaring a vacancy and in providing for the filling of such vacancy at the regular election. The acts of Mr. Pritcher indicated that he abandoned the office with no intention of performing any of its duties and since his return to Orient, as I am advised by you, he has not assumed any of the duties of the office nor has he claimed the right to act as a member of your board. Therefore, in my judgment, the newly elected member is legally acting as a director.

Yours truly,

JOHN FLETCHER.
Assistant Attorney General.

DOGS.—Power of cities and towns to prevent running at large.

July 18, 1912.

MR. FRED T. WALLERT,
Centerville, Iowa.

DEAR SIR: Your letter of the 16th inst. addressed to the attorney general has been referred to me for reply.

You request to be advised as to whether the city authorities have the power to order a vicious dog to be muzzled or killed if not restrained.

Section 707 of the code referring to the powers and duty of cities and towns reads as follows:

> "They shall have power to regulate, restrain, license or prohibit the running at large of dogs within their limits, and to require them to be kept upon the premises of the owners thereof, unless licensed to run at large, and to provide for the destruction thereof when found at large contrary to and in violation of the provisions of any ordinance or by-law passed pursuant to the power herein granted."

If your city has an ordinance of the character provided for in this section they would undoubtedly have the right to compel the owners to restrain dogs and to destroy any dogs that were found running at large contrary to the provisions of the ordinance.

Section 2340 of the code supplement makes it lawful for any person to kill any dog caught in the act of worrying, maiming, or killing any domestic animal, or any dog attacking or attempting to bite any person, and makes the owner of the dog liable to any person injured by being attacked by such dog.

Yours truly,

JOHN FLETCHER,
Assistant Attorney General.

LIVE STOCK.—Inspection of when imported into this state.

July 19, 1912.

DR. GEO. G. HINK,
Mapleton, Iowa.

DEAR SIR: Because of the absence of Attorney General Cosson from the city I take the liberty of replying to your communication of the 16th inst. addressed to him.

You ask an opinion as to whether a person shipping horses and cattle into this state may be required to have them tested for certain diseases. I enclose you the rules and regulations prepared by the state board of animal health governing the importation of live stock into this state.

These rules were adopted by the board under the authority of section 3, chapter 115, acts of the thirty-fourth general assembly, which in my judgment gives the board the authority to make such rules as have been adopted by it.

Sections 5028-j and 5028-k of the code supplement provide for the inspection of registered cattle, or cattle eligible to registry for breeding and dairying purposes and make the expense of such inspection a lien upon the cattle. If tests were made by you upon request of the state veterinarian you are no doubt entitled to proper compensation for your services to be paid by the owner of the stock inspected.

Yours truly,

JOHN FLETCHER,
Assistant Attorney General.

PRIMARY ELECTIONS.—County conventions without power to make original nominations.

July 19, 1912.

MR. JOHN C. DE MAR,
218 Clapp Bldg., City.

DEAR SIR: Owing to the absence of Attorney General Cosson from the city I take the liberty of replying to your letter of the 17th inst. addressed to him.

You request an opinion upon the following state of facts:

> "Polk county comprises an entire judicial district. At the democratic county convention, held on the 29th of June, 1912, a motion was made to proceed to the nomination of a candidate for the office of judge of the district court. This motion was laid upon the table and the convention adjourned without proceeding further in the matter. The question arises on the right of the county central committee to make a nomination and have the same placed on the ballot among the list of Democratic nominees."

Practically the exact question submitted by you was passed upon by former Attorney General Byers in an opinion given to Mr. Geo. W. Finch, August 19, 1910, a copy of which I enclose.

While the primary law has been amended in several particulars since that opinion was rendered none of the amendments affect the question you present, and I affirm the views expressed in that opinion and believe that your committee is without the authority to nominate a candidate for judge of the district court and have his name placed on the regular democratic ticket when no person was nominated at the regular convention which had authority to make a nomination.

The case of *State ex rel Pratt vs. Hayward,* 141 Iowa, 196 cited in the enclosed opinion will be of interest to you in a general way upon the question submitted.

Yours very truly,
JOHN FLETCHER,
Assistant Attorney General.

CRIMINAL PROSECUTION.—Private counsel may be employed to assist in.

July 22, 1912.

MR. J. H. VINE,
Cleghorn, Iowa.

DEAR SIR: Your letter of the 19th inst. addressed to Attorney General Cosson is received.

You desire to be advised as to whether a person interested in the prosecution of a criminal case may employ counsel to assist the county attorney in the trial of the case. The supreme court has held in the following cases that private counsel may be employed to assist in the prosecution and that in acting as an attorney in the case he may do anything in connection therewith that can be done by the county attorney with the same force and effect.

State vs. Taylor, 122 Iowa, 125;

State vs. Crafton, 89 Iowa, 109;

State vs. Shreeves, 81 Iowa, 615;

State vs. Fitzgerald, 49 Iowa, 260;

and the recent case of *State vs. Chocolate,* decided by the supreme court on June 6th which may be found in one of the advance sheets of the Northwestern Reporter.

Yours truly,

JOHN FLETCHER,
Assistant Attorney General.

PRIMARY ELECTIONS—NUMBER OF VOTES REQUIRED TO NOMINATE.

July 23, 1912.

MR. M. F. WILTSE,
411 East Linn St.,
Marshalltown, Iowa.

DEAR SIR: I take the liberty of replying to your communication of the 19th inst. addressed to Attorney General Cosson because of his absence from the city.

You inquire regarding a ruling made by this department interpreting the provisions of the primary law for writing names of candidates for office on the ballot where no nomination papers have been filed for such office.

I do not know what particular opinion you refer to but believe that you can get all the information you desire on this subject in chapter 59 of the acts of the thirty-fourth general assembly which specifies the per cent of votes a person must have in order to be nominated for an office where his name is not printed upon the ballot.

You also ask the following question: "Where there is only one man on the ballot, how many votes does it require for nomination?"

If a candidate's name is printed upon the regular ballot and he receives but one vote, and no vote is cast for any other candidate for that office the regular candidate would be nominated.

Yours very truly,

JOHN FLETCHER,
Assistant Attorney General.

SCHOOLS.—Buildings may be insured in county mutuals.

July 23, 1912.

MR. H. N. WILSON,
Sioux Rapids, Iowa.

DEAR SIR: Yours of the 19th inst. addressed to the attorney general has on account of his absence from the city been referred to me for reply.

Your question is whether or not school boards may lawfully insure school houses in county mutual insurance companies.

In my judgment this inquiry should be answered in the affirmative. The supreme court in the state of New Jersey, in the case of *French, Receiver, vs. Town of Millville,* reported in 66 New Jersey Law, 392, held that cities and towns might insure their public buildings in such companies and that the membership of such companies was not restricted to individuals, and I see no reason why the same ruling should not apply to school corporations or other subdivisions of the state. Code supplement section 1759-a provides as follows:

> "Any number of persons may, without regard to the provisions of the preceding chapter, enter into contracts with each other for the insurance from loss or damage by fire, tornadoes, lightning, hail storms, cyclones or wind storms, and to insure plate glass against breakage by accident, but such associations

of persons shall in no case insure any property not owned by one of their own number except such school and church property as may be situated within the territory in which they do business."

This department has not heretofore passed upon this question. We are advised that the attorney general of Nebraska rendered an opinion to the effect that insurance in such companies would not be iliegal but that it was preferable for school boards to insure in stock companies.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

PRIMARY ELECTIONS—FORM OF SAMPLE BALLOT.

July 23, 1912.

MR. J. B. BERTLSEN,
Correctionville, Iowa.

DEAR SIR: Because of the absence of Attorney General Cosson from the city I take the liberty of replying to your letter of the 17th inst. addressed to him.

You desire to be advised as to whether it is proper for judges or clerks of the primary election to write in or permit to be written in on sample ballots posted in a voting precinct the names of township officers where no names have been printed on the regular ballot.

It is not the duty of this department to give advice except to the various state officials and state departments and the writer merely expresses his views upon the question you submit.

I think that the sample ballot posted at the polling places should be the exact ballot with which the voter will be confronted when he enters the booth to prepare his ballot, and nothing should be placed upon the posted ballots that would in any way mislead the voter. I will say, however, that I do not believe that the writing in of names on these sample ballots would constitute an offense or would in any way vitiate an election.

Yours truly,

JOHN FLETCHER,
Assistant Attorney General.

SCHOOLS—TUITION—HOW COMPUTED WHEN PUPIL ABSENT PART OF MONTH.

July 26, 1912.

MR. W. J. HEINMILLER,
Ionia, Iowa.

DEAR SIR: Yours of the 24th inst. addressed to the attorney general has been referred to me for reply.

Your question is whether or not tuition should be paid for the entire month where a scholar misses four or five days during the month, or whether it should be paid in proportion to the number of days attended.

The law is silent upon this point and the question is one upon which this department could not give an official opinion. However, it would seem to me to be a fair method to charge tuition for the entire month where the pupil remains enrolled for the full time even though he misses four or five days during the month for in such cases he is usually required to make up the work lost, and the additional time required of the teachers in having this work made up would more than offset any inequality there might be in requiring tuition to be paid for a few days during which he did not attend.

On the other hand, if the pupil starts in at the beginning of the month and drops out at the middle of the month and is no longer enrolled, then you should only be required to pay for that portion of the month during which he actually attends.

It seems to me that this rule would be fair both to the pupil and the school district.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

ALLISON MONUMENT COMMISSION—POWER TO PURCHASE SITE.

July 26, 1912.

E. R. HARLAN, *Curator*,
Historical Building.

DEAR SIR: Yours of the 26th inst. addressed to the attorney general has on account of his absence been referred to me for reply.

You call attention to chapter 251 of the acts of the thirty-third general assembly providing an appropriation for a pedestal for a monument to the late Senator Allison. You also submit a plat of the capitol grounds and the grounds adjacent thereto upon which are indicated three proposed locations for said monument, same being indicated on the plat as follows, site "A" being southeast of the southeast corner of the capitol grounds proper, being on the south side of Walnut street and on the east side of East 11th street. Site "B" is in the same general location, being on the south side of Walnut street and west side of East 11th street, while site "C" is located on the south east corner of the capitol grounds proper;

You then submit the following inquiry:

> "Would the commission have power to purchase out of the funds provided by the statute sites 'A' or 'B,' or would it be obliged to use site 'C'?"

Section 2 of the chapter above referred to provides:

> "Said commission is hereby clothed with full authority to *locate* and erect upon the capitol grounds, or any *extension thereof* a suitable pedestal to be used by the Allison Monument Committee in erecting thereon a monument to the memory of the late Wm. B. Allison, and said commission shall have authority to do *all things reasonably necessary to the location* and erection of said pedestal."

Section 4 of said chapter provides:

> "There is hereby appropriated from the funds of the state treasury not otherwise appropriated, the sum of ten thousand dollars, or so much thereof as may be necessary to defray the authorized expenses of erecting said pedestal and of said commission."

In my judgment the authority to locate as specified in section 2, and as quoted above, would authorize the commission to purchase sites "A" and "B" provided said grounds may be constituted an extension of the capitol grounds if in their opinion there is no suitable site available upon the capitol grounds as now constituted, and that they would not be confined to site "C" in the location of said monument.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

ROADS—COUNTY MOTOR VEHICLE FUND—FOR WHAT PURPOSE USED.

July 31, 1912.

MR. J. B. UHL,
c|o Board of Supervisors,
Des Moines, Iowa.

DEAR SIR: Yours of the 29th inst. addressed to the attorney general has been referred to me for reply.

Your question briefly stated is, can the board of supervisors of Polk county use any part of its portion of the county motor vehicle road fund in spreading gravel or cinders on the highways of the county without first having a survey of the roads made.

Section 33 of chapter 72 of the acts of the thirty-fourth general assembly provides in part as follows:

> "The said county motor vehicle road fund shall be expended for the following purposes only; the crowning, draining, dragging, graveling or macadamizing the public highways outside of the limits of cities and towns, and for the building of *permanent culverts* on such highways. Such culverts shall be constructed of concrete or stone, and said fund shall be under the control of the board of supervisors for said purposes only.
>
> "Before undertaking any work of *permanent improvement* in accordance with the provisions of this act, the board of supervisors shall cause the roads proposed to be improved to be surveyed; and the *location of all culverts* shall be designated and the width and height of grade established."

This department has heretofore held that this fund might be used to defray the expense of dragging without first having the road surveyed for the reason that dragging is a temporary and not a permanent improvement. In my judgment if the improvement sought to be made by the spreading of gravel or cinders upon the public highway is of a temporary character, such as the filling of mud-holes or chuck-holes with cinders or gravel, that the fund might be used for such purpose without first having a survey of the road made.

On the other hand, if the improvement sought to be made by the use of gravel or cinders is designed to be of a permanent character and is to be spread upon any considerable portion of the

highway that then the road should be first surveyed and the width and height of grade established before the fund could be so used.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

GIFT ENTERPRISES.—Gift enterprise law interpreted.

July 31, 1912.

MR. CHAS. FRUSH,

Jesup, Iowa.

DEAR SIR: Yours of the 29th inst. addressed to the attorney general has been referred to me for reply.

Your inquiry is with reference to the legality of merchants giving tickets or coupons to customers with each cash purchase, the same being redeemable in dishes, silverware, furniture and other prizes. In the case you mention you say that a large ticket is given with different coin denominations printed on the margin and with each purchase the amount of the purchase is punched out until the entire card is used and then the holder is entitled to certain premiums.

This method would not amount to gambling because there is no element of luck or chance.

The remaining question is whether or not it is a gift enterprise which is prohibited by chapter 226 of the acts of the thirty-third general assembly, sections 1 and 2 of which are as follows:

> "All gift enterprises, as hereinafter defined, and all trade practices carried on in connection therewith are hereby prohibited and declared to be unlawful.
>
> "Whenever two or more persons enter into any contract, arrangement or scheme, whereby for the purpose of inducing the public to purchase merchandise or other property of one of the parties to said scheme, *any other party thereto, for a valuable consideration and as a part of such scheme, advertises and induces or attempts to induce the public to believe that he will give gifts,* premiums or prizes to persons purchasing such merchandise or other property of such party to said scheme, and that stamps or tickets will be given by the seller in connection with such sales entitling the purchaser of such

property to receive such prizes or gifts from any other party to such scheme, the parties so undertaking and carrying out such scheme shall be deemed to be engaged in a 'gift enterprise,' and unless the articles or things so promised to be given as gifts or premiums with or on account of such purchases, shall be definitely described on such stamp or ticket and the character and value of such promised prize or gift fully made known to the purchaser of such merchandise or other property at the time of the sale thereof, and unless the right of the holder of such stamp or ticket to the gift or premium so promised *becomes absolute* upon the completion upon the delivery thereof without the holder being required to collect any specified *number of other similar stamps or tickets* and to present them for redemption together, and the right of the holder of such stamp or ticket to the prize or gift so offered is absolute, and does not depend on *any chance,* uncertainty or *contingency* whatever.''

Unless these tickets are interchangeable among different merchants so that the holder may be required or permitted to buy goods from each merchant and have the amount punched from his ticket as purchases are made, or unless the holder is required to collect two or more of such tickets and present them for redemption together, or unless the holder's right to the gift or prize is to depend upon some chance or contingency, there would be nothing illegal about the scheme described by you.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

COUNTY CONVENTION—ADJOURNMENT.—A county convention may lawfully adjourn to a date subsequent to that on which it is required by law to convene and make nominations on such adjourned date.

July 31, 1912.

A. J. BURT, *County Attorney,*
Emmetsburg, Iowa.

DEAR SIR: Yours of the 26th inst. addressed to the attorney general has been referred to me for reply.

You call attention to the fact that the primary election failed to result in the nomination of candidates for certain county offices

of your county, and that the county convention, which convened on June 29th, without taking any action in regard to nominations for such offices adjourned until the first Monday in September, and your question is whether or not a county convention at this adjourned meeting may lawfully make nominations of candidates for such offices.

Code supplement section 1087-a25 provides:

> "Said county convention shall be composed of delegates elected at the last preceding primary election and shall be held on the fourth Saturday following the primary election convening at 11 o'clock A. M."

The following section provides for holding of district conventions and further provides:

> "No such district convention shall be held earlier than the first Thursday or later than the fifth Thursday following the county convention."

The following section provides that a state convention shall be held not earlier than the first Wednesday, and not later than the fifth Wednesday following the county convention.

It will be observed that times more or less definite are specified for the convening of each of these conventions but there is no provision requiring either of such conventions to complete its work on the date at which it is required to convene and no doubt such a requirement would be unwise for it is a matter of common knowledge that dead-locks frequently occur which necessarily prolong the existence of the convention beyond the day on which it is required to convene. In fact I am advised that such a deadlock existed in the judicial convention recently held in your district and that after an adjournment from the day on which the convention was required to and did convene until the following day that an adjournment was then taken until a fixed date several days later.

In the case of *Phillips vs. Gallagher,* (Minn.) 42 L. R. A., 222, it was held that a nomination made on the day following the day on which the convention was called to meet was valid even though such nomination was made by a reconsideration of the vote taken on the previous day by which another person was nominated for the same office.

In the case of *Phillips vs. Smith*, 25 Colo., 398, it was held that a convention which lawfully convened on the 25th day of August, 1898, and on that date adjourned subject to the call of its chairman, and that a meeting was thereafter duly called by the chairman to be held on the 4th day of October, on which date one John McComb was nominated for state senator, the convention then adjourned until October 11th not having completed its work and on the last mentioned date the nomination of McComb was set aside and one Whitney nominated, it was held that the nomination made on October 11th was legal.

In the case of *People vs. Board of Commissioners*, 31 N. Y. Sup., 112, it was held that where a convention met and finished its work and re-assembled three days later and nominated another candidate that the convention having once completed its work and adjourned sine die that it had exhausted its power.

These authorities are the only ones I have been able to find bearing on the subject and in my judgment a county, district or state convention may lawfully adjourn until a date subsequent to that on which it is required to convene and that it may lawfully make any nominations on the adjourned date that it might have made on the date on which it is required to convene.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

BANK DEPOSITS—TERM "TIME DEPOSITS" DEFINED.

August 1, 1912.

JOHN L. BLEAKLY, *Auditor of State,*
Building.

DEAR SIR: You have submitted to this department certain correspondence which has heretofore passed between your office and the Farmers Loan & Trust Co., and the Farmers Trust & Savings Bank of Sioux City, and in connection therewith you ask for a construction of the following provision contained in code supplement section 1889, and particularly as to the meaning of the term "time deposits" as used therein.

> "The president and cashier of every savings and state bank shall cause to be kept at all times a full and correct list of

the names and residences of the officers, directors, examining committee, and of all the stockholders in the bank, and the number of shares held by each, in the office where its business is transacted. Said list shall be subject to the inspection of all the stockholders and creditors of the bank during business hours of each day in which business may be legally transacted. A copy of such list, verified by the oath of the president or cashier, shall be transmitted to the auditor of state within ten days after each annual meeting. No corporation shall engage in the banking business, receive deposits, and transact the business generally done by banks, unless it is subject to and organized under the provisions of this title, or of the banking laws of the state heretofore existing, except that loan and trust companies may receive *time deposits* subject to the same limitations as are now or may hereafter be prescribed for the receiving of deposits by state banks and issue drafts on their depositaries.

"All such companies and all corporations now existing or hereafter organized under the provisions of chapter 1, title 9 of the code whose articles of incorporation authorize the acceptance and execution of trusts, and all corporations in whose names the word 'trust' is incorporated and forms a part, shall have a full paid capital of not less than the amount of capital of saving (savings) banks, as provided in section 1843 of chapter 10 and shall be subject to examination, regulation and control by the auditor of state, like savings and state banks, and their stockholders shall be liable to the creditors of such companies as provided in section eighteen hundred and eighty-two of this chapter for stockholders in savings and state banks. Any corporation violating this section shall forfeit its charter at the suit of the attorney general, and said corporation, its officers, directors and agents shall be punished by a fine of not less than five hundred dollars, or imprisonment of not less than two years in the penitentiary, or by both such fine and imprisonment, at the discretion of the court; provided that loan and trust companies organized under the general incorporation laws of the state, which were engaged in the banking business prior to the first day of January, 1886, and have continued therein since said date, may, by the proper additions to their articles of incorporation, become state banks within

the provisions of this title, without incorporating the word 'state' in the names of such corporations."

It will be observed that this provision has to do with at least two kinds of deposits; first, deposits, and second, time deposits. The term "deposit" means a temporary disposition of money for safe keeping, especially a sum of money left with a bank or broker subject to order.

"In banking, it means a sum of money left with a bank for safe keeping, subject to order, and payable not in the specific money deposited, but in an equal sum."

13 Cyc., 790;

Hunt vs. Hopley, 120 Iowa, 695.

Hence, when we have before us a provision such as that above quoted which prohibits a corporation from receiving "deposits" but permits it to receive "time deposits" of necessity there must be a distinction between the two. And in my judgment the words "time deposits" as used in this provision have reference to deposits which are made for a specified length of time whether such time be long or short.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

CITIES AND TOWNS—PUBLICATION OF FINANCIAL CONDITION.—Cities and towns must publish statement of finances each year either in newspaper or in pamphlet.

August 1, 1912.

MR. A. H. RUDD,
Dow City, Iowa.

DEAR SIR: Yours of the 24th ult. addressed to the attorney general has been referred to me for reply.

You inquire first, is the city council of an incorporated town required to publish a statement of the town finances each year or not.

This question should be answered in the affirmative.

Code supplement section 1056-a7 provides as follows:

"It shall be the duty of the chief accounting and warrant issuing officer of each city and town, namely auditor or clerk as the case may be, to prepare and to publish the annual report of the financial condition and transactions of the city or town now or hereafter required by law, and all accounting officers of all boards or commission departments and offices whatsoever within the corporate area receiving or disbursing public funds shall file with the auditor or clerk, within thirty days from the expiration of their fiscal year, a report in writing of official transactions in the form and manner required by law. In case of refusal or gross neglect to comply with the law and provisions herein governing the method of accounting for and reporting municipal transactions herein referred to, the official so delinquent shall be deemed guilty of a misdemeanor. The auditor or clerk aforesaid is hereby authorized to institute legal proceedings to enforce the provisions herein requiring report to him."

Code supplement section 1056-a8 further provides in cities and towns having less than 5,000 population, the annual report may be published in pamphlet form if authorized by the city council.

You propound the further question if they are required to so publish and fail to do so for one or two years should they not go back to the time covered by the former publication that there may be no break in the published account.

While the law contemplates that these accounts should be published annually I am not prepared to say that the officers now in office should be required to go back and publish reports which should have been made and published by their predecessors.

In view of the fact that this question may come before the courts I would prefer not to give any further opinion thereon.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

INSURANCE—LIFE INSURANCE—TAXATION OF STOCK.—Stock should be assessed to the owner, the basis to be its value on the first day of January of each year.

August 1, 1912.

CARROLL BROS., *Attorneys,*
301-304 Lane Bldg.,
Davenport, Iowa.

GENTLEMEN: Yours of the 31st ult. addressed to the attorney general has been referred to me for reply.

You call attention to chapter 63 of the acts of the thirty-fourth general assembly and state,

> "It was the understanding of the officers of our company at the time this law was passed that the tax of five mills on the dollar applied to life insurance companies on stock basis. The company we represent is a stock company with a capital of $100,000, writing life, health and accident business, and the question of taxation of the stock of said company is now up for consideration by the assessor of the city of Davenport and it is our idea that the stock of this company should be assessed on the five mill basis as provided in said chapter 63."

You ask to be advised as to this matter.

It will be observed that the chapter to which you refer does not undertake to define "moneyed capital" except as the meaning of that term is defined by section 5219 of the statutes of the United States. Nor does the chapter undertake to define moneys and credits. Nor is the term "moneys and credits" defined by section 1310 of the code which is amended by section 1 of chapter 63.

It has been held that shares of stock in railroad companies and insurance companies and the like are in a fair sense moneyed capital but they are not such within the purview of section 5219.

First National Bank vs. Waters, 7 Fed., 152, at 156;

Mechanics National Bank vs. Baker, 46 Atl., 586;

Redemption Bank vs. Boston, 125, U. S., 60.

Hence, it follows that stock in insurance companies is not moneyed capital and should not be assessed on the 20% basis provided for bank stock and moneyed capital by section 5 of chapter 3.

Our own supreme court in a recent case reversed its former holding in the same case and held that corporation stock was not moneys and credits.

See *Morrill vs. Bentley,* 130 N. W. Rep., 734.

This being true it follows that such shares of stock should not be assessed on the five mill basis provided for by section 1 of chapter 63 as the basis of taxation for moneys and credits.

In my judgment shares of stock in insurance companies should be assessed under code section 1323 to the owner of the stock, the assessment to be on the value of such shares on the first day of January in each year as provided therein.

See *Layman vs. Iowa Telephone Co.,* 123 Iowa, 591.

Hence, the shares of stock in such concerns should be taxed at 25% of its real value.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

INTOXICATING LIQUORS—WHO MAY LAWFULLY SELL.

August 1, 1912.

MR. O. LEONARD JONES,
Luana, Iowa.

DEAR SIR: Yours of the 29th ult. addressed to the attorney general has been referred to me for reply.

Unless the mulct law has been established in your county no person would have the right to sell intoxicating liquors of any kind except a person lawfully holding a permit granted by the district court. No other person would have the right to sell any intoxicating liquors whatever, nor would they have the right to sell any beverage containing any percentage whatever of alcohol however slight. Our supreme court has held that alcohol is an intoxicating liquor however much diluted or disguised.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

POOL HALLS—POWER OF CITIES TO REGULATE.

August 1, 1912.

MR. H. D. GLASSBURN,
Hancock, Iowa.

DEAR SIR: Yours of the 29th ult. addressed to Mr. Fletcher has on account of the fact that he is now taking his vacation been referred to me for reply.

You inquire whether or not proprietors of billiard and pool halls are permitted to sell pop and such like drinks and cigars in connection with their business and whether or not there are stipulated hours for their opening and closing.

I know of no law that would prevent the keeper of a pool or billiard hall selling cigars, pop and other like drinks so long as the beverages sold are not intoxicating.

With reference to the hours of the day when pool and billiard halls are permitted to remain open, will say that this is a matter entirely within the power of the city or town in which the same are located to regulate under the authority conferred by section 702 of the code.

With reference to your other question concerning the sale of tobacco to minors and the use of cigarettes and tobacco by minors, I am enclosing you copy of an opinion heretofore given N. W. Ayer & Son which covers this question.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

DENATURED ALCOHOL—SALE OF BY PERSON NOT REGISTERED PHARMACIST.—One not a registered pharmacist has right to sell denatured alcohol.

August 2, 1912.

MR. S. T. HITCHENS,
Ute, Iowa.

DEAR SIR: Yours of the 1st inst. addressed to the attorney general has been referred to me for reply.

You inquire whether or not it is necessary to take any steps towards getting permission to sell denatured alcohol in view of the fact that you are not a registered pharmacist.

By code supplement section 2593 it is required that certain enumerated articles shall only be sold by registered pharmacists; denatured alcohol is enumerated among the articles mentioned in this section. However, by chapter 162 of the acts of the thirty-third general assembly this section was amended by striking therefrom the words "denatured alcohol" and by further providing that "denatured alcohol shall not be deemed to be a poison within the meaning of the statute relating to the sale of or handling of poisons." Hence, in my judgment you would have the right to sell same even though not a registered pharmacist.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

PRIMARY ELECTIONS—VACANCIES IN NOMINATIONS—HOW FILLED.

August 3, 1912.

MR. L. A. WINE,
Sac City, Iowa.

DEAR SIR: Yours of the 2d inst. addressed to the attorney general has, on account of his absence, been referred to me for reply.

You state that at the primary election there were a few votes cast for a Miss Watson who declined the nomination, and then "we went out and got the name of Mrs. Brown, who consented to make the run. We would like to have her name appear on the democratic ticket. In case this cannot be will you please inform me how we can get her name on the ticket or ballot for the fall election."

I take it from your letter that no nomination for the office was made at the county convention. If not then the following provision would govern:

> "Vacancies in nominations in such offices occurring after the holding of a county, district or state convention, or on failure of any such convention to fill a vacancy in a nomination as aforesaid, then it shall be filled by the party committee for the county, district or state as the case may be."

Code supplement section 1087-a24 as amended. This would put her name on the democratic ticket.

Her name might be placed upon the ballot for the fall election by petition in compliance with code section 1100 which provides:

> "Nominations for candidates for county offices may be made by a nomination paper signed by not less than twenty-five qualified voters, residents of such county."

Blank nomination papers could doubtless be furnished you on request by your county auditor.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

PRIMARY ELECTIONS—CONTESTS—CHARACTER OF VOTES ADMISSIBLE.

August 5, 1912.

HON. W. C. HAYWARD,
Secretary of State,
State House.

DEAR SIR: The letter of Clarence W. Larson, dated August 3d and addressed to you and by you referred to me for reply, has been duly considered.

His inquiry is with reference to the method of hearing the contest arising between himself and Claus L. Anderson on account of objections filed by Mr. Larson to the certificate of nomination filed with you showing C. L. Anderson to be the republican nominee for representative of Montgomery county. And particularly with reference to the manner of producing evidence whether by oral testimony of witnesses, by depositions or by affidavit.

It is provided by code section 1103, that such objections "shall be considered by the secretary and auditor of state and the attorney general, and a majority decision shall be final." No form of trial, however, is prescribed and in the absence of established rules I would say that there would certainly be no objection to the oral testimony of any witness who might be brought. Nor could there be objection to the deposition of any such witness taken upon reasonable notice to the adverse party. And in my judgment there should be no objection to the affidavits of witnesses being received. Certainly there could be no objection to this form of testimony if both parties in interest agreed that the testimony might be taken in that form. Hence, it is my opinion that the

testimony might be submitted in any of the three forms suggested.

I assume that notice has been given the candidate affected by this objection as required by the latter part of section 1103 of the code. If not, the same should be given.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

TAXATION—SECURITIES TAXABLE AND EXEMPT FROM TAXATION.

August 6, 1912.

MR. S. R. WRIGHTINGTON,
33 State St., Boston.

DEAR SIR: Yours of the 10th ult. addressed to the treasurer of state has been referred to this department for reply.

Your first question is:

> "Am I right in understanding that under the laws of 1911, chapter 63, shares in national banks located in Iowa and in Iowa banks of discount as well as savings banks are all taxable to the holder, and that the bank does not in practice pay the tax for the holder?"

The shares are all taxable to the holder as stated, but the bank as a matter of practice still in many cases pays the tax for the holder as it is obliged to do by the provisions of code section 1325, which provides as follows:

> "The corporations described in the preceding sections shall be liable for the payment of the taxes assessed to the stockholders of such corporations, and such tax shall be payable by the corporation in the same manner and under the same penalties as in case of taxes due from an individual taxpayer, and may be collected in the same manner as other taxes, or by action in the name of the county. Such corporations may recover from each stockholder his proportion of the taxes so paid, and shall have a lien on his stock and unpaid dividends therefor. If the unpaid dividends are not sufficient to pay such tax, the corporation may enforce such lien on the stock by public sale of the same, to be made by the sheriff at the principal office of such corporation in this state, after giving

the stockholders thirty days' notice of the amount of such tax and the time and place of sale, such notices to be by registered letter addressed to the stockholder at his postoffice address, as the same appears upon the books of the company, or is known by its secretary."

Your second question is:

"I understand that the shares in insurance corporations organized under the laws of Iowa are taxable to the holder, but that the corporation pays the tax for the holder. What is the practice regarding corporations organized outside of Iowa?"

In such cases the shares of stock held by residents of Iowa are taxed to such residents, owners of same as their other property and they are liable for the payment of the tax. In such cases I know of no way of requiring the corporation to pay the tax assessed and levied against the individual stockholders. But our supreme court has held that the shares of stock in a foreign corporation may be assessed to the resident owner of such stock here even though the property of the corporation has been fully assessed in the state where it is located.

Judy vs. Beckwith, 114 N. W., 565.

Your third question is:

"Am I right in understanding that shares in manufacturing and trading corporations whether organized under the laws of Iowa or elsewhere are exempt if the property of the corporation is located in the state, otherwise taxable? What happens if part of the property is in the state and part outside?"

Code section 1319 provides for the taxation of property in the hands of the manufacturer and that the average value thereof is to be ascertained upon the manufactured and unmanufactured goods and is to be estimated upon those materials only which enter into its combination or manufacture. Machinery used in manufacturing establishments shall for the purpose of taxation be regarded as real estate. "Corporations organized under the laws of this state for pecuniary profit and engaged in manufacturing as defined by this section and which have their capital represented by shares of stock shall through their principal accounting offices

list their real estate, personal property and moneys and credits in the same manner as is required of individuals. The owners of capital stock of manufacturing companies as herein provided for *having listed their property as above directed,* shall be exempt from assessment and taxation on such shares of capital stock."

In reply to the last part of your question will say that in my judgment if the plant and property located in this state is partly listed and assessed by the corporation as required by this section that all shares of stock therein would be exempt even though the corporation might have a part of its property in some other state.

Your fourth question is:

> "Are shares in public service corporations taxable to the holder and does it matter whether the corporation is doing business in the state or is incorporated under the laws of the state?"

Such shares of stock are taxable to the holder and it is immaterial where a corporation does business or whether it is incorporated under the laws of this or some other state.

Your fifth question is:

> "Are shares in unincorporated associations taxable to the holder? We have in Massachusetts many voluntary associations organized under deeds of trust issuing shares of stock like those in corporations. How would you treat such stock in Iowa?"

Such shares cannot under our laws be recognized but the entire property of the association would either be taxed to it the same as to a partnership or firm, or the interest of each shareholder might be assessed to him as an individual.

Replying to the last portion of your letter will say that I would be glad to look over your statement when completed and give you my best judgment as to the correctness thereof in an unofficial way.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

CITIES—SALVAGE FROM OLD PAVEMENT—TO WHOM SAME BELONG.

August 7, 1912.

MR. FRANK L. MAY,
Lansing, Iowa.

DEAR SIR: Yours of the 6th inst. addressed to the attorney general has been referred to me for reply.

Your question briefly stated is whether or not old paving material belongs to the city, the owner of the abutting property or to the contractor removing the same and replacing the pavement.

In my judgment the old material would in reality belong to the property owner the same as the land to the center of the street. However, if the old material is to be used in reconstruction of the new pavement, the cost of which is to be assessed to his property, the cost of the new pavement thus reduced, the property owner should not complain of the city's permitting the contractor to use the old material in the new pavement.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

PRIMARY ELECTIONS—WHEN NOMINATIONS MAY BE MADE BY COUNTY CONVENTION.

August 9, 1912.

AL. WILKIN, *County Auditor,*
Burlington, Iowa.

DEAR SIR: Yours of the 7th inst. addressed to the attorney general has been referred to me for reply.

Your question is whether it is possible to place the name of a candidate on the ballot this fall to fill a vacancy in an office for which no candidate was nominated at the primary election.

If votes were cast for the office at the primary election but were insufficient in number to nominate, then the county convention should have made a nomination for the office. And if they failed to do this then a nomination for the office may be made by the party committee for the county, district or state as the case may be.

See code supplement section 1087-a24 as amended by chapter 69, acts of the thirty-third general assembly.

On the other hand if no votes were cast for the office at the primary then the convention was without authority to make the nomination and the only way by which a candidate's name may be placed upon the ballot under such circumstances is by petition in accordance with the provisions of code section 1100 which provides:

> "Nominations for candidates for state offices may also be made by nomination paper or papers signed by not less than five hundred qualified voters of the state; for county, district or other division not less than a county, by such paper or papers signed by not less than twenty-five qualified voters residents of such county, district or division. But the name of the candidate placed upon the ballot by any other method shall not be had by petition for the same office."

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

NOTARY PUBLIC—ACKOWLEDGMENTS ON SUNDAY AND LEGAL HOLIDAYS.—It is legal to take acknowledgments on a holiday but illegal on Sunday.

August 9, 1912.

MR. L. W. DAWES,
110 Benton St.,
Boone, Iowa.

DEAR SIR: Yours of the 6th inst. addressed to the governor of the state has been referred to this department for reply.

Your first question is whether or not it is legal for a notary public to take acknowledgments on Sundays and holidays.

In my judgment it would be perfectly legal to take acknowledgments on any holiday but that it would be illegal to take the same on Sunday.

Your second question is whether or not the notary lays himself liable to law by taking such acknowledgments.

Code section 5040 provides:

> "If any person be found on the first day of the week, commonly called Sunday * * * * engaged in any labor except that of necessity or charity he shall be fined not more than

$5.00 nor less than $1.00 and be imprisoned in the county jail until the fine, with costs of prosecution, shall be paid."

Hence, your second question should be answered in the affirmative.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

TAXATION.—Personal property taxable for city purposes even though on agricultural land which is exempt.

August 15, 1912.

MR. J. S. SMEAD,
Epworth, Iowa.

DEAR SIR: Yours of the 12th inst. addressed to the attorney general has been referred to me for reply.

Your question is, is the personal property of a resident agriculturist within the corporate limits of a town subject to corporation tax.

In my judgment this question should be answered in the affirmative. Where land exceeding ten acres in extent is within the corporate limits of a town and is used exclusively for agricultural purposes it is exempt from certain municipal taxes, but I know of no law that makes the same exemption with reference to personal property that may be situated thereon.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

CONGRESSIONAL CONVENTION—TIME FOR HOLDING—FILLING OF VACANCIES IN NOMINATION BY COMMITTEE.

August 19, 1912.

MR. LISTON MCMILLEN,
Oskaloosa, Iowa.

DEAR SIR: In yours of the 17th instant you state:

"Hon. N. E. Kendall was elected at the primary election June 3, 1912, as the republican nominee for congress in this

6th congressional district of Iowa, and resigned as such nominee early in this month.

"No congressional convention of the republican party, under section 1087-a26 was called prior to the county convention held July 10, 1912, under section 1087-a25.

"The writer, as a citizen of said district, and candidate for nomination to fill this vacancy in nomination respectfully requests your opinion as attorney general, on the five following questions:

"(1) Has the said central committee the power to fill this vacancy?

"(2) Has any convention the power to fill this vacancy?

"(3) What course should be pursued to fill this vacancy?

"(4) Does the word 'primary' relate to 'primary election' in section 1102?

"(5) Do you consider that an extra session of the legislature would be advisable to relieve the situation?"

Code supplement section 1087-a25 as now amended provides:

"Said county convention shall be composed of delegates elected at the last preceding primary election, and *shall be* held on the *fourth Saturday following the primary election.*"

This would fix the date of the county conventions on June 29th, instead of July 10th, as stated by you.

Code supplement section 1087-a26, as now amended, provides:

"In any * * * * congressional district composed of more than one county, in any year in which a * * * * representative in congress of the United States is to be elected a * * * congressional convention may be held * * * by each political party participating in the primary election of the year. Not less than ten days and not more than sixty days *before* the day fixed for holding the county convention a call for such * * * * congressional convention to be held shall be issued by the party central committee for any such district, and published," etc.

The same section further provides:

"No such district convention shall be held earlier than the first Thursday, nor later than the fifth Thursday following the county convention."

Hence, it would appear that the last date upon which a congressional convention might legally be held was on August 1, 1912, which was prior to the time the vacancy occurred in the instant case.

Code supplement section 1087-a24, as now amended, provides:

First for filling *vacancies in nominations* occurring between the primary election and the convention dates, and second, "Vacancies in nominations in such offices *occurring after the holding of a county, district or state convention,* or on failure of any such convention to fill a vacancy in a nomination, as aforesaid, then it *shall be filled by the party committee for the county, district or state,* as the case may be."

Hence in my judgment, your first question should be answered in the affirmative and the second in the negative.

With reference to your third question will say that said vacancy should be filled by the congressional committee, but if it is desired that a convention be held, the county conventions might be reconvened and delegates selected to a congressional convention and then such convention could express its preference and then the congressional committee in filling the vacancy would have the benefit of the advisory nomination thus made by the congressional convention, but the power to fill the vacancy regardless of the preferences of the convention would still be lodged in the congressional committee.

With reference to your fourth question will say that in my judgment the same should be answered in the negative.

Code section 1102 was enacted at a time when there was no law regulating the time or manner of holding primary elections, and must have referred to such primaries as might then have been in use by the various political parties, rather than the primary now recognized and provided for by law.

Your fifth and last question does not call for a legal opinion but simply touches a matter on which individuals might have an

honest difference of opinion and an answer to the same could be of no assistance to you in determining the real question in issue.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

PRESIDENTIAL ELECTORS—METHOD OF FILLING VACANCIES IN NOMINATION.—Vacancy in nomination of elector at large should be filled by state committee and in a particular congressional district by congressional committee.

August 22, 1912.

HON. B. F. CARROLL,
Governor of the State of Iowa,
State House.

DEAR SIR: In response to your oral request for an opinion as to the proper method of filling vacancies in nomination for the office of presidential elector will state that code section 1173 provides:

> "At the general election in the years of the presidential election, or at such other times as the congress of the United States may direct, there shall be elected one person from each congressional district into which the state is divided, as elector of president and vice-president, and two from the state at large, no one of whom shall be a person holding the office of senator or representative in congress, or any office of trust or profit under the United States."

It has been held that the term "state officer" includes every officer for whom all the electors of the state are entitled to vote and who is authorized to exercise his official functions throughout the entire state and without limitation of any political sub-division of the state except United States senators, members of congress and electors for president and vice-president of the United States.

People vs. Nixon, 158 N. Y., 221; s. c. 52 N. E., 1117.

Code supplement section 1087-a24 as now amended provides:

> "Vacancies in nominations in such offices occurring after the holding of a county, district or state convention * * * shall be filled by the party committee for the county, district or state as the case may be."

In my judgment presidential electors at large are to all intents and purposes state officers, while the other presidential electors are district officers even though all are elected by the voters of the entire state. Hence it follows that should a vacancy in nomination exist for the office of presidential elector at large, such vacancy should be filled by the state committee of the particular political party, and should a vacancy in nomination exist in the office of presidential elector in a particular congressional district of the state the vacancy should be filled by the congressional committee of that district for the particular political party.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

SCHOOLS.—Authority of district to deed property for road purposes without submitting to vote of the people.

August 23, 1912.

MR. BENJ. P. POOR,
Burlington, Iowa.

DEAR SIR: Yours of the 19th inst. addressed to the attorney general has been referred to me for reply.

Your question briefly stated is whether or not a school district would have authority to deed to the city for road purposes any portion of a school house site without being so authorized by the vote of the people of the district.

While the board would not have the authority to procure at the expense of the district real estate for highway purposes except by a vote of the people in accordance with the provisions of code section 2749, yet in my judgment they would have the authority to dedicate such portion of a school house site as might not be required for school purposes to the public for highway purposes, especially if it furnish an avenue or highway leading to the school. In my judgment there should be no objection to the execution of such a deed if it is clearly and specifically set out in the deed that the conveyance is made for highway purposes and is to revert to the school district when it ceases to be so used. At any rate no serious complication could result for if such a conveyance is beyond the

power of the board the portion of the site thus conveyed would still belong to the district.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

CITIES AND TOWNS.—Number of votes required to incorporate.

August 23, 1912.

MR. C. M. THORNE,
Dubuque, Iowa.

DEAR SIR: Yours of the 17th inst. addressed to the attorney general has been referred to me for reply.

Your question briefly stated is whether or not when the petition provided for by code section 559 has been signed in writing by twenty-five of the qualified electors of the territory proposed to be embraced in the incorporated town, the election provided for in section 601 must be participated in by the same or greater number of qualified electors.

Code supplement section 602 provides:

> "If a majority of the ballots *cast* at such election be in favor of the incorporation and the same has been confirmed and approved as above provided, the court or judge thereof in vacation shall order the election of council, mayor, clerk, treasurer," etc.

In my judgment this provision does not require all of the electors who signed the petition or an equal number to participate in such election and that such an incorporation may be completed where a less number of electors participate in the election, and all that is required by the letter of the law is a majority of the votes cast at such election.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

INTOXICATING LIQUORS—CANVASS OF PETITION.—Petition must be canvassed at regular meeting of the board of supervisors and not at an adjourned meeting.

August 24, 1912.

MR. HANS PAHL,
Hartley, Iowa.

DEAR SIR: Your of the 19th inst. addressed to the attorney general has been referred to me for reply.

Your question is whether or not it is legal for the board of supervisors to canvass the saloon petition at an adjourned meeting.

Code supplement section 2448, subdivision 1, provides with reference to such consent petition that the same "shall have been filed with the county auditor and shall, by the board of supervisors, at a *regular meeting*, have been held sufficient."

In my judgment this language should receive a reasonable construction, and while the board of supervisors' meeting might adjourn from day to day and the petition be approved on any of those days, in that sense it might be at an adjourned meeting. But I do not believe that the board of supervisors could adjourn to a future date leaving any considerable time intervening and approve a consent petition at such adjourned meeting. Hence it follows that your question should be answered in the negative.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

POOL HALLS—OPERATION IN CONNECTION WITH OTHER BUSINESS.—Minors cannot be permitted in barber shop operated in same room as pool hall.

August 24, 1912.

MR. C. P. BEARDSLEY,
Lock Box 51, Reinbeck, Iowa.

DEAR SIR: Yours of yesterday addressed to the attorney general has been referred to me for reply.

You ask for the law relating to the operation of billiard or pool room in connection with a barber shop.

Code section 5002 provides:

"No person who keeps a billiard hall, beer saloon or nine or ten pin alley, nor the agent, clerk or servant of any such person, nor any person having charge or control of any such hall, saloon, or alley, shall permit any minor to remain in such hall, saloon or alley, or to take part in any of the games known as billiards or nine or ten pins. A violation of the provisions of this section shall be punished by a fine not less than five nor exceeding one hundred dollars, or imprisonment in the county jail not exceeding thirty days."

You further ask is a partition required and if so the character of its construction. If minors are to be permitted in the barber shop then it must be separated from the pool or billiard hall proper by a substantial partition completely obstructing the view from that portion of the room where pool and billiards are to be played.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

SCHOOLS—COMPUTING COST OF TUITION.—In computing the cost of tuition the total number of pupils attending the school is the proper basis.

August 24, 1912.

MR. T. J. BRYANT,
Griswold, Iowa.

DEAR SIR: Yours of the 10th inst. addressed to the attorney general has been referred to me for reply.

You ask for a construction of section 3, of chapter 146 of the acts of the thirty-fourth general assembly as to whether or not the average cost of tuition should be determined on the basis of the total number of pupils attending the high school, or whether it should be limited to the number so attending who reside in the district.

In my judgment the proper basis is the number of pupils attending the high school from all sources and is not limited merely to the number residing in the district. I concede that the statute

is not as clearly written as it might be, but I think this is the proper interpretation.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

SCHOOLS—SCHOOL BOARD—AUTHORITY TO PRESCRIBE COURSE OF STUDY.—School boards cannot prescribe course of study in advance of the eighth grade without approval of the superintendent of public instruction.

August 27, 1912.

HON. A. M. DEYOE,
Superintendent Public Instruction.

DEAR SIR: Yours of the 22d inst. addressed to the attorney general has been referred to me for reply.

Your first question is:

> "Can rural school boards, under section 2772, code of Iowa, which reads as follows: 'The school board shall prescribe a course of study for schools of the corporation,' etc., legally prescribe a course of study in advance of the eighth grade or common branches, without first securing the approval of the superintendent of public instruction, as provided in section 2776?"

The material portion of the first section referred to is quoted in the above inquiry.

Section 2776 provides:

> "It shall have power to maintain in each district one or more schools of a *higher order* for the better instruction of all in the district prepared to pursue such a *course of study*, and it may establish grade or union schools and determine what branches shall be taught therein, but the *course of study* shall be subject to the approval of the *superintendent of public instruction.*"

There are three possible constructions which might be placed upon this section. The course of study which is to be subject to the approval of the superintendent of public instruction might be the one of the school of a higher order, or it might be of one for use in the grade or union school, or it might be both. However, I am of the opinion that the course of study refers not only to

the schools of a higher order mentioned in this section, but also to the grade or union schools. Hence it follows that your first question should be answered in the negative.

Your second question is:

> "Can town independent school boards legally prescribe a high school course under section 2772, code, without securing the approval of the superintendent of public instruction?"

No other provision is found authorizing the school board of an independent town district to prescribe a course of study or high school course unless this power is conferred by the sections above referred to, 2772 and 2776. Hence, it would seem to be implied that these sections were intended to apply to city or town independent school districts as well as to other school corporations.

This view seems to be strengthened when we take into account code section 2823, the last section of chapter 14 of title XIII of the code, of which the foregoing sections are a part, which provides:

> "The provisions of this chapter shall apply alike to all districts, except when otherwise clearly stated, and the powers given to one form of corporation, or to a board in one kind of corporation, shall be exercised by the other in the same manner, as nearly as practicable."

Hence, it follows that your second question should also be answered in the negative.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

ELECTIONS—FILING NOMINATION PAPERS—TIME IN WHICH NOMINATION PAPERS FOR STATE OFFICERS MUST BE FILED—NOMINATION OF PRESIDENTIAL ELECTORS BY PETITION.

August 28, 1912.

MR. CARL FRANKE,
724 Fleming Bldg., Des Moines.

DEAR SIR: Response will be made to your oral request for an opinion concerning nomination papers in their order as follows:

First, Within what time can nomination papers be filed?

Code section 1104 provides:

> "Certificates of nomination and nomination papers of candidates for state, congressional, judicial and legislative offices shall be filed with the secretary of state not more than sixty, nor less than thirty days; those for all other offices, except for cities and towns, with the county auditor of the respective counties, not more than sixty nor less than twenty days * * * before the day fixed by law for the holding of the election."

Hence it would follow that nomination papers for state officers, and all others above mentioned except county officers, for this year should be filed not earlier than September 6th nor later than October 5th; and for county officers not earlier than September 6th nor later than October 15th.

Your second question is with reference to the form of signature.

Code section 1100 provides:

> "Each elector so petitioning shall add to his signature his place of business and postoffice address."

Your third question is, Can presidential electors' names appear on the same petition?

While all of the electors are voted for by the state at large, yet it is provided by code section 1173:

> "At the general election in the years of the presidential election, or at such other times as congress of the United States shall direct, there shall be elected by the electors of the state one person from each *congressional district* into which the state is divided as elector of president and vice-president, and two from the *state at large.*"

Hence in my judgment the two electors for the state at large are in effect state officers, and nomination papers nominating electors at large should have the same number of names as state officers, to wit, five hundred. Whereas, on the other hand, the electors for each of the several congressional districts should be petitioned for by electors residing in that district and only twenty-five names would be required for each. Hence it follows that the names of the two electors at large might appear on the same petition but the names of the other electors should appear on separate petitions and be signed only by residents of the particular congressional district to be represented by the elector.

Your fourth question is, Can the names of all state officers be upon the same petition?

In my judgment this inquiry should be answered in the affirmative.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

BOARD OF SUPERVISORS.—What proceedings of required to be published.

September 3, 1912.

W. S. BILBY, *County Attorney,*
Knoxville, Iowa.

DEAR SIR: Yours of the 23d ult. addressed to the attorney general has been referred to me for reply. Your question as stated by you is as follows:

> "The board of supervisors of Marion county directs me to submit to you for your opinion the question of whether or not the proceedings of a board of supervisors required under the provisions of 1330-c, and under section 1346-g, title VII, chapter 1, supplement, code, which relate to the assessment of telegraph and telephone companies and railroad and express companies, are of such nature as are required to be published as official publications under section 441 of the supplement code."

The last section to which you call attention provides:

> "And the two applicants thus showing the greatest number of bona fide yearly subscribers living within the county shall be the county official papers, in which all the proceedings of the county board of supervisors * * * shall be published at the expense of the county during the ensuing year."

The first section to which you refer provides:

> "At the first meeting of the board of supervisors held after such statement is received by the county auditor it shall cause such statement to be entered in its minute book, and make and enter therein an order stating the length of the lines and the assessed value of the property of each of said companies situated in each city, town, township, or lesser taxing district in its county, as fixed by the executive council, which shall

constitute the taxable value of said property for taxing purposes."

Our supreme court has said:

"The proceedings of the board are its official acts, resolutions and *orders* upon the various matters which come before it."

Haislett vs. Howard Co., 58 Iowa, 378.

The second section to which you refer makes a similar provision as to the order to be entered by the board.

It would seem to me that both of these orders are clearly proceedings of the board, within the meaning of the term as used in code supplement section 441, and hence, it would follow that they should be published in some form. However, I am inclined to think that it would not be necessary to publish the matter in full, and it may be that the same could be abstracted in such a way as to comply with the law and yet make the publication much less expensive to the county.

I am enclosing you copy of an opinion heretofore rendered the county attorney of Madison county covering similar questions.

In view of the following provision found in both code supplement sections 1330-c and 1346-g: "The county auditor shall immediately thereafter transmit a copy of said order to the councils of cities, or towns, and to the trustees of each township in the county," it would seem that there is no real necessity for the publication of such matters, as all parties in interest are provided with a copy, and that these and other matters might well be excepted from the requirements of publication. But this must be done by the legislature and not by unwarranted construction of an existing statute.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

FENCES—PARTITION.—When and how made hog tight.

September 3, 1912.

MR. FERD DITTMER,
R. R. No. 1, Stockton, Iowa.

DEAR SIR: Yours of recent date addressed to the attorney general has been referred to me for reply.

You state that six years ago, without the permission of your neighbor you put hog wire on the partition fence; that now he has the field hog tight all around and refuses to pay you for the old wire or put on new.

At the time you put on this old wire he was not required to make his fields hog tight, but under the new law, chapter 138 of the acts of the thirty-third general assembly, which went into effect July 4, 1909, it was provided: "that all partition fences may be made tight by the party desiring it, and when his portion is so completed, and securely fastened to good substantial posts set firmly in the ground, not more than twenty feet apart, the adjoining property owner shall construct his portion of the adjoining fence, in a like tight manner, same to be securely fastened to good substantial posts, set firmly in the ground not more than twenty feet apart."

It is further provided:

> "Upon the application of either owner, after notice given as prescribed in this chapter, the fence viewers shall determine all controversies arising under this section, including the partition fences made sheep and swine tight."

If your fence complies with this law, then your neighbor would be required to make his part comply with the law, either by paying you for the wire or by permitting you to remove it and by substituting wire of his own, and your remedy would be to call out the fence viewers who would probably make an order requiring him to pay or substitute wire of his own.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

JURY.—Verdict of must be unanimous and signed by foreman.

September 3, 1912.

GEO. C. STILES, *Attorney,*
Andrus Bldg.,
Minneapolis, Minn.

DEAR SIR: Yours of the 31st ult. addressed to the attorney general has been referred to me for reply.

You ask to be advised whether the laws of this state require the verdict of a jury in a civil case to be unanimous, and also ask to have quoted the sections of our statute covering the subject.

Your inquiry should be answered in the affirmative, as will appear from the following sections of the statute:

> "When the case is finally submitted to the jury, they may decide in court or retire for deliberation. If they retire, they shall be kept together, under charge of an officer until they agree upon a verdict or are discharged by the court. The officer having them under his charge shall not suffer any communication to be made to them, or make any himself, except to ask them if they have agreed upon their verdict, unless by order of the court, and he shall not, before their verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon."
>
> Code section 3711.
>
> "The verdict must be in writing, signed by a foreman chosen by the jury itself, and, when agreed to, the jury must be conducted into court, their names called, and the verdict rendered by him and read by the clerk to the jury, and the inquiry made whether it is their verdict. If any juror disagrees, the jury must be sent out again, but if no disagreement is expressed, and neither party requires the jury to be polled, the verdict is complete, and the jury shall be discharged from the case."
>
> Code section 3722.
>
> "When the verdict is announced, either party may require the jury to be polled, which shall be done by the court or clerk, asking each juror if it is his verdict. If any one answers in the negative, the jury must be sent out for further deliberation."
>
> Code section 3723.

However, the parties may agree to accept the verdict of a majority, as will appear by the following section:

> "The parties, at any time before the final submission, may agree to take the verdict of the majority, which agreement, being stated to the court and entered upon the record, shall bind the parties, and in such case a verdict, signed by any seven

or more and duly rendered, when read and not disapproved by said majority, shall in every particular be as binding as if made by a full jury; or, when both parties require it, a struck jury may be ordered, whereupon eighteen jurors shall be called into the box, and the plaintiff first, and then the defendant, shall strike out one juror in turn until each has struck six, and the remaining six shall try the case."

Code section 3699.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

INSURANCE.—Banks are not authorized to write insurance.

September 5, 1912.

MR. HENRY DRESLER,
Silver City, Iowa.

DEAR SIR: Yours of the 30th ult. addressed to the attorney general has been referred to me for reply.

Your question is, "Is it permissible under our statute for state bank to write fire insurance and advertise that fact."

This question should be answered in the negative. The writing of insurance is not within the powers of a state bank. However, there is no objection to employes of the bank acting as agent for the insurance company but the bank itself is not permitted to assume any obligations whatever in connection therewith.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

LOAN AND TRUST COMPANIES.—Not authorized to receive savings deposits.

September 10, 1912.

HON. JOHN L. BLEAKLY,
Auditor of State,
State House.

DEAR SIR: Yours of the 27th ultimo enclosing a letter of Mr. James F. Toy, addressed to the attorney general, has been referred to me for reply. Your first question is:

"Will you please give me your opinion as to whether or not a loan and trust company organized under the laws of the state of Iowa can receive savings deposits or postal savings deposits."

This question should be answered in the negative. In code supplement section 1889 it is provided:

"No corporation shall engage in the banking business, receive deposits, and transact the business generally done by banks unless it is subject to and organized under the provisions of this title, or of the banking laws of the state heretofore existing, except that loan and trust companies may receive time deposits subject to the same limitations as are now or may hereafter be prescribed for the receiving of deposits by state banks, and issue drafts on their depositaries."

Your second question is:

"Also, whether a loan and trust company organized under the laws of this state prior to 1886 can, by amending its articles of incorporation, do a general banking business."

This question should be answered in the affirmative, as in the latter part of the same section it is provided:

"Provided that loan and trust companies organized under the general corporation laws of the state, which were engaged in the banking business prior to the first day of January, 1886, and have continued therein since said date, may, by the proper additions to their articles of incorporation, become state banks within the provisions of this title, without incorporating the word 'state' in the names of such corporations."

And if the loan and trust company, by complying with this provision, becomes a state bank, it would have the right to do the same kind of banking business as other state banks.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

TOWNSHIP TRUSTEES.—Power of over highway taxes.

September 11, 1912.

EUGENE E. OWEN,
R. F. D. No. 3, Postville, Iowa.

DEAR SIR: Yours of the 9th inst. addressed to the attorney general has been referred to me for reply.

Your question is whether or not the trustees of one township have any authority to dispose of the highway tax money by turning the same over to another township.

This question should be answered in the negative.

Your second question is with reference to your remedy.

The proper officers would probably be required to account for this money to their own home township the same as though it had not been turned over. It is also possible that you might have some remedy against the trustees or other officers of the other township wrongfully receiving the money and compel its return to the officers of the proper township.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

POOL HALLS.—How operated in connection with other business.

September 11, 1912.

MR. G. W. DAWSON,
Rockford, Iowa.

DEAR SIR: Yours of the 9th inst. addressed to the attorney general has been referred to me for reply.

Your question has reference to the character of a partition to be maintained between a pool room and a barber shop or store where both are maintained in the same room or building.

If minors are entirely excluded from both then no partition would be required. Otherwise a substantial partition shutting off all view of the pool room from the barber shop or store should be maintained. If it is desired that light be admitted through this partition I can see no objection to the upper portion of the same

being constructed of frosted or ground glass which would admit light and yet obstruct the view.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

INTOXICATING LIQUORS.—Defined.

September 11, 1912.

MESSRS. GOULD & BANCROFT CO.,
131 State Street, Boston, Mass.

GENTLEMEN: Yours of the 7th inst. addressed to the secretary of state has been referred to this department for reply.

You call attention to the fact that you are importing an English non-alcoholic non-intoxicating ale and stout containing .63% alcohol, and ask to be informed as to the proper party to whom you might submit sample for an analytical report from our state in order that you might assure yourselves and your customers that they conform to the requirements for sale as a temperance *beverage* without conflicting with any existing liquor laws.

Our statute prohibits the sale of intoxicating liquors as a beverage, and further provides that intoxicating liquors, as used herein, shall be construed to mean alcohol, wine, beer and spirituous, vinous and malt liquors and all other intoxicating liquors whatever, and in construing this statute our supreme court has stated:

> "Alcohol is therefore an intoxicating liquor, regardless of the fact that the quantity drank at any one time would not have that effect. It is immaterial, in a statutory sense, what effect alcohol may have on the human system; it is an intoxicating liquor. However much it may be diluted it must remain an intoxicant when used as a beverage. That is to say, the statute provides that alcohol is an intoxicant whenever and however used as a beverage; and no matter how it may be diluted or disguised, it so remains, simply because the statute so declares. The liquor in question contained alcohol, and therefore it, as a matter of law, was intoxicating."

State vs. Intoxicating Liquors, 76 Iowa, 245.

Hence, it follows that if the article which you propose to sell in this state for use as a beverage contains any alcohol whatever it may not lawfully be sold in this state.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

INCOMPATIBLE OFFICES.—What are.

September 11, 1912.

MR. L. OLIVER,
Gilbert Station, Iowa.

DEAR SIR: Yours of the 10th inst. addressed to the attorney general has been referred to me for reply.

Your question briefly stated is whether or not two elective offices may be held at the same time by the same person, that is, justice of the peace, assessor and school president, any two or all of them.

I do not know of any holding to the effect that the fact that the offices are elective would prevent their being held by one person at the same time. The rule is that one person may hold more than one office unless there is some incompatibility in the duties of the several offices. I know of no incompatibility which would exist with reference to the offices mentioned.

You inquire if there has been a decision of the court covering this point.

The only recent decision is the one holding that the office of mayor and justice of the peace cannot be held at the same time by the same person. I am enclosing you copy of the opinion.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

ELECTIONS.—Bribery at defined.

September 12, 1912.

MR. J. S. BUTTNER,
Rockwell City, Iowa.

DEAR SIR: Yours of the 7th instant addressed to the attorney general has been referred to me for reply.

You inquire whether or not it would be in violation of our election law for a candidate to hand to the voters of his district a card bearing his announcement on one side and a political map or chart, sample of which you enclose, printed upon the other.

Code section 4914 provides:

> "Any person offering or giving a bribe to any elector *for the purpose of influencing his vote* at any election authorized by law, or any elector entitled to vote at such election receiving such bribe, shall be fined not exceeding five hundred dollars, or imprisoned in the county jail not exceeding one year, or both."

Code supplement section 1087-a33 provides:

> "Any person offering or giving a bribe, either in money or other consideration, to any elector *for the purpose of influencing his vote* at a primary election, or any elector entitled to vote at such primary election receiving and accepting such bribe, * * * shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined not less than one hundred dollars, nor more than five hundred dollars, or be imprisoned in the county jail not less than thirty days nor more than six months."

I am certain there could be no offense by the mere delivery of the announcement card, but if the political map or chart is a thing of value (and the fact that it is copyrighted would indicate that it had some value) and is given to the voter for the purpose of influencing his vote, as specified in the sections cited, I am inclined to think it would be a violation of these provisions. Whether or not the card with the chart thereon would be such a thing of value is a question which I would not undertake to determine. If it is not a thing of value, then there would be no violation.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

SUPERINTENDENT OF PUBLIC INSTRUCTION—EXPENSES OF DEPUTY.—The deputy state superintendent is entitled to his actual traveling expenses when acting for state superintendent.

September 12, 1912.

HON. A. M. DEYOE,
Sup't of Public Instruction.

SIR: Yours of the 11th instant addressed to the attorney general has been referred to me for reply.

Your question, as stated by you, is as follows:

> "In case of the inability of the superintendent of public instruction to fulfill an appointment, and he should send his deputy as a substitute, would the law authorize the payment of the traveling expenses of the deputy in accordance with sections 2621 and 2627?"

The first section to which you refer provides:

> "The superintendent of public instruction shall have an office in the capitol. * * * He may appoint a deputy who shall qualify in like manner as his principal, and who, in the the absence or inability of the superintendent, shall perform his duties."

Code supplement section 2627 provides for the salary of the superintendent of public instruction and the salary of his deputy, to be paid monthly, and further provides:

> "In addition thereto, the state superintendent shall receive three hundred dollars ($300.00) annually, or so much thereof as may be necessary to pay actual traveling expenses incurred in the performance of official duties."

The general policy of the law is to permit the deputy to perform any duty which his principal might perform in the absence of restrictions to the contrary, and in my judgment, the three hundred dollars which the state superintendent is entitled to receive annually to pay traveling expenses would be available for the purpose of paying the actual traveling expenses incurred in the performance of official duties by either the superintendent of public instruction or his deputy. It follows that your inquiry should be answered in the affirmative.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

PUBLIC OFFICER.—Salary of—Ceases with his death.

September 12, 1912.

HON. JOHN L. BLEAKLY, *Auditor,*
State House.

DEAR SIR: With reference to the question suggested by the correspondence which has taken place between A. M. Fellows, administrator of the estate of the late Judge L. E. Fellows, and your office, with reference to the right of his estate to recover salary for that portion of the month of July following his death will say that under our statute salary of judges of the district court is a yearly salary and it is only for convenience that the salary is payable at stated intervals, and unless the salary were terminated immediately upon the death of the incumbent there would be no greater reason why he should not draw the salary for the remainder of the entire year as well as for the remainder of the current month. The appointment of a successor might have been made at once and the compensation of the successor would start immediately upon his qualifying, and if the estate of the deceased is entitled to draw salary for any period of time after his death the state would be liable for a double salary during that portion of the time after the appointment of the incumbent which it is claimed the deceased is also entitled to recover salary for. It seems to me that no one would contend that such a result might follow.

It is well settled that a vacancy in the office occurs upon the death of the incumbent. (23 Cyc., 517.) I am therefore of the opinion that the estate is only entitled to salary for that portion of the year during which Judge Fellows lived and performed the duties of the office.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

AUTOMOBILES.—Where required to be registered to use part of the time in this state and part in another.

September 13, 1912.

E. M. SABIN, *County Attorney,*
Northwood, Iowa.

DEAR SIR: Yours of the 5th inst. addressed to the attorney general has been referred to me for reply.

You call attention to the fact that V. C. Gullickson, a resident of your town, owns four automobiles and operates a land office in Northwood, also one in Albert Lea, Minnesota, and that the four machines are used interchangeably in these offices, and that only one of said machines is licensed in Iowa, the other three in Minnesota, and you ask the opinion of this department as to whether he can be required to secure an Iowa license for any or all of these machines.

Section 3 of chapter 72 of the acts of the thirty-fourth general assembly provides:

> "Every owner of a motor vehicle which shall be operated or driven upon the public highways *of this state* shall, except as herein otherwise expressly provided, cause to be filed in the office of the secretary of state, a verified application for registration on a blank to be furnished by the secretary of state for that purpose," etc.

Section 17 of the same chapter provides:

> "The provisions of the foregoing sections relative to the registration and display of registration numbers shall not apply to a motor vehicle owned by a *non-resident of this state* * * * provided that the owner himself shall have complied with the provisions of the law of the foreign country, state, territory or federal district of his residence relative to the registration of motor vehicles."

In view of these provisions I am of the opinion that inasmuch as the party is a resident of this state that all of the machines should be registered in this state. It is only machines owned by non-residents of the state that are entitled to the exemption provided for in section 17.

Yours truly,

C. A. ROBBINS,

Assistant Attorney General.

PRIMARY ELECTIONS.—Political party defined.—Nominations by petition.—When and how made.

September 18, 1912.

MR. FRED A. NILES,

Cedar Rapids, Iowa.

DEAR SIR: Yours of the 15th ult. addressed to the attorney general has been referred to me for reply.

Your inquiry briefly stated is with reference to the proper method of making nominations for congress on the National Progressive party ticket.

Inasmuch as no votes were cast for this party at the last general election it is not a political party within the meaning of the primary law and that law does not apply, and in my judgment the proper method of making nomination for the office of representative in congress is by petition in accordance with the provisions of code section 1100, which provides:

> "Nominations for candidates for state offices may also be made by nomination paper or papers signed by not less than 500 qualified voters of the state; for county, *district or other division, not less than a county,* by such paper or papers signed by not less than 25 qualified voters, residents of such county, district or division. * * * Each elector so petitioning shall add to his signature his place of residence and post-office address."

This petition should be filed as directed by code section 1104 which recites:

> "Certificates of nomination and nomination papers of candidates for state, *congressional,* judicial and legislative offices shall be filed with the secretary of state not more than sixty, nor less than thirty days * * * before the day fixed by law for the holding of the election."

Hence it follows that in your case you should have a petition signed by at least twenty-five qualified voters, residents of your congressional district and file said petition with the secretary of state not less than thirty days prior to the election day.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

SCHOOLS.—Taxes—When to be levied.

September 18, 1912.

J. FOSTER, *Secretary,*
New Sharon, Iowa.

DEAR SIR: Yours of the 16th inst. addressed to the attorney general has been referred to me for reply.

Your question is:

> "Would a school of a school township be justified in levying tax under section 2806 of the school law after the 3d Monday in August or would the secretary be compelled to certify it."

Both branches of this question should be answered in the negative. This section provides:

> "No tax shall be estimated by the board after the third Monday in August in each year."

And our supreme court, in the case of *Standard Coal Co. vs. Independent District of Angus*, 73 Iowa, 304, held that a tax levied by the school district after the date fixed in a similar statute was void and its collection was properly restrained by injunction.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

CITIES AND TOWNS.—Right of telephone company to use of streets and alleys.

September 19, 1912.

E. E. BENDER, *Mayor,*
Spencer, Iowa.

DEAR SIR: Your letter of August 21st addressed to the attorney general has been referred to me for investigation and reply.

You submit an opinion of City Solicitor Buck bearing upon the question of the rights of Spencer telephone companies to use the streets and alleys for the purpose of operating their telephone exchange system, and ask for the opinion of this department as to whether or not the opinion of the city solicitor is correct.

In my judgment the conclusion reached by the city solicitor is the correct one, and in addition to the authorities to which he calls attention I would call your attention to code section 2158 which authorizes "any person or firm, or any corporation organized for such purpose within or without the state to construct a telephone or telegraph line along the public roads of the state." Also to code sections 775 and 776, and to the decision of our supreme court in the case of *East Boyer Telephone Co. vs. Incorporated*

Town of Vail, reported in 129 Northwestern Reporter, page 298, wherein it is said on page 300:

> "Although the cases above referred to were decided since the taking effect of the present code, in neither of them is there any reference to sections 775 and 776, above quoted, perhaps for the reason that the defendant in each case was relying on some grant or authority antedating the present code in which the provision in section 776 first appeared. The question is therefore presented now for the first time whether section 776 is so far inconsistent with and so far controls the interpretation of section 2158 that we must now hold a franchise granted by vote of the people of the city or town to be essential to the right of a telephone company to construct its lines in the streets and alleys."

And on page 301:

> "If cities and towns have, as to the use of their streets for telephone lines, power to regulate only under section 775, as construed in connection with section 2158, with the provision in section 776 that no franchise shall be granted by any city or town for the use of its streets in the construction and maintenance of 'telegraph, district telegraph, telephone, street railway, and other electric wires and poles and other supports thereof', then there is as to telephone lines no occasion for the granting of a franchise, and the requirement that no franchise shall be granted except on vote of the people does not apply to telephone lines."

The effect of this decision is to hold that streets and alleys of a town are roads within the meaning of code section 2158, and that such companies are not required to have any franchise because they are authorized by section 2158 to make use of the streets and alleys in the construction and maintenance of their lines.

This department does not wish to be understood as approving the justness of the law under which these decisions were rendered but in view of the decisions with the law as it now stands we have no criticism against the opinion of Solicitor Buck.

I am enclosing a copy of this opinion to City Solicitor Buck, and return herewith his opinion.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

SCHOOLS.—When pupil eligible to high school in other district at expense of home district.

September 20, 1912.

MR. T. T. MCDANIEL,
R. F. D. No. 2, Davis City, Iowa.

DEAR SIR: Yours of the 18th inst. addressed to the attorney general has been referred to me for reply.

Your question briefly stated is whether or not a pupil may attend a high school in a district other than his own and require the home district to pay his tuition when he has not completed the work of the 9th and 10th grades which is provided for in his home district.

In my judgment this question should be answered in the negative, that is he could not take at the expense of his own district the same work which his own district provides. However, if he should pass a satisfactory examination covering the work of the 9th and 10th grades he might take in the other district at the expense of his home district the work of the 11th and 12th grades.

Yours truly,
C. A. ROBBINS,
Assistant Attorney General.

APPREHENSION OF CRIMINALS—REWARD.—Where a person captures a criminal who is tried and acquitted on the ground of insanity the person capturing is entitled to the reward.

September 21, 1912.

HON. B. F. CARROLL,
Governor of Iowa.

DEAR GOVERNOR: Where a building has been blown up or otherwise injured by the unlawful use of dynamite, and there is offered by the state "A reward of two hundred fifty dollars *for the apprehension of the guilty person or persons,* whoever they may be, *and for his or their delivery to the proper authorities to be dealt with according to law;* the payment of said reward being *contingent upon the conviction* of the person or persons;" and where thereafter a person is apprehended, indicted and placed on trial for the offense, and it is fully shown that he committed the act complained of but is acquitted of the crime because found by the jury

to be insane at the time of the commission of the act; your question is, whether the person who, acting upon said offer of reward, apprehended the defendant and delivered him to the proper authorities is entitled to the reward offered, and whether the state is justified in paying the same.

Code section 62 provides:

> "Whenever the governor *is satisfied* that a crime has been committed within the state, punishable by death or imprisonment in the penitentiary for a term of ten years or more, and that the person charged therewith has not been arrested or has escaped from arrest, he may, in his discretion, offer a reward not exceeding five hundred dollars *for the arrest and delivery to the proper authorities* of the person so charged, which reward, upon the certificate of the governor that the same has been earned, shall be audited and paid by the state."

It will be observed that the thing for which this statute authorizes the offering of a reward is "the arrest and delivery to the proper authorities" and not *the conviction* of the person charged.

The offer as made makes the reward *payable* after *conviction,* but this was doubtless not for the purpose of imposing upon the person seeking the reward, the additional burden of securing the conviction, but rather for the purpose of ascertaining whether the person who committed the act had been apprehended and delivered. The reward was not offered for the apprehension of a known person, but for an unknown person, and hence there would be no better way of knowing that the real offender had been apprehended than by requiring conviction.

In *Stone vs. Dysert,* 20 Kansas, 123, it was held that when a prisoner in Montgomery county was transferred to Franklin county for safe keeping, and while there escaped, and the sheriff of the latter county offered a reward for the arrest and delivery of the prisoner to him at Independence, Kansas, that plaintiffs were entitled to the reward although they delivered the prisoner to the sheriff of Montgomery county, for they had substantially complied with the offer.

In *Mosley vs. Stone,* 108 Ky., 492, it was held that:

> "Plaintiff is entitled to a reward offered by the Governor for the arrest of a fugitive and his delivery to the jailer, though in making the arrest he wounded the fugitive so that he died before he could be delivered to the jailer."

The court saying:

> "It is usually a laborious act to find, and a hazardous one to apprehend, a fugitive. Here the appellant had performed both, and, except for the death of Clark, he would have complied with the Governor's offer according to the letter of the statute. In our opinion, he complied substantially with the Governor's proclamation and the statute. Having done this, the reward offered has been earned. In *Stephens vs. Brooks,* 2 Bush, 140, the court had under consideration a statute substantially the same as the present one, and in discussing the question as to whether the reward had been earned by the party who arrested the fugitive, said: 'We think a fair and liberal construction of the statute is especially required by the beneficial objects of its enactment, and that generally a substantial compliance with its requirements in apprehending a fugitive criminal and bringing him to justice should entitle the party rendering this important and often dangerous service to the reward offered by the Governor in accordance with law.' "

In *Haskell vs. Davidson,* 91 Me., 488, it was held:

> "An offer of a reward for 'the arrest and conviction' of an unknown perpetrator of a crime cannot be taken literally, but the conditions thereof are substantially performed by a person who obtains possession of facts necessary to secure his arrest and conviction and gives them to some proper person interested, although he does not himself make the arrest, but this and the prosecution are made by the proper officers."

The court saying:

> "An offer of reward is a proposal. The party making it may insert his own terms, and no person can become entitled to the reward without a performance of all the terms contained in the proposal. But such performance need not be a literal compliance with the terms of the offer. It is sufficient if the party claiming the reward has substantially performed the service required by the proposal."

In *Williams vs. U. S.,* 12 Ct. Cl., 192, where the conviction was prevented by the district attorney, after a verdict of guilty, moving the court to suspend judgment of conviction, it was held that plaintiff had substantially complied with the offer and was entitled to the reward.

In *Smith vs. Vernon County,* 188 Mo., 501, it was held:

> "A reward offered by a county for the arrest and conviction of a felon is earned by arresting and delivering him to the proper officers, and attending as a witness at the trial, which results in a conviction, although the prosecution is by the county officers, and not by the claimant, *where the authority to offer the reward is limited to arrest and apprehension.*"

The statute in that case required conviction before payment and read as follows:

> "'Whenever the county court of any county in this state, or any two judges thereof in vacation, shall be satisfied that any felony has been committed in said county, such court or judges may, at their discretion, offer a standing reward of not exceeding $500 for the apprehension and arrest of the person or persons committing the same, which reward shall be paid out of the county treasury; but in no instance shall any reward * * * be paid to any person who may be entitled thereto until final conviction of the defendant.'"

And the court said:

> "Starting out with the assumptions (1) that the county court had no power to offer a reward for the arrest and conviction of a felon, except such as may be found in the statute (24 Am. & Eng. Enc. Law, pp. 944, 945), and that (2) such county court had no power to go beyond and enlarge the terms of the statute in an offer of a reward for the arrest of one committing a felony, it will be seen that the statute is a warrant of authority to the county court to offer a certain kind of a reward, to-wit, a reward 'for the apprehension and arrest of the person or persons committing the same;' * * * It will be seen, further, the statute does not contemplate that the party apprehending or arresting a felon had the duty resting on his shoulders of not only turning the criminal over to the law, but also of convicting him. The duty of conviction, after the felon is produced, is left by the statute where reason and law place it, in so far as a county reward is concerned; that is to say, upon the proper officers, in the proper court, and with the proper instrumentalities all under the wise safeguards of the law."

In view of these authorities and in view of the fact that conviction would undoubtedly have followed but for the fact that the

defendant was found to be insane, I am of the opinion that the person who apprehended and delivered him has substantially complied with the terms of the statute and offer and that the reward has been earned and should be paid.

Yours very truly,
C. A. ROBBINS,
Assistant Attorney General.

BOARD OF SUPERVISORS—CONVEYANCE OF REAL ESTATE.—Board of supervisors has no authority to convey property held by the county as a poor farm.

September 21, 1912.

O. W. WITHAM, *County Attorney,*
Greenfield, Iowa.

DEAR SIR: In response to your request by telephone, I have investigated to some extent the question which you propound, namely, whether or not the board of supervisors of a county have authority to convey real estate owned by the county and which has heretofore been used as a county farm for the support of the poor of the county, where the purpose of the county is to acquire another farm for such purpose and where the one now owned is no longer desired for that purpose.

Paragraph 9 of section 422 authorizes the board "to purchase for the use of the county any real estate necessary for the erection of buildings for county purposes, to remove the site of or designate a new site for any county buildings required to be at the county seat."

Subdivision 20 of the same section authorizes the board "to purchase for the use of the county any real estate necessary for the erection of buildings for the support of the poor of the county and for a farm to be used in connection therewith."

Subdivision 3 authorizes the board to make such orders concerning the corporate property of the county as it may deem expedient.

I find nowhere in the law express authority to sell or convey real estate. Our supreme court has held that inasmuch as the power has been given to the county to hold property that it has the power to make all contracts necessary for the protection and

perfection of its title to such property, and that a contract by the county to give an agent a portion of its interest in the swamp lands in compensation for procuring the allowance of the same by the government was valid.

Allen vs. Cerro Gordo Co., 34 Iowa, 540;

Page County vs. American Emigrant Co., 41 Ia., 115.

In the case of *Harrison vs. Palo Alto County*, the county had made a warranty deed and the question arose as to whether or not it was liable on the covenants of warranty, and in passing thereon, the supreme court said:

> "But there is no statute giving it power to execute a deed with covenants of warranty. If it had such authority, it is in virtue of its implied power. Such power is not necessary to make the conveyance available. Nor is it essential to the purposes and objects of the corporation. A conveyance or assurance is good and perfect without either a warranty or a personal covenant. And, as the powers granted to or implied of a municipal corporation are only such as are necessary to make those expressly granted available, it seems quite clear that it has no authority to execute a deed with covenants of warranty."

In the case of *Findla vs. City and County of San Francisco*, 13 Cal., 534, it was held that a town was authorized to make a conveyance of its land, but was not bound by the covenants contained in a deed which it had conveyed, when in fact the land belonged to a stranger.

Under these authorities I am of the opinion that the board of supervisors would have the right to make a conveyance under the facts and circumstances stated by you.

You also inquire whether a tax can be imposed upon moneys and credits in addition to the five mill tax provided for by section 1 of chapter 63 of the acts of the thirty-fourth general assembly.

After making provision for this five mill tax, the statute recites:

> "The millage tax here provided for shall be in lieu of all other taxes upon moneys and credits and shall be levied by the board of supervisors, placed upon the tax list and collected by the county treasurer, and the amount collected in the

various taxing districts of the state shall be divided between the various funds upon the same pro rata basis as other taxes collected in such taxing district are apportioned."

In view of this provision this question must be answered in the negative.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

SCHOOLS—FUMIGATION—EXPENSE OF—HOW PAID.

September 25, 1912.

MR. A. H. WIEBENER,
Durant, Iowa.

DEAR SIR: Yours dated September "29th," addressed to the attorney general has been referred to me for reply.

Your question briefly stated is, whether the school district or the county should pay the expense of fumigation of the school house where the same was fumigated on account of scarlet fever.

The law covering this question is found in chapter 156 of the acts of the thirty-third general assembly which provides:

"All fumigations and disinfections, for the protection of the public health shall be done in accordance with the regulations of the state board of health and under the directions of the local board, which shall direct the attending physician to superintend or perform the work. * * * All bills and expenses incurred in carrying out the provisions of this section and establishing, maintaining and raising quarantine and furnishing necessary detention hospitals shall be filed with the clerk of the local board of health. This board at its next regular meeting or special meeting called for the purpose shall examine and audit the same and if found correct, approve and certify the same to the county board of supervisors for payment. If the board of supervisors determine such bills payable under the provisions of this act, it shall order the county auditor to draw a warrant therefor. The board of supervisors shall not be bound by the action of the local board of health

in approving such bill but may increase or diminish the same as may be just and reasonable."

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

COUNTY SUPERINTENDENT.—A competent witness in trial before him.

September 26, 1912.

WM. F. CONDON, *Attorney,*
Ft. Dodge, Iowa.

DEAR SIR: Yours of the 25th inst. addressed to the attorney general has been referred to me for reply.

You call attention to the fact that in a certain matter for trial before the county superintendent it is desired to use the testimony of such superintendent, and you ask the opinion of this department as to whether or not you have the right to have her testify.

I can see no reason why you would not be entitled to have the testimony of the county superintendent if she is possessed with knowledge of facts material to the question at issue. By code section 4610 it is provided:

> "The judge of the court is a competent witness for either party and may be sworn upon the trial."

And as in this case the county superintendent is to preside at the trial and act in the judicial capacity I am of the opinion that the same rule would apply.

I think the same rules would apply in court with reference to your proposed amendment to the complaint and that a continuance would not necessarily result but might be granted in case some new issue is tendered. However, in view of the fact that this department may be called upon to advise the state superintendent in the event of an appeal to him, we prefer not to give any opinion covering this or the other matters referred to in your letter.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

SCHOOLS.—Pupils may not be employed where dangerous machinery is used.

September 27, 1912.

MR. CHARLES W. KLINE, *Superintendent*,
Waterloo, Iowa.

DEAR SIR: I am in receipt of your communication of the 24th instant advising that you are planning to allow some of your boys to work in shops and factories while attending school, and requesting an opinion as to whether under this arrangement a boy who is still in school must be sixteen years of age in order to take up work of this kind.

If the employment in the shop or factory will be in line with manual or mercantile training which the boy will receive in school, the law ought to receive a liberal interpretation. I do not believe, however, that the mere fact that a boy is in school would tend to render the statute relating to the employment of minors inoperative.

I direct your attention to section 2477-a of the supplement to the code which provides:

> "No person under *fourteen* years of age shall be employed with or without wages or compensation in any mine, manufacturing establishment, factory, mill, shop, laundry, slaughter house or packing house, or in any store or mercantile establishment where more than eight persons are employed, or in the operation of any freight or passenger elevator."

Section 2477-b applies to persons sixteen years of age and is as follows:

> "No person under sixteen years of age shall be employed at any work or occupation by which, by reason of its nature or the place of employment, the health of such person may be injured, or his morals depraved, or at any work in which the handling or use of gunpowder, dynamite or other like explosive is required, and no female under sixteen years of age shall be employed in any capacity where the duties of such employment compel her to remain constantly standing."

So far as this section is concerned I do not see that there is any prohibition there which ought not to apply to adult persons; that is to say, no one should be required to work in a place which would

tend to destroy his health or make him morally depraved, and section 2477-c provides:

> "No person under sixteen years of age shall be employed at any of the places or in any of the occupations recited in section 1 hereof before the hour of six o'clock in the morning or after the hour of nine o'clock in the evening, and if such person is employed exceeding five hours of each day, a noon intermission of not less than thirty minutes shall be given between the hours of eleven and one o'clock, and such person shall not be employed more than ten hours in any one day, exclusive of the noon intermission, but the provisions of this section shall not apply to persons employed in husking sheds or other places connected with canning factories where vegetables or grain are prepared for canning and in which no machinery is operated."

Again the prohibition there seems to be entirely reasonable.

Yours very truly,
GEORGE COSSON,
Attorney General.

BOARD OF SUPERVISORS—REDUCTION IN BOARD—WHEN EFFECTIVE.

September 28, 1912.

S. E. STANFIELD, *County Attorney,*
Rockwell City, Iowa.

DEAR SIR: Yours of the 24th inst. addressed to the attorney general has been referred to me for investigation and reply.

You call attention to the fact that in August, 1910, the board of supervisors of your county were petitioned to submit to the legal voters at the general election in November of that year the proposition to reduce the number of supervisors from five to three and to elect the same at large, which proposition was declared carried.

You also call attention to the resolution of your board on February 9th, by which the county was sought to be divided into three supervisor districts and an order was made that the supervisor from district No. 2 should begin his term of office January 1, 1913, and the supervisors from districts Nos. 1 and 3 should begin their terms of office January, 1914; also to the order under date of March 26th, 1912, attempting to set aside that portion of the previous order fixing the terms of various supervisors and make in lieu there-

of the order that at the November election in 1912 there should be elected one supervisor from district No. 2, whose term of office should begin January, 1913, and to the further fact that one J. J. Cody has been nominated from district No. 2, and on account of the fact that you still have four supervisors who were elected at the election in 1910 that a request has been made upon you to cause notice to be served upon the county auditor not to place the name of J. J. Cody on the ballot to be voted at the coming general election, and you ask to be advised as to your duty in the matter.

The question which you propound is one not easy of solution. The matter was presented by former county attorney Hunter to this department and Mr. Cosson, on December 28, 1910, rendered an opinion from which I quote the following:

> "But since the men have been duly elected I am of the opinion that the change will not take place until the terms of two of the members expire. This position is further strengthened by section 419 of the code which provides:
>
> " 'Any county may be redistricted as provided by the three preceding sections once in every three years and not oftener, and nothing herein contained shall be so construed as to have the effect of lengthening or diminishing the term of office of any member of such board.' "

By section 410 of the code it is provided:

> "The board of supervisors in each county *shall consist of three persons,* except where the number may heretofore have been or hereafter be increased in the manner provided by this chapter."

The section then provides for a method of increasing the number of members to five or to seven as may be decided by the electors of the county. Hence, it would seem that the law clearly contemplates that the board of supervisors shall consist of an odd number of members, that is, three, five or seven, and it does not seem to contemplate that in any contingency the board might consist of an even number or numbers such as you would have in your county if the fifth supervisor is not elected at the coming general election. The reason for this policy of having the board consist of three members is not difficult to discover. In a board consisting of an odd number there would always be a majority either in favor of or against any given proposition which the board is called upon

to consider. Whereas with an even number of supervisors they might be equally divided upon most or all propositions and hence be unable to accomplish their work. Hence we have the situation where your board of supervisors undertook to divide the county into three supervisor districts at a time when it had and was required to have five supervisors. In my judgment this was beyond their power.

Section 416 of the code provides:

> "The board of supervisors may at its regular meeting in January in any even numbered year divide its county by townships into a number of supervisor districts *corresponding* to the number of supervisors in such county."

As we have seen the number of supervisors was five and must continue to be five until the terms of two supervisors expire at the same time. Hence, the board had no authority to reduce the number of districts below five at the time the reduction was made. In my judgment the board was without power to fix the time when the terms of the various members in the several districts should begin or end. This matter is fixed by law.

By section 411 of the code it is provided:

> "At the general election in the year 1906 there shall be elected for a term of two years members of the county board of supervisors to succeed those whose terms were extended one year by the biennial election amendment at the general election in the year 1906, and biennially thereafter there shall be elected members of the board of supervisors for a term of three years to succeed those whose terms of office will expire on the first Monday in January following such election; there shall also be elected members for a term of three years to succeed those whose terms will expire on the first Monday in January one year later than the aforesaid date. It shall be specified on the ballot when each shall begin his term of office."

Hence it follows that if your county has complied with the law the terms of at least two of your present supervisors will expire on January 1, 1914, and if no successors are chosen in their place the board will then be reduced to three. If the terms of more than two expire on the first day of January, 1914, then there should be elected at the election this year a supervisor, or supervisors to

succeed all except two of those whose terms expire at said date, and this will still leave the board with three members after January 1, 1914, and with five members until said date.

It follows from what has been said that one member of the board of supervisors should be elected at the general election this fall for a full term of three years, and if there is nothing illegal about the nomination of J. J. Cody I know of no reason why his name should not be permitted to appear upon the ballot. Even though he was nominated for a particular district and this district was illegally established, the office is a county office and he should be regarded as nominated and may be voted for by the voters of the entire county. See,

State ex rel Robbins vs. Parker, 125 N. W., 856.

On the other hand, even conceding the right of the board to reduce the number of districts to three, then on your statement of the matter unless Cody, or someone else is elected from the second district that district would be unrepresented and it is provided by section 418 of the code:

> "In case such division, or any subsequent division shall be found to leave any district or districts without a member of such board of supervisors then at the next ensuing general election a supervisor shall be elected by and from such district having no member of such board."

In addition to the case to which I have already called your attention, see

Bradfield vs. Wart, 36 Iowa, 291, and

Lahart vs. Thompson, 140 Iowa, 298.

If the nomination of Mr. Cody has been regularly made and the papers regularly filed, then in my judgment his name should be printed upon the ballot unless objections are filed and determined against his right to have the same so printed under and in accordance with the provisions of section 1103 of the code, and I think you should follow this course whether the foregoing conclusions are correct or not. Then after the election the matter may be determined by quo warranto proceedings if any person is sufficiently interested to institute the same.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

MULCT TAX.—Money received by city or town should be placed to the credit of the general fund.

September 30, 1912.

MR. M. F. COX,
c|o V. E. Vane, City Auditor,
Cedar Rapids, Iowa.

DEAR SIR: Your letter of the 16th instant addressed to Mr. George Gallarno of the municipal accounting department of the state auditor's office has been referred to me for reply. You request to be advised as to what fund should be credited with the money received from the county treasurer as the city's share of the mulct tax.

The statutes are entirely silent upon this question and in the absence of a special statutory provision, money received from any source by a city or town should be placed in the general fund. There has never been but one attempt made by way of special enactment as to the disposition of the mulct tax. Chapter 25 of the thirtieth general assembly provided that any city or town under special charter, where the mulct law was in force, might appropriate not to exceed 20 per cent of the amount of mulct tax received by the municipality for the support and maintenance of a public library. Whether this provision is now in force is a question that I do not wish to pass on at this time.

It is my opinion that with the exception above referred to, the money received by a city or town from the mulct tax should be placed in the general fund, and I do not think that after it has been placed in the general fund it can be transferred to any other fund.

Yours very truly,

JOHN FLETCHER,
Assistant Attorney General.

HOTEL INSPECTION.—Effect of stay order in *Hubbell vs. Higgins*, 148 Iowa, 36, is that such order does not prevent state from enforcing the law against others than defendant.

September 30, 1912.

MR. LAFAYETTE HIGGINS,
Des Moines, Iowa.

DEAR SIR: Pursuant to your oral request for an opinion as to the validity of chapter 168, acts of the thirty-third general

assembly, generally known as the hotel law, I have to advise that a suit was instituted in the name of F. M. Hubbell vs. Lafayette Higgins, Hotel Inspector, in the district court of Polk county, Iowa, asking for an injunction upon the ground of the unconstitutionality of said act. The lower court found in favor of the plaintiff and granted the injunction upon the ground that the law was unconstitutional. The supreme court of Iowa, however, reversed the decision of the lower court and held the law valid and constitutional, with the exception that it was held that a hotel keeper was not criminally liable for a failure to pay the inspection fee specified in said act. (*Hubbell vs. Higgins,* 148 Iowa, 36.) Nothing, however, was said in said opinion which would excuse or exonerate the hotel keeper from paying the fee, nor did the court hold invalid the provisions of said act which authorize the granting of an injunction against any hotel keeper in the event that the provisions of the law were not complied with.

An appeal has been taken from the decision of the supreme court of our state to the supreme court of the United States, and a stay order was granted restraining the hotel inspector from enforcing the law pending said appeal against the plaintiff F. M. Hubbell. I am of the opinion, however, that the stay order does not prevent the state from enforcing the law as to all other persons coming within the purview of the said act other than the said plaintiff F. M. Hubbell.

I am further of the opinion that it is your duty to proceed in the enforcement of said act and make the inspection therein required of such hotels as are covered by the act in question except the hotel operated by the plaintiff F. M. Hubbell.

Yours very truly,

GEORGE COSSON,
Attorney General.

CORPORATIONS—PUNISHMENT OF BY CRIMINAL PROCEEDINGS—JURISDICTION OF—HOW OBTAINED.

September 30, 1912.

HON. W. B. BARNEY,
Commissioner Food and Dairy Dept.

DEAR SIR: You have orally requested the opinion of this department upon the following questions:

First, Whether or not a corporation may be punished by means of prosecution before a justice of the peace for violation of the provisions of section 5077-a23 of the supplement to the code, and

Second, If so, by what method a corporation is to be brought before the justice in order to give such justice jurisdiction to proceed in the matter.

With reference to your first question the general rule of modern jurisprudence is that an indictment will lie against a corporation although not for every species of crime and misdemeanor.

10 Cyc., 1226.

They are not, however, liable for such crimes as require a specific criminal or immoral intent, such as treason, felony or breach of the peace.

10 Cyc., 1231.

However, where the statute prohibits a person from committing an offense created by statute, such as Sabbath breaking, a corporation may be indicted and punished the same as a natural person.

10 Cyc., 1230.

State vs. Baltimore R. Co., 15 W. Va., 362;

Same case, 36 Am. Rep., 803.

And this is the rule adopted in Iowa. See section 48 of the code, subdivision 13, which reads, "The word 'person' may extend to bodies corporate."

In the case of *Stewart vs. Waterloo Turn Verein,* 71 Iowa, 229, it was held that a corporation was to be considered as a person when the circumstances in which they are placed are identical with those of natural persons expressly included in the statute, and where a committee or corporation ordered beer and a person became intoxicated at a ball given under the supervision of the corporation that the corporation itself was liable for the penalty imposed. However, the statute under consideration does not prohibit persons from making sales, but reads:

> "Whoever sells, offers or exposes for sale any of the seeds specified in sections 13 and 14 of this act, * * * or who shall violate any of the provisions of this act, shall be guilty of a misdemeanor and upon a conviction shall be fined not more than $100.00 and costs of prosecution."

We have then the question, whether or not the word "whoever" is broad enough to include corporations as well as natural persons.

By an Indiana statute penalties were provided for "whoever with intent to defraud another designedly and by color or any false writing or pretense obtains from any person any money or thing of value refers to a person or persons and should also be construed to include an incorporated city as an artificial person."

State vs. Bruner, 135 Ind., 419; 35 N. E., 22.

By a statute of Maine it was provided that "whoever kills or destroys or has in possession certain game at a certain time of the year, shall forfeit," etc., and the court in passing upon that statute said, "that the statute may in general terms be broad enough to include corporations as well as natural persons within its prohibition and punish the defendant corporation accordingly."

Bennett vs. American Express Co., 83 Me., 236; 22 Atl., 159; 13 L. R. A., 33.

Hence, I am of the opinion that your first inquiry must be answered in the affirmative.

With reference to your second question, it is provided by section 5309 of the code:

> "The process of an indictment against a corporation shall be a notice under the seal of the court which shall be issued by the clerk at any time after the filing of the indictment in his office, on the application of the county attorney, and shall substantially notify the defendant of the finding of the indictment, of the nature of the offense charged, and that it must forthwith appear and answer the same; it may be served by any peace officer in any county in the state on any officer or agent of the defendant by reading the same to him and leaving with him a copy thereof * * * and from and after two days from the time of making of such service the defendant shall be considered in court and present to all proceedings had on the indictment."

In the chapter concerning trials before justices of the peace, section 5580, it provides for the issuance of the warrant; section 5581 of the code provides for the service of the same by the officer and further provides:

> "If defendant is a corporation, it may be proceeded against upon notice as in case of indictment."

Hence it follows that the proper method of bringing a defendant corporation before a justice of the peace for punishment is by notice substantially as provided for in case of indictment by section 5309, above quoted.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

FREE PASS—ISSUANCE TO LIBRARY TRUSTEE.—A library trustee is a public officer in sense that he is not entitled to a free pass when employed by railroad company.

October 7, 1912.

MR. S. KERR,
Agent Illinois Central R. R. Co.,
Cedar Rapids, Iowa.

DEAR SIR: Yours of the 6th inst. addressed to the attorney general has been referred to me for reply.

Your question briefly stated is whether or not a library trustee, who receives no emoluments, is a public officer in such sense that he is not entitled to use free pass when also employed by the railroad company.

I am inclined to the view that this question should be answered in the affirmative. An individual who is invested with the authority and is required to perform the duties incident to an officer is a public officer.

State ex rel Walker vs. Bus, 135 Mo., 325.

A public officer is one who has any duty to perform concerning the public and he may be either elected or appointed.

6 Words & Phrases, p. 4933.

Code supplement section 879-q provides:

"No officer, including members of the city council * * * shall accept or receive, directly or indirectly, from any person, firm or corporation operating within said city or town any railway, interurban railway, street railway * * * any frank,

free pass or ticket or other service upon terms more favorable than is granted to the public generally."

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

INTOXICATING LIQUORS.—Permit to sell may not be held by partnership.

October 7, 1912.

MR. O. J. DAVISSON,
Mechanicsville, Iowa.

DEAR SIR: Yours of the 3d inst. addressed to the attorney general has been referred to me for reply.

Your question briefly stated is whether or not a druggist may lawfully hold a permit for the sale of intoxicating liquors for lawful purposes at a time when he is in partnership with a traveling salesman for a whiskey house.

The law prohibits a partnership firm from having such permit. However, I know of no provision that would prevent one member of a partnership firm from having such a permit even though the other member may be a traveling salesman. This question might be considered by the court as bearing upon the question of his fitness to hold such a permit but it is not a legal bar to his holding the same.

Your remaining question is whether or not the population of a town is to be considered, and you state that your town has a population of 800.

While there is a law providing for only one saloon to each thousand of population in a town, this provision does not apply to permits. However, the court might take into account the population in determining the necessary number of permits required.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

LAKE BEDS—SALE OF BY STATE—WHAT PART MAY BE SOLD—PLATTING BY ENGINEER.

October 7, 1912.

HONORABLE EXECUTIVE COUNCIL OF THE STATE OF IOWA.

SIRS: Yours of the 3d instant addressed to the attorney general has been referred to me for reply. Your first question is concerning chapter 186, acts of the thirtieth general assembly, and is:

> "Is the executive council confined to the land which lies wholly within the original government meander line and also within the established meander lines made by the engineer appointed by the governor under the provisions of this chapter, in making sales of land under this act?

By section six of the act it is provided:

> "After such lake or lake bed has been surveyed and the land composing the same subdivided as hereinbefore required, and a plat of such survey filed with the secretary of state, and the county auditor of the county in which said lake or lake bed is situated, the lands belonging to the state which lie *within the meander lines of the original government survey*, and composing the lake beds, shall be appraised by a commission appointed by the governor, consisting of three (3) disinterested freeholders of the state, one of whom shall be a resident of the county in which the land is situated, who shall examine and appraise said land, and return a written report of such appraisement to the governor, which report shall be filed in the office of the secretary of state."

Hence, I am of the opinion that your first question should be answered in the affirmative.

Your second question is:

> "If you answer this question in the affirmative, then is the engineer appointed by the governor of necessity required to make two plats subsequent to the original survey and platting to be made by him prior to the hearings provided for in this chapter, one platting the land within the present meander line or water line and the other platting into lots the land lying within the government meander line and also within the meander line established by the lake bed engineer, or should the engineer confine his platting entirely, under this chapter, to lands within both meander lines?"

In my judgment it would be unnecessary for the engineer to make a plat of that portion of the lake lying without the original meander line thereof. However, it might be perfectly proper for him to make such plat of that portion in compliance with section two of the chapter to which you refer, which recites:

> "The governor shall, within thirty (30) days after the receipt of such statement, appoint a competent engineer who shall at once examine the situation and condition of such lake or lake bed, make a survey and plat thereof, and ascertain whether its location is such that it can be drained and improved, and make a full report to the executive council of the area and depth of water in the lake and of its general physical condition, which report shall be accompanied by his plat, field notes and profile of his survey."

But this survey would not be essential in connection with that portion of the lake lying within the original meander lines where the survey is being made for the purpose of selling the lands under the authority of this chapter, rather than for the improvement of the lake.

Your third question is:

> "Again, the executive council desires instruction as to the ownership of the lands lying between the two meander lines. As an example we submit herewith two plats of surveys made of Swan Lake in Pocahontas county, upon one of which is traced the original government meander line and the other showing the platting of the lake bed within the present water lines or the established meander line made by the lake bed engineer into lots. Examining this plat you will notice that Lot A in section 8, containing more than twenty-five acres, and against which the county authorities have levied an assessment for drainage purposes of over eleven hundred dollars, lies wholly without the original meander lines and within the present water line or the meander line established by the lake bed engineer."

In this state our supreme court has laid down the following rule in what is known as the "Iowa Lake" case:

> "Meandering a body of water does not determine its character, and in a strict sense a meander line is not a boundary and where the surveyor meanders a body of water *proper to*

be meandered, the abutting owner takes title not merely to the meander line, but to the actual water line,—that is, high water mark. But if there is no body of water corresponding to the meander line, the adjoining owner is limited by that line and his land is not extended by accretion or reliction."

Carr vs. Moore, 119 Iowa, 152.

The doctrine of this case has been universally followed by our supreme court in the later cases, the last expression of the court being found in the case of *State vs. Jones,* 143 Iowa, 398. With reference to this case, however, it is proper to state that an appeal has been perfected by the defendant to the supreme court of the United States where the action is still pending, but the doctrine of these cases should be followed by the officials of the state until the Jones case is adversely determined by the supreme court.

While the title of the state is not limited to the land lying within the original meander lines of the lake, but is bounded in reality by the high water mark as it existed at the time of such original survey, it necessarily follows that where the meander line is within the high water mark, the lands lying between the meander line and the high water mark belong to the state to the same extent as the bed of the lake which lies wholly within the meander lines. And on the other hand, where the meander line is drawn within the high water boundary line, the land lying without the meander line but within the high water boundary line likewise belongs to the state. However, as we have heretofore seen, the legislature in conferring authority to sell and dispose of this land, has limited the authorities to the lands lying within the meander lines. Hence, it would follow that while the state would own Lot A in section 8 and would doubtless be liable for the proper drainage assessments levied against the same, it would not have the authority under the chapter referred to to sell and dispose of the same.

Applying the same rules, it would necessarily follow that the state would not own the high agricultural lands adjacent to Lot 6 and between high water mark and the meander line, but that such land would belong to the owner of government Lot 6 in said section and the state would not be liable for any drainage tax levied thereon.

I am enclosing the plats which were enclosed in your letters.

Your very truly,

C. A. ROBBINS,
Assistant Attorney General.

PRACTICE OF MEDICINE—WHAT CONSTITUTES.

October 7, 1912.

MR. W. F. LEMKE,
Waverly, Iowa.

DEAR SIR: Yours of the 4th inst. addressed to the attorney general has been referred to me for reply.

You ask to be advised concerning whether or not you have the right to advertise, by distributing printed circulars, a remedy for certain ailments, and charge therefor.

Code section 2579 provides:

> "Any person shall be held as practicing medicine * * * or to be a physician within the meaning of this chapter, who shall publicly profess to *cure or heal.*"

And our supreme court has frequently ruled that persons advertising by means of circulars certain cures for certain diseases were publicly professing to cure and heal within the meaning of this section, and that unless they held a certificate entitling them to practice medicine, they would be subject to indictment and prosecution. See,

State vs. Wilhite, 132 Iowa, 226;
State vs. Kendig, 133 Iowa, 164;
State vs. Corwin, 151 Iowa, 420.

It will doubtless pay you to read these cases, especially the case last cited, and from an examination of them I am satisfied that you will conclude that you cannot afford to take the risk of prosecution, and that you will first procure a certificate entitling you to practice medicine before undertaking to handle the remedies in the way you desire.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

PRESIDENTIAL ELECTORS.—National bank directors ineligible.

October 8, 1912.

MR. CARL FRITZ HENNING,
Boone, Iowa.

DEAR SIR: Yours of the 5th inst. addressed to the attorney general has been referred to me for reply.

You call attention to the resignation of Fred E. Frisbie of Sheldon as a candidate for presidential elector on the ground that he was a director in a national bank and hence ineligible, and you ask whether this decision also affects a candidate for clerk of the court who is a director in a state or national bank.

This question should be answered in the negative. The provision which rendered Mr. Frisbie ineligible is found in the constitution of the United States, subdivision 2 of section 1 of article II, which reads as follows:

> "Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress; but no senator or representative, or person *holding an office of trust or profit under the United States,* shall be appointed an elector."

And it has been held that a director in a national bank was one holding an office of trust under the United States, but there is no such requirement as to eligibility of clerk of the district court.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

SUPERVISORS.—When elected at large and when by district.

October 9, 1912.

GEO. W. SPENCER, *Secretary-Treasurer,*
Rockwell City, Iowa.

MY DEAR MR. SPENCER: I have yours of the 8th inst. with reference to the supervisor situation in your county, and, as suggested by you, I am somewhat familiar with it on account of former correspondence had with interested parties.

By a careful examination of the law you will observe that while code section 410 authorizes the people to vote upon the proposition to increase or reduce the number of supervisors there is no authority for the proposition to be submitted to them or voted upon by them that the supervisors should be elected at large rather than by districts.

By section 416 it is provided that "the board of supervisors may, at its regular meeting in January in any even-numbered year,

divide its county by townships into a number of supervisor districts corresponding to the number of supervisors in such county; or at such regular meeting it may abolish such supervisor districts *and provide for electing supervisors for the county at large.*" So that the question of whether supervisors are to be elected by districts or at large is lodged with the board of supervisors to determine and not with the people.

In my judgment the resignation of one of the other members would simply create another vacancy and would not operate to effect a change from 5 to 3 supervisors earlier than would otherwise result and it is especially provided that where districts are created and any district has no member on the board that a member from that district shall be elected at the next ensuing election. (Section 418 of the code.)

I am firmly convinced that the law should be amended so as to abolish supervisor districts and to provide for the election of all supervisors at large whether the number in any given county be 3, 5 or 7, and perhaps your people may be sufficiently interested to help the cause along at the coming session of the legislature.

Yours truly,

GEORGE COSSON,
Attorney General.

JUDGES OF ELECTION—QUALIFICATION—ASSESSOR—DUTY OF TO FURNISH LIST OF PERSONS SUBJECT TO—TOWNSHIP CLERK—COMPENSATION OF.

October 9, 1912.

N. D. KELLEN, *Township Clerk,*
LeMars, Iowa.

DEAR SIR: Yours of the 30th ult. addressed to the attorney general has been referred to me for reply.

Your first question briefly stated, is whether or not judges of election are required to qualify when they have already qualified as township trustees.

This question should be answered in the affirmative. Code section 1094 provides:

> "Before opening the polls each of the judges and clerks shall take the following oath: 'I, A. B., do solemnly swear that

I will impartially, and to the best of my knowledge and ability, perform the duties of judge (or clerk) of this election, and will studiously endeavor to prevent fraud, deceit and abuse in conducting the same.' ''

The following section provides:

''Any one of the judges or clerks present may administer the oath to the others, and it shall be entered in the poll books subscribed by the person taking it and certified by the officer administering it.''

Your second question, as stated by you, is:

''If the township assessor does not furnish the township clerk with a list of all persons over twenty-one and under forty-five years of age, whose duty is it to compel him to do so?''

By code section 1540, the assessor was required to furnish to the township clerk a list containing the names of all persons required to perform two days' labor on the road as poll tax.

By code supplement section 1540-a this section was repealed and a substitute enacted, and by the new section it is provided that the township clerk shall, not later than the 15th day of April, make out and deliver to the superintendent of roads a list of all persons required to pay road poll tax under the provisions of this act. And it is further provided, to enable him to make out such a list, the assessor shall furnish the clerk of said township before the first day of April of each year a complete copy of the assessment lists of said township for that year which shall be the basis of such poll tax list.

In my judgment the clerk would have the right to demand this list from the assessor and in the event of his failure to furnish the same the clerk might bring an action of mandamus to compel the assessor to furnish such list. The assessor and his bondsman would also be liable for his failure of duty in this respect.

Your third question is, ''Can the township clerk charge for taking the oath of a road superintendent and putting his bond on record?''

The compensation of the clerk is fixed by code supplement section 591, which fails to provide any compensation for such service. Hence, I am of the opinion that this question should be answered in the negative.

The first subdivision of this section, however, provides:

> "The township clerk shall receive for each day of eight hours necessarily engaged in official business, where no other compensation or mode of payment is provided, to be paid out of the county treasury, $2.00."

Work of this sort could doubtless be paid for under this subdivision.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

COUNTY OFFICERS—SALARY OF.—Where the salary of officer is based upon population of the county the law automatically changes the salary at the beginning of each year to conform to the population.

October 10, 1912.

O. W. WITHAM, *County Attorney,*
Greenfield, Iowa.

DEAR SIR: Yours of the 8th inst. addressed to the attorney general has been referred to me for reply.

Briefly stated your first question is, whether or not the salary of a county officer may be changed during the term of office for which he is elected.

Speaking generally this question should be answered in the negative. Especially so where the power to fix the salary is lodged with a board whose duty it is to fix the salary in advance of the commencement of the term.

Goetzman vs. Whitaker, 81 Iowa, at 532.

However, as applied to the facts in your county your first question in reality is, what salary should the county attorney receive for the year 1912, when at the time of his election in 1910 and his qualification in January, 1911, the population of said county, as shown by the last preceding state census, was over 15,000, and for the year 1912 such population is less than 15,000, as shown by the last preceding national census published in June, 1911.

At the time of the decision in the Goetzman-Whitaker case the salary of the county attorney was fixed by the board of supervisors for a term of two years, the statute reading:

> "The county attorneys of the several counties in this state shall be allowed an annual salary to be fixed by the board of supervisors of their respective county at their general meeting of each even-numbered year."

and as the election was also required to be held in November of the even-numbered years, the court held that this in effect deprived the board of supervisors of power to change the salary of such officer during the term for which he was elected.

The statute providing for the compensation of county attorneys has been changed, and is now found in code supplement section 308, and the salary of the county attorney is therein absolutely fixed according to population, and the board of supervisors have nothing whatever to do with fixing the amount except in counties having a population exceeding 30,000, the language applicable to your county being as follows:

> "County attorneys shall be allowed an annual salary in counties having a population of less than 1,500, $900; in counties of 15,000 and under 25,000, $1,000."

By chapter 3 of the acts of the thirty-fourth general assembly provision is made for the certification and publication of the federal as well as the state census, and the last sentence of section 1 of said chapter provides:

> "Whenever in the code, or any supplement to the code, or any copy of the session laws prior to this date, the population of any county, city or town is referred to, it shall be determined by the *last certified,* or certified and published official census *whether the same be state or national."*

Hence, to ascertain the population of Adair county at any time during 1912, we have but to look to the federal census which reveals a population of less than 15,000, and it necessarily follows that for the year 1912 the salary of the county attorney of such county is $900, and there is no change of salary required to be made by the board of supervisors or any other body, the law automatically fixing the salary annually according to the population of the year for which the salary is to be drawn; and if the census had shown an increase in population a higher salary might be paid for the last year of the term than was paid for the first year thereof.

As applied to the facts in your case your third question is, what should be the salary of the clerk of the district court of your

county for the year 1912, when at the time of his election in 1910, and his qualification in 1911, the population of the county as shown by the last preceding state census was over 15,000, and when as shown by the last preceding national census, certified and published in the year 1911, such population was under 15,000. It will be observed by a careful examination of code section 297 that while the board of supervisors have the power to fix the salary of the clerk in counties of less than 10,000 that the board has nothing whatever to do with fixing the salary of a clerk in a county having a population of over 10,000. The portion of the section applying to your county for the year 1912 reads as follows:

> "In counties having a population of 10,000, and not to exceed 15,000, the salary shall be $1,200.00."

And for the year 1911, as follows:

> "In counties having a population of 15,000, and not to exceed 20,000, the salary shall be $1,300.00."

Hence, it follows that the salary of the clerk for the year 1912 should be $1,200.00, and this does not operate to change the salary except as the same is automatically changed by the operation of the law which fixes such salary according to the population and it is unnecessary for your board to make any entry whatever upon its books fixing such salary.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

BAD EGGS.—Sale of constitutes public offense.

October 15, 1912.

MR. W. B. BARNEY,
Dairy and Food Commissioner,
State House.

DEAR SIR: In reply to your letter of even date making request for an opinion as to responsibility in the sale of eggs, will say that the food law, section 4999-a20. makes it a crime to expose or offer for sale any adulterated or misbranded food. Section 4999-a22 defines as adulterated an article of food which consists in whole or in part of a diseased, filthy, decomposed or putrid animal or vegetable substance, whether manufactured or not.

Under this statute, the offering or exposing for sale of eggs either by the case or in small quantities would be a violation of the food law unless the person offering for sale or selling first removes any eggs that may be unfit for food purposes. The marking of packages with a statement that the goods contained therein are not guaranteed and are at the risk of the purchaser, does not relieve the seller from responsibility.

Yours very truly,

JOHN FLETCHER,
Assistant Attorney General.

BANKS—LIABILITY OF STOCKHOLDERS IN.

October 15, 1912.

MR. W. F. LEMKE,
Waverly, Iowa.

DEAR SIR: Replying to yours of the 9th inst. will say that by section 9 of article VIII of the constitution of this state it is provided:

> "Every stockholder *in a banking corporation or institution* shall be individually responsible and liable to its creditors, over and above the amount of stock by him or her held, to *an amount equal* to his or her respective shares so held, for all its liabilities accruing while he or she remains such stockholder."

But I know of no provision which renders a stockholder in a corporation other than a banking corporation liable for more than the amount of his stock in such corporation, and if his stock has once been fully paid I think that would end his liability. However, this is a private matter about which this department is not at liberty to advise you.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

ELECTORS—DISFRANCHISEMENT OF BY REASON OF CONVICTION IN FEDERAL COURT—AUTHORITY OF GOVERNOR TO RESTORE CONVICT TO CITIZENSHIP.

October 16, 1912.

HON. B. F. CARROLL,
Governor of Iowa.

SIR: With reference to your question orally propounded as to the effect of a conviction of a crime in the federal courts upon the citizenship and right to vote of the person thus convicted, I call your attention to Pierce's Federal Code, section 1583, which provides:

> "All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States."

By section 1587 it is provided that persons deserting from military or naval service are deemed to have voluntarily relinquished and forfeited their rights of citizenship as well as their right to become citizens, upon certain conditions named in the section.

I find no federal statute which forfeits the right of citizenship where one is convicted of a crime under the federal statutes. However, by section 5 of article II of the constitution of Iowa, it is provided:

> "No idiot or insane person, or person convicted of any *infamous crime* shall be entitled to the privilege of an elector."

It will be observed that this provision does not operate to forfeit the citizenship of the person convicted, but simply his privilege as an elector.

It will also be observed that this provision is not limited to convictions in the state court, and doubtless if a person was convicted of a crime falling within the class of infamous crimes either in the state or federal court, his elective franchise would be lost unless restored as hereinafter shown.

By Code section 5706 it is provided:

> "The governor shall have the right to grant any convict who has been confined in the penitentiaries whom he shall think worthy thereof, a certificate of restoration to all his rights of citizenship, although such convict may have been guilty of an infraction of the rules and regulations of the penitentiary. The warden, upon request of the governor, shall, in case of

application for such restoration, furnish him with a statement of the convict's deportment during his imprisonment, and may at all times make such recommendations to the governor as he shall think proper respecting his restoration thereto."

In my judgment the effect of this section is to give the governor the power to restore to the convict his right to vote where the same has been lost by reason of his conviction of an infamous crime.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

STREAMS—PONDS—BOUNDARIES OF—HUNTING AND FISHING ALONG STREAMS—USE OF PUBLIC WATERS FOR FISHING.

October 17, 1912.

MR. M. O. BAIRD,
Palo, Iowa.

DEAR SIR: Yours of the 14th inst. addressed to the attorney general has been referred to me for reply.

Your first question is:

"Where is the boundary line of the streams of Iowa located? Is it at high water mark as many seem to think?"

The rule in Iowa is that the boundary line of the adjoining owner's land which abuts upon a *meandered* body of water, whether a lake or stream, is the high water mark, and hence the lands below high water mark, including the bed of the stream or lake, is in the state.

Taylor vs. Park Commissioners, 133 Iowa, 453;

State vs. Jones, 143 Iowa, 398, at 402.

Your second question is:

"Are the small ponds of Iowa now state waters?"

This question is answered in the previous answer, that is, unless said lakes or ponds were meandered by the government surveyors they are not state waters but belong to the owner of the land upon which they are situated.

Your third question is:

"Can persons who own land known as low lands or bottom lands prevent any person from hunting, trapping or fishing along any of these waters, including all state waters?"

The owners of land, even though it may be low land, have the right to prevent hunting and fishing thereon where the lakes or streams bordering such low lands are not state waters, but where they are state waters they have no right to interfere with persons hunting and fishing between high and low water mark or upon the water.

Your fourth question is:

"What constitutes trespass? Does damage have to follow in order to make it trespass?"

Any entrance upon the premises of another without his permission constitutes a trespass and nominal damages could be recovered even though no substantial damage could be shown.

Your fifth and last question is:

"Can people be shut away from state waters or forbidden to cross low lands to fish, etc., when no damage is done to owner of the low land?"

The public cannot be shut away from state waters but they have no right to cross the land of a private owner lying above high water mark. They should enter and leave the lands where they have a right to go, that is, between high water and low water mark, at some point where such lands are crossed by a public highway.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

PENITENTIARY—COMPENSATION OF WARDENS.

October 18, 1912.

HONORABLE BOARD OF CONTROL OF STATE INSTITUTIONS,
State House.

GENTLEMEN: Your letter, addressed to the attorney general, has recently been referred to me for investigation and reply.

You call attention to code supplement section 5716 fixing the compensation of the wardens of the state penitentiaries; also to

code section 5717 which provides that the warden shall be furnished with house rent, fuel and light for himself and family at the expense of the state, "but no other perquisite or allowance;" also to the provisions of the same section requiring the warden to make a certain affidavit before a warrant for his compensation shall be issued; also to code supplement section 5718-a28, which authorizes the warden to use the labor of two prisoners for domestic services; also to section 23 of chapter 192 of the acts of the thirty-fourth general assembly appropriating $500.00 for the support fund of the warden, and to section 24 of the same chapter appropriating $200.00 for the warden's house fund; also to code supplement section 2727-a43, which you have construed as superseding that portion of code section 5717 requiring the affidavit above referred to, and you then propound the following questions:

First, "Are the requirements of 5717 of the code, relating to the affidavit of the warden, still in force?"

In my judgment this question should be answered in the negative. While there has been no express repeal of this provision, other provisions intended to accomplish the same purpose and, to some extent, inconsistent are found in code supplement section 2727-a43 to which you refer.

Your second question is, "Is the provision of section 5717 of the code in regard to 'other perquisite or allowance' still in force or is it superseded by later statutes?"

In my judgment the provisions of this statute are at least modified by subsequent statutes, to which you refer, to such an extent that the provision quoted would be no longer of any particular force or effect.

While these questions are not entirely free from doubt yet the interpretation placed upon them by your department is entitled to some weight in construing their provisions, especially where the same has been acquiesced in by the legislature as has been done in this state.

Yours very truly,

C. A. ROBBINS,

Assistant Attorney General.

RESIDENCE—LEGAL—FOR ELECTION PURPOSES—WHAT CONSTITUTES.

October 21, 1912.

DR. T. L. RICE,
Ames, Iowa.

DEAR SIR: I am advised by the attorney general that you are interested in the question of the right of a student to vote at the place where he is attending school, and by his direction I am writing you concerning the matter.

The question was before our supreme court in the case of *Vanderpeel vs. O'Hanlon,* 53 Iowa, 246, in which case the court said:

> "If it was the intention of the plaintiff to return to Mitchell county when he had finished his education, it would probably be conceded that his place of residence, within the meaning of the constitution, continued to be in Mitchell county during all the time he was absent. And, on the other hand, it would probably be admitted, if, when he went to Iowa City, or at any time thereafter before he offered to vote, his intention was to make that place his home and residence when he ceased to attend the University, that such place was and became his place of residence in such sense that he would have become a legal voter in Johnson county. * * * *
>
> "It is undoubtedly true that the residence of the plaintiff was in Mitchell county at the time he first went to Iowa City, and it must be equally true that it so continued until he acquired another. Another proposition will, we think, be conceded, and that is, that an individual cannot be entitled to vote in two different counties in this state at the same election. Yet he may, in a certain sense, actually reside in one and be a legal voter in another. He is entitled to vote only in the county where his home is—where his fixed place of residence is for the time being—and such place is, and must be, his domicile, or place of abode, as distinguished from a residence acquired as a sojourner for business purposes, the attainment of an education, or any other purpose of a temporary character. If a person leaves the place of his residence or home with intent of residing in some other place and making it his fixed place of residence, but never consummates such intent, it cannot be said his residence has been changed thereby. But if he so intends, and does actually become a resident

of another place, then the former residence will be regarded as abandoned and a new one acquired."

In the case of *State vs. Savre,* 129 Iowa, at page 125, the court said:

> "Mere bodily presence or absence cannot have controlling effect in determining residence when once established. Many qualified voters spend most of their time in pursuits out of the ward or even the state. Persons who travel for business or pleasure for long or short periods do not lose their residence by such absence. But bodily presence ordinarily is essential in effecting a domicile in the initiative. One might intend to dwell in a place as permanent abode, and yet never see it. So he might dwell without thought of remaining. In neither event would he be a resident within the meaning of the election laws. There must be the act of abiding without the present intent of removing therefrom. * * * The vital inquiry, then, in determining the residence of a person always is where is his home, the home where he lives, and to which he intends to return when absent, or when sick, or when his present engagement ends."

From these decisions it will be observed that it is largely a question of the intention of the student as to where his place of abode shall be after his school work is finished, and two students might have spent the same length of time in the same school and one be a resident of and entitled to vote in the town where the school is located, and the other not. A student who has the intention of returning to his former home as soon as his school work is finished is not a resident of the place where the school is located, within the meaning of the law. On the other hand the residence of a scholar of full age, who has left the home of his parents on coming to the school, intending to make the place where the school is located his residence until his school work is finished and then intending to locate at some place other than his former home, is the place where the school is located.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

JUDGE—WHAT RELATIONSHIP DISQUALIFIES.

October 22, 1912.

FRED S. HUNTER, *Attorney,*
Chillicothe, Mo.

DEAR SIR: Yours of the 18th inst. addressed to the attorney general has been referred to me for reply.

You ask whether or not we have a law in this state which prohibits the near relatives of the district or circuit judge, such as father, brother or other relative, from practicing before the judge who is the near relative of the attorney. We have no such law. We have on the district bench in this county a judge and he has a brother in active practice. Prior to that time the father was on the bench and they both practiced before him.

I know of no state which has such a law as the one which you suggest. We have, however, the following statute prescribing when a judge is disqualified to act in a particular case.

> "A judge or justice is disqualified from acting as such, except by mutual consent of parties, in any case wherein he is a party or interested, or where he is related to either party by consanguinity or affinity within the fourth degee, or where he has been attorney for either party in the action or proceeding. But this section shall not prevent him from disposing of any preliminary matter not affecting the merits of the case." Code (1897), section 284.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

CITIES AND TOWNS.—Required to drag roads within corporate limits.

October 23, 1912.

P. J. KLINKER, *County Attorney,*
Denison, Iowa.

DEAR SIR: Yours of the 21st inst. addressed to the attorney general has been referred to me for reply.

Your question briefly stated is whether or not section 4 of chapter 70 of the acts of the thirty-fourth general assembly which provides:

> "It shall be the duty of the city or town council of cities and towns to cause the main traveled roads within the corporation limits leading into the city or town to be dragged, and so far as practicable and possible the provisions of this act shall apply."

is sufficient to authorize cities and towns to levy the one cent mill tax for the dragging fund which section 2, of the same chapter, provides shall be levied by township trustees in their respective townships.

This department has heretofore had occasion to investigate this question and at that time Mr. Cosson reached the conclusion that the question was one of very much doubt in view of the fact that authority to levy a tax should always be clearly conferred before the right is exercised. However, the question is one which probably ought to be tested out in the courts, and if your officials see fit to take this course the matter could probably be determined by the supreme court before the next legislature adjourns and then, if it was desired that the city should have this power it would be conferred by the necessary amendments to this chapter.

In this connection I call your attention to the recent case of *Keokuk vs. The County Treasurer of Lee county,* in which the opinion was filed on the 18th instant, and which you will doubtless have in the Northwestern Reporter in the next ten days. In that case the holding is that the board of supervisors are without power to levy within the city of Keokuk taxes for bridges and culverts, but that that power is in the city. I would not contend that this case is an authority upon the question which you have propounded but it may have some indirect bearing upon the same inasmuch as it discusses the scope of the power of the two taxing authorities, namely, the county and city.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

SIDEWALKS—ASSESSMENT OF COST TO ABUTTING PROPERTY—NOTICE TO PROPERTY OWNERS.

October 25, 1912.

MR. MALCOLM CURRIE,
Sac City, Iowa.

DEAR SIR: Yours of the 23d inst. addressed to the attorney general has been referred to me for reply.

Your question as stated by you is as follows:

> "Do you think section 779 code supplement confers power on a city or town council to levy special assessment for permanent sidewalks without fixing a time and place for owners of abutting lots to appear and show cause why the levy should not be made?"

You also call attention to the fact that the ordinance in your town provides for notice to the owner of the necessity of the improvement and gives him an opportunity to build the walk within a certain time, and also for notice by publication for bids, but that where the walk is constructed by the city the property owner is not given any opportunity to be heard upon the question of the amount of his assessment.

The statute to which you refer is silent upon the question. Our supreme court has held that where the city ordinance provided for a notice not designated by the statute that then the city was compelled to comply with its ordinance and give the notice provided for therein.

Zalesky vs. Cedar Rapids, 118 Iowa, 714;

Burget vs. Greenfield, 120 Iowa, 432.

While the statute allowing assessments on abutting property without due notice to the owner is unconstitutional, it does not follow that a valid assessment may not be made in pursuance of it if the notice and due opportunity to be heard are provided by local ordinance.

Gatch vs. City of Des Moines, 63 Iowa, 718.

As having a further bearing on the question, and as indicating the necessity of notice, I call your attention to the case of

Bebee vs. Magoun, 122 Iowa, 94, and

Reed vs. Cedar Rapids, 137 Iowa, at 113.

And in view of these authorities, and in view of the general rule that the party being assessed is entitled to his day in court I think it would be much safer to have your ordinance so amended as to give the property owner notice of the time when the question of the amount of the assessment against his property is to be heard and an opportunity to be present and make any showing that he would in justice be entitled to make, such as that the proceedings were insufficient to authorize any assessment or upon the question as to the proper amount of any assessment to be made.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

PRIMARY ELECTION.—Certificate of nomination by county convention sufficient in absence of objection.

October 25, 1912.

J. R. MARTIN, *County Auditor*,
Emmetsburg, Iowa.

DEAR SIR: I had a conversation with Mr. Davidson over the telephone this afternoon in which he stated that he was talking for you, and requested my opinion as to whether you could question the regularity of the proceedings of the democratic county convention in nominating a candidate for county attorney where a certificate of nomination had been regularly filed with you.

It is my opinion that if the certificate is regular on its face that you have no authority to make inquiry beyond that certificate and refuse to file it because of some irregularity in the proceedings of the nominating convention, unless objections have been filed with you, as provided in section 1103 of the supplement to the code.

The opinion in the case of *Pratt vs. Secretary of State* referred to by Mr. Davidson in our conversation over the telephone simply held that party committees have no authority to make an original nomination. There is nothing in that case that would throw any light on the question presented by you.

You will observe by reading section 1087-a25 of the supplement to the code that the law does not require a majority of delegates to be present at a county convention—simply that a majority of the precincts of the county are represented. I do not know

whether it was the intention of the legislature to make this rule or not, but nevertheless, that section will bear no other construction. Unless objections are made by someone at least eight days before the day of election, you should have the name of the nominee printed upon the official ballot if, as I have stated above, the certificate of nomination appears to be regular.

Yours very truly,

JOHN FLETCHER,
Assistant Attorney General.

BANKS—DEBENTURE BONDS—AUTHORITY OF SAVINGS BANKS TO INVEST IN.—Authority of savings banks to invest in debenture bonds discussed and held that savings banks cannot own such bonds.

October 25, 1912.

HON. JOHN L. BLEAKLY,
Auditor of State,
State House.

DEAR SIR: Yours of the 23d inst. addressed to the attorney general has been referred to me for reply.

Your question is, whether or not state or savings banks organized under the laws of Iowa may legally purchase or own debenture bonds.

A debenture is defined to be,

> "An instrument in the nature of a mortgage, to secure a certain sum of money with interest;
>
> "An instrument which shows that the party owes and is bound to pay and is acknowledgment of the debt;
>
> "A document which either creates a debt or acknowledges a debt;
>
> "A writing acknowledging a debt specifically, an instrument generally under seal, for the repayment of money loaned;
>
> "Usually, if not exclusively, use of obligations of corporations or large moneyed co-partnerships, issued in a form convenient to be bought and sold as investments;

"A writing which is firstly, a simple acknowledgment under seal of the debt; secondly, an instrument acknowledging the debt and charging the property of the company with repayment; and thirdly, an instrument acknowledging the debt, charging the property of the company with repayment, and further restricting the company from giving prior charge."

13 Cyc., pages 388 to 390.

Section 1850 of the code supplement provides as follows:

"Each savings bank shall invest its funds or capital, all moneys deposited therein and all its gains and profits, only as follows:

"1. In bonds or interest bearing notes or certificates of the United States;

"2. In bonds or evidences of debt of this state, bearing interest;

"3. In bonds or warrants of any city, town, county, school district, or drainage district of this state, issued pursuant to the authority of law; but not exceeding twenty-five per cent of the assets of the bank shall consist of such bonds or warrants;

"4. In notes or bonds secured by mortgage or deed of trust upon unincumbered real estate in this state, worth at least twice the amount loaned thereon."

In none of these subdivisions will there be found any term which may be construed to cover debenture bonds, hence, I am of the opinion that your question, in so far as *savings banks* are concerned should be answered in the negative. I will say, however, that where the debenture is given and in connection with it there is deposited or pledged security for the payment of the amount shown to be due by the debenture, and that such bonds and securities as are described in paragraphs 1, 2, 3 and 4 of the section above quoted, are such as may be owned by savings banks, then the bank would be authorized to purchase these securities without the accompanying debenture, and the fact that it is taken in addition would not render the transaction illegal.

With reference to state banks, I am unable to find any statute similar to code supplement section 1850 prescribing or limiting the securities in which its capital may be invested, hence, I am of

the opinion that in so far as state banks are concerned your question should be answered in the affirmative.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

GAMBLING.—A sale of chances on articles donated for charitable purposes constitutes.

October 25, 1912.

J. H. STOUFFER, Cashier,
Walcott, Iowa.

DEAR SIR: Yours of the 24th inst. addressed to the secretary of state has been referred to this department for reply.

Your question, briefly stated, is whether or not your Ladies' Cemetery association in holding their bazaar, would have a right to sell chances on articles donated to them where the money realized is to be used in beautifying the cemetery.

This question should be answered in the negative. It matters not how noble the purpose may be for which the proceeds of the game are to be used if the property is to be distributed by chance it would constitute a lottery as well as gambling and both are prohibited by the statute.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

HORSES.—Inspection of upon importation required.

October 26, 1912.

MR. WALTER STEADMAN,
Hancock, Iowa.

DEAR SIR: I have your letter of the 21st inst. in which you state that you bought a team of horses in South Omaha and had them shipped to you at Hancock, Iowa; that the horses were not inspected in Omaha but later were examined by an inspector at Hancock, and a fee of $10.00 charged to you for the inspector's services. You request my opinion as to whether you are required to pay the fee charged.

Under the laws of this state it was necessary for the horses to be inspected at their destination in this state if they were not previously inspected in the state from which they came. The amount of fee to be charged depends largely upon the distance that it was necessary for the veterinarian to travel for the purpose of inspecting the horses. I have talked with the state veterinarian and he advises me that the fee of $10.00 charged you was a very reasonable one under the circumstances. I do not see how you can avoid the payment of the bill but you should have required inspection in Omaha before the horses were shipped to you at the expense of the person from whom you purchased them.

Yours very truly,

JOHN FLETCHER,
Assistant Attorney General.

CROSS EXAMINATION.—What is proper in condemnation proceedings.

October 28, 1912.

HON. EXECUTIVE COUNCIL,
State House.

GENTLEMEN: With reference to the question of whether or not it would be advisable for the state to appeal from the judgment recently rendered in the case of *Eva Brown, et al, vs. The State of Iowa*, in which injunction proceedings were instituted for the purpose of obtaining lands for an addition to the state fair grounds, I will state that on the trial of the case the plaintiffs placed upon the stand the witness T. L. Sellers and he was permitted to state the value of the real estate in controversy at the time it was taken. The defendants sought to show on cross examination that he was present at an auction sale of the buildings which are situated upon the real estate in controversy, and that plaintiff was also present, and defendants also sought to show the prices at which the buildings and improvements sold at said auction sale. This the defendant was not permitted to do, the court sustaining an objection to the questions propounded which sought to elicit this information. This is the only question in the case, and if this was reversible error, a new trial should be granted and doubtless would be awarded on appeal.

My attention has been called to the case of *Lough vs. Minneapolis & St. Louis Railroad Company,* 116 Iowa, 35, wherein the supreme court held in a condemnation proceeding that it was error for the witness to value the farm sought to be crossed by the railroad company in that case in detached parcels, but in that case the testimony came from the defendant's witnesses and was not in the nature of cross examination, and hence, a different rule would apply.

In the case of *Hollingsworth vs. Des Moines & St. Louis Railway Company,* 63 Iowa, 443, it was held that the testimony of witnesses as to the value of nearby property was incompetent and immaterial.

In *Watkins vs. Railroad Company,* 137 Iowa, at 442, a similar holding was made. In *Snouffer vs. Railway Company,* 105 Iowa, 681, it was held that where a witness testifies as to the value, he may be asked on cross examination as to the value of other lots in the neighborhood and as to the prices paid, for the purpose of showing his knowledge of values. To the same effect see

Damon vs. Weston, 77 Iowa, 259;
Jenks vs. Lansing Lumber Co., 97 Iowa, 350;
40th Cyc., at 2499;

where it is held:

> "A witness as to value is properly subjected to a line of cross examination designed to test the accuracy and worth of his estimate, and so he may be interrogated as to his reasons for his opinion, the basis of his estimate or the price realized at sales of other similar property or at a previous sale of the same property."

In the case of *Morrill vs. Palmer,* 33 L. R. A., 416, it was held:

> "The defendant testified as to the value of his farm including a tenement house thereon, and a wood lot which forms part of the farm. The plaintiff, in cross examination, was permitted to inquire as to the cost of buildings and value of a portion of the real estate detached from the rest. This was not error. It was legitimate cross examination. Such testimony might tend to show a portion of his premises worth more than what he testified the value of the whole of it was. It was certainly a legitimate mode of inquiry to test the value of his statements, and enable the jury to determine what credit they would give to his testimony."

In 16th Cyc., at page 1135, it was held that the price obtained at an auction sale of land or of an undivided interest therein is admissible as some evidence of the value of the land in the absence of proof of imposition or mistake, and in 17th Cyc., at page 130, it is laid down as a rule that "the scope of cross examination is largely a matter within the discretion of the presiding justice and considerable latitude has been permitted. A witness may be examined as to his knowledge of the value of adjacent land, and as to the price paid or received."

After having fully examined these authorities, I am of the opinion that the ruling of the court complained of was erroneous, and that there would probably be an equal chance of reversing the judgment on appeal.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

ELECTION—POLLING PLACES.—Circulation of consent petition about the polling place on election day should be prohibited.

October 29, 1912.

AGNES TE PASKE, Attorney-at-Law.
Sioux City, Iowa.

DEAR MADAM: Yours of the 26th inst. addressed to the attorney general has, on account of his absence, been referred to me for reply.

You call attention to the probability that on election day the saloonists will be circulating their petitions of consent for signatures among the voters in the polling places or at the doors immediately adjoining.

By code section 1134 it is provided:

> "No person shall on election day do any electioneering or soliciting of votes within any polling place or within one hundred feet therefrom as defined in this chapter, or interrupt, hinder or oppose any voter while approaching the polling place for the purpose of voting. * * * Any violation of the provisions of this section shall be punished by a fine of not less than $5.00 nor more than $100.00, or by imprisonment of not less than ten days, nor more than thirty days in the county jail, or by both fine and imprisonment."

While the soliciting of signatures to a consent petition might not be the soliciting of votes within the meaning of this section, and while it might not be electioneering within the letter of the law above quoted, yet it would seem that it would be within the spirit of the law and that such practices should not be tolerated in or about the polling places by the election officers.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

VOTING MACHINES—NUMBER OF REQUIRED IN EACH PRECINCT—ARRANGEMENT OF LEVERS DISCUSSED—RIGHT OF PERSONS TO VOTE AFTER TIME FOR CLOSING POLLS.

October 30, 1912.

MR. C. A. RAWSON,
Chairman Republican Central Committee,
Fleming Building, City.

DEAR SIR: Replying to the letter of Mr. George E. Hilsinger of Maquoketa, dated October 26th, which has been submitted to this department through you for reply, will say with reference to the question as to the number of voting machines required in a voting precinct that it is provided by code section 1113:

> "The booths and compartments shall be so built and arranged, if possible, as to be permanent, so that after the election they may be taken down and deposited with the township, city or town clerk, as the case may be, for safe keeping and for future use. The number of voting booths shall *not be less than one to every sixty voters or fraction thereof* who voted at the last preceding election in the precinct."

The chapter which makes provision for the use of voting machines instead of booths makes no provision for the number of voting machines required in any particular precinct, but it is provided by code supplement section 1137-a27,

> "All of the provisions of the election law now in force and not inconsistent with the provisions of this act *shall apply with full force* to all counties, cities, and towns adopting the use of voting machines."

In the absence of any provision for a less number of voting machines than booths, I am inclined to the view that the courts may hold that one voting machine is required for every sixty voters; in other words, the same number as the number of booths required. The question, however, is one of some doubt, but in any event a sufficient number of voting machines should be furnished in a voting precinct to accommodate the voters without requiring any to wait an unreasonable length of time in order to be furnished an opportunity to vote.

In this morning's paper I saw what purports to be a reproduction of the face of the voting machine as it will appear to the voter on election day on November 5th next, and the names of the individuals who are candidates for presidential electors do not appear but instead appears a lever by means of which the voter is supposed to vote for all of the candidates for electors upon his party ticket. I assume that the machine has been so arranged in an attempt to fill the provisions of code supplement section 1127-a11, and while in the latter part of the section it is provided:

> "It may also be provided with one ballot in each party column or row containing only the words 'presidential electors' preceded by the party name, and a vote for such ballot shall operate as a vote for all the candidates of such party for presidential electors."

in my judgment this provision should not be the only one made for the purpose of affording the voters an opportunity to vote for presidential electors, and that while the machine may be equipped with a lever by means of which the voter may vote for all of the electors of any one particular party by means of one lever, yet it should also be provided with individual levers for each candidate for presidential elector in order that the voter may have an opportunity to vote as he desires in case he does not wish to vote for all of the presidential electors of any given political party.

With reference to the other question which Mr. Hilsinger propounds as follows:

> "Suppose twenty voters are present in polling places and all demanding the right to vote before the time the law says the polls shall close, can the board close the *voting* at time named by law or are those who are present and demand their rights to vote entitled to cast their ballot?"

the general rule is that the provision of a statute as to the time

of opening and closing of polls is so far directory that an irregularity in this respect which does not deprive a legal voter of his vote or admit an unqualified voter to vote will not vitiate the election.

15 Cyc., page 364.

Hence, I would say that it would be the duty of the election officers, in the case supposed by him, even though they closed the polls at the hour fixed by the statute, to permit all persons entitled to vote who were within the polling place at the time of closing to vote before the polls are finally closed.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

PRESIDENTIAL ELECTOR.—One holding office of county attorney eligible.

November 2, 1912.

MR. W. F. RYAN,
Larchwood, Iowa.

DEAR SIR: Yours of yesterday addressed to the attorney general has been referred to me for reply.

Your question, briefly stated, is, whether or not one who has been nominated as candidate for county attorney in the June primary is eligible to the office of presidential elector, and whether his name may appear on the official ballot for both offices at the coming election.

The general rule is that two incompatible offices may not be held by the same person at the same time. I can see nothing in the duties of the respective offices that would render them incompatible and can see no reason why one person may not be permitted to exercise the duties of both offices.

Code section 1100 provides for nomination of candidates by petition and further provides—

> "That the name of a candidate placed upon the ballot by any other method shall not be added by petition for the *same office.*"

This language would indicate that there might be no objection to the same person's name appearing upon the ballot more than once where it was for a *different* office.

Code section 1173 providing for the election of presidential electors contains only the following prohibition:

> "No one of whom shall be a person holding office of senator or representative in congress, or any office of trust or profit under the United States."

While the office of county attorney is an office of trust as well as of profit, it is one under the state government and not under the United States and hence this provision would not interfere with a county attorney acting also as presidential elector.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

MAYOR.—Extent of jurisdiction of in civil matters.

November 4, 1912.

J. C. BAKER, J. P.,
Marengo, Iowa.

DEAR SIR: Yours of the 2nd instant addressed to the attorney general has been referred to me for reply.

Your question briefly stated is, whether or not a mayor of a city has the right to sue on accounts outside of the city.

The mayor in exercising jurisdiction in civil cases acts as a justice of the peace ex officio, and hence, he would have the same jurisdiction as other justices of the peace which would extend throughout his county.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

BOXBALL ALLEYS.—Minors should be excluded from.

November 6, 1912.

EARL PETERS, Mayor,
Clarinda, Iowa.

DEAR SIR: Yours of the 4th instant addresed to the attorney general has been referred to me for attention.

You call attention to the provisions of code section 5002 and inquire whether or not this statute prohibits the keeper of a box ball alley from permitting a minor to take part in the game known as "box ball."

The statute provides:

> "No person who keeps a billiard hall, beer saloon or nine or ten pin alley * * * shall permit any minor to remain in such hall, saloon or alley, or take part in the game known as billiards, or nine or ten pins."

I do not know anything about the game of "box ball," but if it is a game that would fall within the description of any of the games described in section 5002, as above quoted, your question should be answered in the affirmative.

I enclose a leaflet covering the gambling laws generally.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

PEDDLING.—Sale of from car does not constitute.

November 6, 1912.

HUTCHINSON GROCERY CO.,
Decorah, Iowa.

GENTLEMEN: Yours of the 4th instant addressed to the attorney general has been referred to me for reply.

Your question briefly stated is, whether or not a resident of another state or county may ship in a car of apples or potatoes not raised by him and sell the contents of the car by the bushel to the consumer and not be subject to the license provided by our law or by city ordinance.

This department has heretofore ruled that where the sales are made from the car and no peddling is done by the party making the sales that neither the license law nor ordinances would be violated by sales made in such manner. If, however, they undertook to peddle the vegetables around throughout the county and outside of the city or town then the license law would apply, and if within the town the city ordinance might be made to apply.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

HIGHWAYS—ESTABLISHMENT OF OVER GROUNDS OF STATE COLLEGE—AUTHORITY OF BOARD.—Board of supervisors have no authority to establish highways over state property without consent of board of control.

November 9, 1912.

IOWA STATE BOARD OF EDUCATION,
State House.

SIRS: Your letter of October 25th addressed to the attorney general has been referred to me for reply. The questions which you propound are:

> "1. Has the board of supervisors of Story county the right and power to establish a highway as proposed over college grounds against the remonstrance of the board of education and college authorities?
>
> "2. If they have such power, then what rights have the state board of education and college authorities to control traffic over such a highway when established?"

"Where lands owned by the state are in actual use by it for a public purpose it cannot be condemned for another and inconsistent use under general statutory authority to condemn land. There must be express statutory authority, or the authority must arise from necessary implication; and this is true, although the general statutes are sufficiently comprehensive to embrace any lands owned by the state."

15 Cyc., 611.

St. Louis, etc., R. Co. vs. Ill. Inst. for Education of Blind, 43 Ill., 303;

Davis vs. Nichols, 39 Ill., App. 610;

Matter of Utica, 73 Hun. (N. Y.) 256; 26 N. Y., Sup. 564.

By code section 1509, as now amended, it is provided that the board of regents or board of control of the institutions belonging to the state may vacate, alter, change or establish public highways through the lands belonging to the state and *for the use of such institutions,* as the board of regents or board of control may deem for the best interests of the state and the public, subject, however, to the approval of the board of supervisors of the county or the city council of the city wherein such lands are situated.

There is no express statutory authority for the establishment of public highways through lands belonging to state institutions except in conjunction with, and with the consent of, the board of regents or the board of control. Hence, I am of the opinion that your first question should be answered in the negative, and in view of this answer, it becomes unnecessary to reply to your second question.

The copy of notice which you enclosed is herewith returned.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

TAXATION.—Validity of certain taxes assessed against certain land belonging to the state purchased since the levy.

November 9, 1912.

HONORABLE BOARD OF CONTROL,
State House.

SIRS: Your letter of the 6th instant, together with letter from Geo. O. Free, county treasurer, dated October 29th, requesting an opinion in regard to the validity of certain taxes which are claimed to be a lien upon certain lands now owned by the state, has been referred to me for reply.

You call attention to an opinion of former Attorney General Mullan of date December 19, 1905; also to one of former At-

torney General Byers of date December 31, 1907, which have some bearing upon the matter.

In the instant case it appears from the letter of the county treasurer that the state obtained its title by deed dated November 10, 1911, the land having been assessed for taxes in the spring of that year, and the taxes levied at the usual time in September prior to the time of the purchase by the state. In this respect the case is to be distinguished from the case considered by former Attorney General Mullan, for in that case the land was conveyed by the person to whom it was assessed to the state on the 10th day of June, 1904, and prior to the time of the levy of the taxes for that year.

And in the case considered by Mr. Byers the proposed sale of the land for taxes was for the taxes of the year 1903. The state obtained its title May 23, 1903, before the taxes for the year 1903 were levied.

Hence, the case is to be distinguished from each of the cases heretofore considered by this department in the opinions referred to. However, it is provided by code section 1015:

> "Taxes upon real estate shall be a lien thereon against all persons *except the state* * * * As between vendor and vendee such lien shall attach to such real estate on the 31st day of December, following the levy, unless otherwise provided in this chapter."

Inasmuch as the purchase was made by the state prior to December 31st following the levy which was made in September, the taxes in question were not a lien at the time the real estate was purchased by the state.

Baldwin vs. Mayne, 42 Iowa, 131;

Rex Lumber Co. vs. Reed, 107 Iowa, 111, at 114.

Furthermore, it would seem that after the title had passed to the state the provisions of code section 1435 would apply wherein it is provided:

> "and no assessment or taxation of such lands, nor the payment of any such tax by any person, or the *sale and conveyance* for taxes of any such lands shall in any manner affect the right or title of the public therein, or confer upon

the purchaser or person who pays such taxes any right or interest in such land."

District of Oakland vs. Hewitt, 105 Iowa, 663.

In view of these authorities I am of the opinion that whatever remedy the county may have against the former owner of the lands for the collection of such tax, that such tax is not a lien upon the land, nor may the land be sold for the same, nor is the state in any way liable for the payment of such tax.

Respectfully,

C. A. ROBBINS.
Assistant Attorney General.

FEEBLE MINDED.—By what authority committed to institution.

November 9, 1912.

MR. H. H. HART,
Director Russell Sage Foundation,
105 E. 22nd St., New York, N. Y.

DEAR SIR: Yours of the 1st instant addressed to the attorney general has been referred to me for reply.

Your first question is:

"By what authority are feeble-minded persons admitted to your state institution for feeble-minded?

"(a) By court commitment? If so, by what court?

"(b) By trustees of the institution?

"(c) By superintendent of the institution?

"(d) By what authority, if any?"

Feeble-minded persons are admitted to our state institutions for feeble-minded by trustees of the institution and by the superintendent thereof under the direction of such trustees upon the application of the father and mother, or either of them if the other be dead or insane, or by the guardian, and if none, by the board of supervisors or county attorney of the county in which the child or youth resides. There is also provision for commitment by

the juvenile court where the child requires treatment, and it is the duty of the county superintendent of schools in each county to report to the superintendent of the institution for feeble-minded the name, age and postoffice address of every person in his county of school age who is deprived of a reasonable degree of benefit from the common schools by reason of mental or physical condition.

Your second question is:

> "Can feeble-minded persons be committed to a state institution without consent of their parents?"

Except where the commitment is made by the juvenile court this question should be answered in the negative.

Your third question is:

> "Have parents authority to remove feeble-minded minors from the institution at their discretion?"

This question should be answered in the affirmative, and it is further provided by code section 2698:

> "Any inmate of the institution by order of the board of trustees, made at any time, may be returned to his parents or guardian."

Your fourth question is:

> "Can insane minors be committed to a state institution without the consent of their parents?"

Insane minors may be committed to the asylum for the insane but not to the state institution for feeble-minded without the consent of their parents.

Your fifth question is:

> "Have parents authority to remove insane minors from the institution at their discretion?"

This question should be answered in the negative.

Yours very truly,

C. A. ROBBINS.
Assistant Attorney General.

CITIES AND TOWNS—COUNCIL.—May not permit boys in pool or billiard halls.

November 16, 1912.

REV. F. C. WITZIGMAN,
Conrad, Iowa.

DEAR SIR: I am in receipt of your communication of the 14th instant requesting to be advised as to whether a town council may permit boys to enter a nine and ten pin alley.

Section 5002 of the code provides:

> "No person who keeps a billiard hall, beer saloon or nine or ten pin alley, nor the agent, clerk or servant of any such person, nor any person having charge or control of any such hall, saloon or alley, shall permit any minor to remain in such hall, saloon or alley, or to take part in any of the games known as billiards or nine or ten pins. A violation of the provisions of this section shall be punished by a fine not less than five nor exceeding one hundred dollars, or imprisonment in the county jail not exceeding thirty days."

No one has the authority to violate the provisions of this act, or to authorize any one else to violate any of the provisions of this act, and no ordinance passed by any city or town council in conflict with the provisions of this act would be of any force or effect or operate as a bar to a punishment under said section.

Yours very truly,

GEORGE COSSON,
Attorney General.

SCHOOLS.—Manual training may not be had in railway shops.

November 16, 1912.

MR. GEORGE H. CARR,
Des Moines, Iowa.

DEAR SIR: I am in receipt of your communication of the 11th instant advising that the Chicago Great Western Railroad Company has established a school for the training of employees at Dubuque open to all who can pass the proper physical examination, and who

are not less than seventeen years of age nor older than twenty-one years of age; that this school is located at Dubuque and it becomes necessary to take the students to Oelwein in order that they may receive practical information at the company's shops.

You request an opinion as to whether they may be transported free in view of the exception found in division (o) of section 2157-g, supplement to the code, 1907.

While I naturally incline to a liberal interpretation of most any provision of law, it seems to me that to construe division (o) of said section to include a private school of this nature would expand the section entirely beyond the thought in the minds of the general assembly. Certainly there are no cases construing the word "public" which would at all warrant such a construction, although I believe that there is just as much reason for transporting these pupils free as there is to transport pupils free to any kind of a parochial school.

It occurs to me that in view of the other exceptions found in the section that it would not be difficult at all to induce the general assembly to amend the section to cover students attending a school of this nature.

Yours very truly,

GEORGE COSSON,
Attorney General.

SOLDIERS' DESERTION.—Effect upon citizenship.

November 19, 1912.

MR. HUGH FARRELL,
Anita, Iowa.

DEAR SIR: Yours of the 12th inst. addressed to the attorney general has been referred to me for reply.

Your question briefly stated is, whether or not a soldier who deserts the United States army forfeits his citizenship, including his right to vote upon public questions.

Sections 1996 and 1997 of the Revised Statutes of the United States, provide:

"All persons who deserted the military or naval service of the United States and did not return thereto or report themselves to a provost-marshal within sixty days after the issuance of the proclamation by the president, dated the 11th day of March, 1865, are deemed to have voluntarily relinquished and forfeited their rights of citizenship, as well as their right to become citizens; and such deserters shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizens thereof.

"No soldier or sailor, however, who faithfully served according to his enlistment until the 19th day of April, 1865, and who, without proper authority or leave first obtained, quit his command or refused to serve after that date, shall be held to be a deserter from the army or navy, but this section shall be construed solely as a removal of any disability such soldier or sailor may have incurred, under the preceding section, by the loss of citizenship and of the right to hold office, in consequence of his desertion."

and fully answers your question.

Yours truly,

C. A. ROBBINS.
Assistant Attorney General.

CHIROPRACTOR.—Is without right to practice without first obtaining certificate.

November 21, 1912.

C. R. WOOD, *County Attorney,*
Corwith, Iowa.

DEAR SIR: Your letter of the 19th instant referring to the fact that persons are practicing medicine under what is known as the chiropractic system in your county addressed to Attorney General Cosson has been referred to me for reply.

You request to be advised as to whether persons practicing this system of healing have a legal right to practice in this state.

Such persons can only practice by complying with the requirements of our statute with respect to procuring a license from the

state board of medical examiners and recording the same in the office of the recorder of the county in which they reside. There have been a number of prosecutions of chiropractors in this state and the supreme court has several times held that this class of practitioners can only engage in the practice by complying with the law requiring a certificate to practice medicine. The leading one of these cases passed on by the supreme court is probably that of *State vs. Corwin*, 151 Iowa, 420. Other cases are *State vs. Miller*, 124 N. W., 167 and *State vs. Zechman*, a case recently affirmed by the supreme court and not yet reported. I am mailing you herewith a copy of the opinion of the court in this case.

If persons are practicing under this system in your county you ought to immediately get indictments against them, and if you desire any help in the way of preparing indictments I will be glad to render you such assistance as I can. I can also furnish you my brief in the case of *State vs. Corwin* which was filed in the supreme court.

Yours very truly,

JOHN FLETCHER,
Assistant Attorney General.

ELECTIONS—REGISTRATION BOARD.—When required to be in session.

November 26, 1912.

MR. J. N. WEIDENFELLER,

Secretary, Commercial Ass'n,
Ottumwa, Iowa.

DEAR SIR: Yours of the 22d inst. addressed to the attorney general has been referred to me for reply.

Your question, briefly stated, is whether it is necessary for the board of registration to be in session for the purpose of registering voters previous to holding of special elections called for the purpose of voting upon the question of adopting the commission form of government.

This question should be answered in the affirmative. Code section 1077 provides:

> "The registers shall meet on the second Thursday prior to any general, city, or *special election* at their usual voting place

in the precinct in which they have been appointed, and shall hold continuous sessions for two consecutive days from eight o'clock in the forenoon until eight o'clock in the afternoon.

Yours truly,

C. A. ROBBINS.
Assistant Attorney General.

HUNTING.—On enclosed lands of another without permit constitutes an offense.

November 26, 1912.

MR. A. L. YEAROUS,
Eagle Grove, Iowa.

DEAR SIR: Yours of the 25th inst. addressed to the attorney general has been referred to me for reply.

Your question, as stated by you, is as follows:

"Can a person arrest another person for trespassing?"

It is not the policy of this department to answer questions where the purpose is simply to settle some dispute. However, if I were to answer the question I would not answer it "Yes *or* no," but by Yes *and* No. That is, if the trespass was malicious trespass amounting to a criminal offense under any of the sections of chapter 4 of title XXIV of the code, an example of which is found in section 4821 of the code which reads as follows:

> "Any person who shall hunt with dog or gun upon the cultivated or enclosed lands of another without first obtaining permission from the owner or occupant thereof, or his agent, shall for each offense be fined not more than ten dollars and costs of prosecution, and shall stand committed until such fine and costs are paid; but no prosecution shall be commenced under this section except upon the information of the owner or occupant of such cultivated or enclosed lands, or his agent."

then the question should be answered in the affirmative and an arrest might be made in accordance with the provisions of code sections 5195 and 5196, which read as follows:

> "An arrest may be made by a peace officer or by a private person.

"A peace officer may make an arrest in obedience to a warrant delivered to him; and without a warrant:

"1. For a public offense committed or attempted in his presence.

"2. Where a public offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it."

On the other hand if the trespass were a mere technical trespass without a malicious intent to violate any of the sections of chapter 4, above referred to, the question should be answered in the negative.

Yours very truly,

C. A. ROBBINS.
Assistant Attorney General.

MONEYS AND CREDITS AND MONEYED CAPITAL.—How taxed.

November 26, 1912.

E. S. WILLARD & Co.,
45 Pine St., New York.

GENTLEMEN: Yours of the 19th inst. addressed to the treasurer of state has been referred to this department for reply.

Your first question is:

"If a local company of your state lends on mortgage, secured by real estate of your state,

"Is there an annual state tax on the mortgage? Rate?

"Is there an annual local tax? Average rate?

"Is there any recording tax that exempts the mortgage thereafter from any further taxes? Rate?

"Is there an income tax on mortgage interest? Rate?"

All four subdivisions of this question should be answered in the negative. However, if the *note* was held by an individual simply as an investment and without any view of negotiating the same, or reloaning or reinvesting the money, it would be subject to a

five mill tax under the provisions of section 1, chapter 63, acts of the thirty-fourth general assembly.

If, on the other hand, the note was held by a bank or other moneyed capitalist using his funds in competition with bank capital it would be subject to be taxed on twenty per cent of its actual value at the rate of levy applicable to other property in the taxing district where the holder of the note resides, as provided by section 5 of said act.

Your second question is:

> "If said local company sells and assigns the mortgage to a New York company, which records the assignment in your state, and thereafter keeps it in New York state,
>
> "Is there a tax on the assignment or on the recording of the assignment? Rate?
>
> "Must the New York company pay the annual state, annual local, income tax of your state, or a license tax for doing business?"

Both subdivisions of this question should be answered in the negative.

Your third question is:

> "If the New York company loans money by taking the mortgage directly to itself as mortgagee, and then records it in your state, and thereafter keeps it in New York state, must it pay the annual state, annual local, income tax of your state, or a license tax for doing the business?"

and should be answered in the negative.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

FIRE COMPANIES—MEMBERS OF EXEMPT FROM POLL TAX.—Members of fire department under the control of a city or town are exempt from the payment of poll tax.

November 29, 1912.

MR. J. L. JOSLIN,
Prairieburg, Iowa.

DEAR SIR: Yours of the 26th instant addressed to the attorney general has been referred to me for reply.

Your question as stated by you is, what is necessary to be done where a fire company is organized in a city or town in order that the members of such company may be legally exempt from poll tax?

Code section 2462 provides in part as follows:

> "Any person while an active member of any fire engine, hook and ladder, hose, or any other company for the extinguishment of fire, or protection of property at fires, under the control of the corporate authorities of any city or town, shall be exempt from the performance of military duty and labor on the roads on account of poll tax, and from serving as a juror."

From this it will be seen that no form of organization is required except that it be under the control of the corporate authorities.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

LOTTERY.—What constitutes.

November 29, 1912.

MR. H. H. HARROLD,
Eddyville, Iowa.

DEAR SIR: Yours of the 26th instant addressed to the attorney general has been referred to me for reply.

Your question, briefly stated, is whether or not a merchant may give away to customers in connection with purchases made by them

numbers on an article to be given away with the understanding that a number is to be drawn from a hat and the first number drawn will entitle the person holding the number to the article given as a prize, provided the merchant does not advertise in a newspaper or in any way except by conversation.

This method of giving away prizes amounts to a lottery pure and simple and to gambling as well, and the question of whether or not the matter is advertised in the newspaper is entirely immaterial. Hence your question should be answered in the negative.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

SOLDIERS—EXEMPTIONS.—Property in wife's name—When allowed.

November 29, 1912.

MR. T. D. BELLINGER,
Laurens, Iowa.

DEAR SIR: Yours of the 23d instant addressed to the attorney general has been referred to me for reply.

You call attention to the fact that several old soldiers in your locality owning homesteads consisting of house and lot in town, the title to which has been taken in the name of the wife, are denied the soldiers' exemptions provided for by law, and your question briefly stated is, whether or not they are entitled to such exemptions even though the property may be in the name of the wife.

This department has heretofore held that where the property was in fact purchased by the soldier and paid for by him, that it is in fact his property and he is entitled to the exemption even though the record of the title may be in the name of the wife. See *Ratliff vs. Elwell,* 141 Iowa, 312, where this conclusion was reached by our supreme court.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

SCHOOLS.—Rate of high school tuition fixed by law if maximum only. November 30, 1912.

MR. J. J. BILLINGSLEY,
Primghar, Iowa.

DEAR SIR: Yours of the 11th instant addressed to the attorney general has been referred to me for reply.

Your question briefly stated is whether or not a school corporation may exact as tuition for non-resident pupils a less amount than that authorized by law.

In my judgment the law was only intended to fix the maximum amount and that there would be nothing to prevent their fixing a lower rate in cases where they saw fit to do so.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

ELECTIONS—REGISTRATION BOARD.—Days required to meet.

November 30, 1912.

J. D. GLASGOW, *Mayor*,
Washington, Iowa.

DEAR SIR: Yours of the 22d instant addressed to the attorney general has been referred to me for reply.

Your question briefly stated is, how many days are the registrars of voters required to meet or perform services for which they should be allowed compensation.

By code section 1077 they are required to meet on the second Thursday prior to any general, special or city election, and to hold continuous session for two days, and in presidential years for three days.

By code section 1079 they are required within three days after the end of the three day period, mentioned in section 1077, to prepare two alphabetical lists of all persons registered, etc. This would require at least one day and might require more.

By code section 1080 they are required to meet on Saturday before the election and hold continuous session from eight o'clock

in the forenoon until nine o'clock in the afternoon; and by section 1082 they are required to be in session on the day of the election.

Hence, it follows that the minimum number of days for which they should be allowed compensation would be six.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

SEEDS—ADULTERATION OF.—What per cent of foreign seeds may be included in without violation of the statute. Sale of by merchant.

December 3, 1912.

MR. W. B. BARNEY,
Dairy & Food Commissioner,
Des Moines, Iowa.

DEAR SIR: Yours of the 18th ult. addressed to the attorney general has been referred to me for reply.

You enclose a letter from Albert Dickinson Co., with reference to the Iowa seed law, and they propound the following questions:

First:

> "Sections 5077-a14, -a18 and -a23, all have a bearing on the quantity of mustard allowed in rape seed. Will you please advise us how we can comply with section 5077-a18 paragraph 4th, without violating sections -a14 and -a23."

Paragraph 4, of section 5077-a18 provides for the purpose of this act, seeds shall be deemed to be mixed or adulterated where rape contains 5% or more of common mustard or black mustard. Rape is included in the list of agricultural seeds enumerated in section 5077-a14.

Section 5077-a23 provides:

> "Whoever sells, offers or exposes for sale, any of the seeds specified in sections 13 and 14 of this act which are mixed, adulterated or misbranded, or any agricultural seeds which do not comply with sections 10, 11 and 12 of this act * * * shall be guilty of a misdemeanor," etc.

Section 10 of the act referred to provides:

> "No person shall sell, offer or expose for sale or distribution in this state for the purpose of seeding any of the agricultural seeds as defined in section 9, unless the said seeds are free from the seeds of the following weeds,"

Then follows an enumeration of seeds including wild mustard.

Section 11 of the act provides:

> "The seeds of the following weeds shall be considered as impurities in the agricultural seeds as defined in section 9 of this act, sold, offered or exposed for sale within the state for the purpose of seeding."

Then follows an enumeration which includes black mustard. Hence, I am unable to advise you how you may comply with section 5077-a18 without violating sections 5077-a14 and -a23, and would suggest that you refer this question to the legislature at its coming session. They may see fit to clear up the inconsistencies to which attention has been called.

The second question is:

> "Section 5077-a20. Does paragraph 2 prohibit the farmer from selling seed to the merchant for recleaning purposes unless it complies with section 5077-a15 of the act?"

Code supplement section 5077-a20 provides:

> "The provisions concerning agricultural seeds contained in this act shall not apply to * * * , second, any person selling seeds direct to merchants, to be cleaned or graded before being offered for sale for the purpose of seeding. This shall not however, exempt the seller from the restriction of section 10 of this act;"

Section 10 being identical with section 5077-a15 referred to in your question, hence it follows that your question must be answered in the affirmative. However, I am unable to see how the farmer might sell, even to his neighbor for seeding purposes, seeds which do not comply with said section 10.

Your third question is:

> "Would also like to have your opinion with regard to a point in section 5077-a17. It states that 'seed not capable of germ-

inating shall be considered impurities.' Will you kindly advise us how you make your tests so as to comply with this provision.''

It is impractical to apply this test to seeds which are naturally slow of germination and no attempt has been made to apply the same except in the case of corn which usually germinates in a few days.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

MULCT TAX.—Exacted by state must be uniform in each city.

December 6, 1912.

COUNTY ATTORNEY W. H. PALMER,
Maquoketa, Iowa.

DEAR SIR: I am in receipt of your communication of the 5th inst. requesting an opinion as to the right of a city council to sell saloon licenses at different prices; and you also request an opinion as to whether or not a resolution by a city council which prescribes that a saloon shall use a certain kind of beer is valid and legal.

I am of the opinion that the council has no authority to exact different amounts from different persons unless they can show that this increased cost paid by one person is due to the fact that he receives a very favorable location in which to operate his saloon. I can see how a person in a different location might be required to pay more than some one else.

I believe it would be within the power of the council to exact a large sum for the license and to possibly charge more of a person enjoying a particular location in the town if that were specified, but other conditions being equal, undoubtedly each saloon keeper should pay the same amount for his license.

I think the city council might also provide that beer should be inspected, or that beer should not be sold which contained more than a certain per cent of alcohol, but I do not believe they have any authority to say that a particular brand of beer should be sold by any saloon keeper, as such proceeding would look very much as though they were getting a private rake-off from a brewery.

As to the right under any circumstances to charge one saloon keeper more than another, I do not wish to express any official opinion, but certainly they would not have this right unless, as before suggested, it could be shown that a larger price was exacted for the reason that the saloon in question was to be located in a more favorable place in the town.

Yours very truly,

GEORGE COSSON,
Attorney General.

MOVING PICTURE SHOWS—OPERATION OF ON SUNDAY.—Cities and towns have power to prohibit by ordinance the operation of such shows.

December 6, 1912.

REV. N. R. MILES,
Colfax, Iowa.

DEAR SIR: Yours of the 6th instant addressed to the attorney general has been referred to me for reply.

You ask the opinion of this department as to the legality of the proposed ordinance prohibiting the operation of moving picture shows on Sunday. In your letter you refer to the fact of having sent a copy of the proposed ordinance, but we fail to find any such enclosed. However, I will say that it is provided by code section 703, with reference to the powers of cities and towns as follows:

> "They shall have power to regulate, license or *prohibit* circuses, menageries, *theaters,* theatrical exhibitions, shows and exhibitions of all kinds; but lectures on science, history or literary subjects shall not come within the provisions of this section."

Hence, it follows that it would be within the power of your council to enact an ordinance prohibiting such shows on Sunday.

The state law with reference to Sunday violations is found in code section 5040, but the punishment prescribed is a fine of only $1.00 to $5.00, and it seems to have been insufficient to compel respect for the law. The legislature at the coming session might

be induced to increase the scope of this section and the punishment imposed.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

CITIES AND TOWNS—POOL AND BILLIARD HALLS.—Have power to regulate and prohibit.

December 6, 1912.

S. W. BRYANT, *Mayor*,
Centerville, Iowa.

DEAR SIR: Yours of the 4th instant addressed to the attorney general has been referred to me for reply.

The question which you propound is:

> "Can a city or town pass an ordinance imposing a fine upon minors for going into a billiard or pool hall, as well as fining the proprietor?"

I am enclosing copy of a letter written the mayor of Blue Grass on May 3d of this year, in which you will find quoted the two sections of the statute governing the matter. You will notice that the last section, 702, gives cities and towns power to *regulate*, license, tax or *prohibit* billiard saloons, billiard tables, pool tables, etc. While the question is not entirely free from doubt, it is my best judgment that under this power to regulate, a city or town might lawfully pass an ordinance preventing minors from attending such pool halls and to punish them by a fine for violation thereof. The surer way, however, would be to pass an ordinance prohibiting pool and billiard tables altogether.

If the keepers of the pool and billiard halls are unable to keep the minors out the city would have the right to revoke their license.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

COUNTY ATTORNEY.—Should be provided with office and supplies at expense of county.

December 9, 1912.

MR. FRED JENSEN,
Spencer, Iowa.

DEAR SIR: I am in receipt of your communication of the 5th instant requesting to be advised (1st) as to whether you are entitled to supplies pursuant to the provisions of section 468 of the code; (2d) as to whether or not the board of supervisors should furnish you an office at some place other than the court house in the event that the office at the court house is not suitable for a county attorney's office.

Undoubtedly you are entitled to all such supplies that you would use as county attorney the same as any other county officer. Of course this does not include supplies which would be used by you in your private practice.

You are also entitled to a suitable office. If the supervisors can furnish you a suitable office at the court house they are under no obligation to furnish you one elsewhere. If they cannot furnish an office suitable and proper at the court house, they should furnish you with an office elsewhere at Spencer, the county seat of your county.

I am enclosing you copy of an opinion given by former Attorney General Mullan which is in harmony with these views. I had also furnished an opinion to Mr. O. A. Hammond of your place, in which opinion I took the same views as herein expressed.

Your very truly,

GEORGE COSSON,
Attorney General.

SALOONS—CONSENT PETITIONS.—Clause therein agreeing not to withdraw not binding.

December 16, 1912.

FRANK L. MAY, *County Attorney,*
Lansing, Iowa.

DEAR SIR: Yours of the 14th instant addressed to the attorney general has been referred to me for reply.

You enclose copy of general statement of consent in which appears the following clause:

> "And we agree and pledge not to sign a withdrawal or take our names off, and we ask the board of supervisors to disregard any such withdrawal,"

and you inquire whether or not in the canvass of such petition the supervisors would be compelled, in the face of this clause, to accept and count the withdrawals, or is it in their discretion to allow or not to allow the withdrawals.

In my judgment this clause would not be irrevocably binding, and that a withdrawal might be filed and should be counted notwithstanding this clause if the withdrawal is filed within the proper time. I am inclined to think this provision would be void as against public policy as it would have a tendency to prevent a man from exercising his will and his best judgment in the matter and it might have a tendency on this account to invalidate the entire petition for the reason that the board of supervisors might not know how many signers of the petition would, if permitted freely to exercise their will, withdraw their names therefrom but for the fact that they had signed a statement of this kind. In other words, the tendency would be for a man to leave his name on this petition after he has once signed it on account of the fact of signing alone even though the clause is not binding and even though he would have a legal right to withdraw his name therefrom.

I have no doubt whatever with reference to the first point, namely, that a person signing such a petition would have the right to withdraw, but there is a doubt as to whether or not such a petition should be counted as sufficient.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

SPECIAL ASSESSMENTS.—Property is liable for even though exempt from other taxes.

December 18, 1912.

MR. JOHN LEE,
1036 Water Street,
Webster City, Iowa.

DEAR SIR: Yours of the 17th instant addressed to the attorney general has been referred to me for reply.

Your question briefly stated is whether or not your property is exempt from a special assessment for sewer tax in view of the fact that you are a soldier and the property is otherwise exempt from taxation.

The uniform holding of the courts is to the effect that property exempt from taxation is not exempt from special assessments on the ground that the value of the property is enhanced by the improvement payment for which the special assessment is made. Hence, your inquiry should be answered in the negative.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

HUNTERS—LICENSE.—Issued without payment of fee is valid.

December 18, 1912.

MR. F. A. SNYDER,
Ackley, Iowa.

DEAR SIR: Yours of recent date addressed to the attorney general has been referred to me for reply.

You call attention to the practice of county auditors signing and delivering to others to be issued to the applicant hunting licenses in advance of the payment of the fee therefor, and you inquire what position has been taken by this department as to the legality of such transactions.

In my judgment the provision requiring the payment of the fee before the license is issued is directory and that a license delivered by the auditor directly to the applicant or indirectly to the

applicant through the medium of an agent for the sake of convenience or otherwise, should be regarded as a lawful license and should protect the licensee even though the fee be not paid, and that the auditor should stand charged with the fee the same as though it had been collected by him.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

SCHOOLS.--High school defined.

December 19, 1912.

DELLA GRIFFIN OWENS, *County Superintendent,*
Bedford, Iowa.

DEAR MADAM: Yours of the 17th instant addressed to the attorney general has been referred to me for reply.

Your question briefly stated is what is the meaning of the term "any high school" as used in the third line of section 1 of chapter 146 of the acts of the thirty-fourth general assembly.

The term "high school" refers to a school where the higher branches of common school education are taught.

Whitlock vs. State, 38 Neb., 815;

Attorney General vs. Butler, 123 Mass., 304.

A high school is a school which is designed for scholars who have passed through the primary grades and are supposed to be able to read, write and spell correctly.

State vs. School District, 31 Neb., 552.

The term "any high school" as used in this section has been construed by this department to mean any school where instruction is given in the 9th, 10th, 11th or 12th grade work and that it need not be a school furnishing the work in all of such grades before it should be treated as a high school. Of course if a pupil attend one of such schools he could only take, at the expense of his home district, the work furnished in such school which was not furnished in his home district; for instance, if in his home district work was not furnished beyond the 8th grade he could take either 9th, 10th,

11th or 12th grade work in the other district at the expense of his home district, but if his own district furnished work up to and including the 11th grade he could only take at the expense of his home district the work of the 12th grade in the other district.

You also call attention to the fact that at Lenox, where some are attending the high school, the tuition rate is $4.00, whereas at Conway the same is from $1.75 to $2.00, and the question is, for what rate is the home district liable where the pupil attends another district.

The latter part of section 1, above referred to, provides that the average cost of tuition allowed shall not exceed the average cost of tuition in the nearest high school. Hence, it would follow that if the pupil attend a high school other than the one nearest his home district and took work in the 9th grade for instance, his home district would only be liable for the average cost of tuition in the school nearest his home district in which the 9th grade work was furnished.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

OLEOMARGARINE—USE OF BY STATE—INTRODUCTION OF COLORING MATTER PROHIBITED.

December 20, 1912.

HON. BOARD OF CONTROL,
State House.

GENTLEMEN: With reference to the question recently propounded by your Mr. Bannister as to whether or not it would be any violation of either state or federal statute governing the disposition of oleomargarine for the state to purchase uncolored oleomargarine and for the superintendents of the various state institutions to add thereto the necessary coloring matter to make the same of a yellow color in imitation of butter before the same is served to the inmates of the various institutions, I have to advise as follows:

By section 4163 of Pierce's United States code, it is provided:

> "That special taxes are imposed as follows: Manufacturers of oleomargarine shall pay six hundred dollars. Every person who manufactures oleomargarine for sale shall be deemed a

manufacturer of oleomargarine. And any person that sells, vends, or furnishes oleomargarine for the use and consumption of others, *except to his own family table* without compensation, *who shall add to or mix with* such oleomargarine *any artificial coloration* that causes it to look like butter of any shade of yellow shall also be held to be a manufacturer of oleomargarine within the meaning of said act, and subject to the provisions thereof."

I am inclined to think the practice suggested would be such as would render the person introducing the coloring matter a manufacturer and render him liable for this tax.

By our code section 2518 it is provided:

> "No one shall color with any matter whatever any substance intended as a substitute for butter or cheese, so as to cause it to resemble true dairy products, * * * * or combine with any substance whatever, intended as a substitute for butter or cheese anything of any kind or nature for the purpose or with the effect of imparting to the compound the color of yellow butter or cheese, the product of the milk or cream from cows, *or use,* solicit orders for delivery, keep for sale or sell any such substance so colored and disguised as a substitute for butter or cheese."

Our supreme court has held that this section, together with the two preceding sections, prohibits the sale of oleomargarine as a substitute for butter which is the color of butter made from pure milk or cream, even though it contains no ingredient *the sole function of which is coloration.*

State vs. Armour Packing Co., 124 Iowa, 323.

Hence, I am of the opinion that the practice suggested would be such a use of colored oleomargarine as would amount to a violation of this section of our code, and hence, not permissible without an amendment of this statute.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

SCHOOLS—ESTABLISHMENT OF KINDERGARTEN DEPARTMENT.—Authority of board to establish kindergarten department in connection with permanent school system of Davenport discussed.

December 21, 1912.

HON. A. M. DEYOE, *State Superintendent,*
State House.

DEAR SIR: I have yours of recent date requesting an opinion from this department upon the questions referred to in an opinion rendered by Messrs. Lane & Waterman of Davenport to W. R. Weir, president of the school district of that city, on the 14th instant concerning the matter of establishing a kindergarten department in connection with the common school system in the city of Davenport, and also the request of Mr. J. D. McCollister, secretary, in which he asks that you procure the opinion of this department upon that portion of Lane & Waterman's opinion marked "First."

It will be observed that we have no constitutional provision fixing the age limit of children who may be educated in the common schools. The provision fixing the age limit is as set forth in the opinion of Lane & Waterman, and is statutory rather than a constitutional enactment. It is true that the school funds are apportioned in accordance with the number of children of school age in the several districts, but this does not necessarily mean that children above or below the age thus fixed might not be authorized by law to receive the benefits of the schools.

The word "kindergarten" means literally, a garden of children. The word was devised by Friedrich W. Froebel, a German philanthropist and educator and was intended to apply to a system which he elaborated for the instruction of children of very tender years.

24 Cyc., page 803.

In Kindergarten Schools (Colo.) 19 L. R. A., page 469, it was held by the supreme court of Colorado that:

> "The power of the legislature to provide for a kindergarten department in the public school system for the education of children of an age less than six years is not prohibited by a constitutional provision for 'free public schools throughout the state wherein all residents of the state between the ages of six and twenty-one years may be educated gratuitously.'"

In the course of the opinion the supreme court further says:

> "We think, therefore, that under a fair rule of construction, section 3, article 9, can be held a requirement, and not a prohibition, and that such construction is in harmony with the progressive school policy of the state, and will enable the legislature to confer upon all classes of children the advantages of a system that has proven of incalculable benefit. We are of the opinion that the legislature has the power, under the constitution, to provide for the establishment and maintenance of a kindergarten department in the public school system for the education of children of an age less than six years."

To the same effect see *Sinnott vs. School Treasurer of San Jose*, 20 L. R. A., 594, in which it was held by the supreme court of California that:

> "The significance of the word 'kindergarten' is within judicial cognizance.
>
> "Kindergarten classes may be instructed in separate buildings and no studies except those of the kindergarten system taught in such classes, under Pol. Code, section 1666, providing that other studies may be authorized by the board of education but not to the neglect or exclusion of studies named in section 1665, as section 1665 only requires those branches of study 'in the several grades in which each may be required.'"

and also:

> "A fund for the support of primary and grammar schools may be lawfully used to pay salaries of teachers in a kindergarten which has been duly adopted as part of the public primary schools, although when the money was raised by tax the kindergarten had no existence in those schools."

In view of these authorities, rather than on account of any reasons stated in the opinion of Messrs. Lane & Waterman, I am inclined to concur in the conclusion reached by them with reference to the question marked "First" by them in their said opinion, which opinion is herewith returned.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

BOARD OF SUPERVISORS—COMPENSATION OF MEMBERS.—Members not entitled to compensation while attending convention of supervisors.

December 21, 1912.

C. S. MOORE, *County Attorney Elect,*
Rockford, Iowa.

DEAR SIR: Yours of the 19th instant addressed to the attorney general has been referred to me for reply.

Your question is whether the board of supervisors has a right to mileage or per diem alone for attending state conventions of the board of supervisors.

The attendance of such conventions is no part of the official duty of the members of the board of supervisors and in my judgment they are only entitled to the compensation fixed by code section 469, as amended by section 4 of chapter 24 of the acts of the thirty-fourth general assembly which is $4.00 per day for each day actually in session, and $4.00 per day when not in session but employed on committee service. Hence, they are entitled to no per diem or mileage for attending such conventions.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

SCHOOLS—FORMATION OF NEW DISTRICT—POWER OR AUTHORITY OF BOARD OF DIRECTORS DISCUSSED.

December 24, 1912.

A. M. DEYOE, *Superintendent Public Instruction,*
State House.

DEAR SIR: Yours of the 21st instant addressed to the attorney general has been referred to me for reply.

Your question is:

> "May school boards of two rural independent districts by concurrent action set off contiguous territory for the purpose of forming a new rural independent district under the provisions of section 2798 of the code without a vote of the electors?"

The provision for the subdivision of independent school districts is first found in chapter 133 of the acts of the seventeenth general assembly, section 2 of which provides:

> "At the written request of one-third of the legal voters residing in any independent school district, the board of directors of said independent district shall call a meeting of the qualified electors of said independent district, at the usual place of holding their meeting, by giving at least ten days' notice thereof by posting three notices in the independent district sought to be divided, and by publication in a newspaper, if one be published in the independent district, at which meeting the electors shall vote by ballot for or against such subdivision."

and section 3 of which provides:

> "Should a majority of the votes be cast in favor of such subdivision, the board or boards of directors shall call a meeting in each independent district so subdivided or formed as aforesaid, for the purpose of electing by ballot three directors, who shall hold their office one, two and three years respectively, the length of their respective terms to be determined by lot; and but one director shall be chosen annually thereafter, who shall hold his office for three years."

By chapter 131 of the acts of the eighteenth general assembly, section 1 of chapter 133 of the acts of the seventeenth general assembly was repealed and the following enacted as a substitute therefor:

> "That any independent school district, organized under any of the laws of this state, may subdivide, for the purpose of forming two or more independent school districts, or have territory detached to be annexed with other territory in the formation of independent district or districts, and it *shall be the duty of the board of directors of said independent district to establish the boundaries of the districts so formed,* the districts so formed not to contain less than four government sections of land each. This limitation shall not apply when, by reason of a river, or other obstacle, a considerable number of pupils will be accommodated by the formation of a district containing less than four sections, or where there is a city, town, or village within said territory, of not less than one hundred inhabitants, and in such cases the independent districts

so formed shall not contain less than two government sections of land, such subdivision to be affected (effected) in the manner provided for in sections 2, 3, and 4 of this chapter: Provided, *That where either of the districts so proposed to be formed contains less than four government sections, it shall require a majority of the votes of each of the proposed districts to authorize such subdivision.*"

Construing these two chapters together it will be observed that there are two provisions for an election; first, for an election of the electors of the district sought to be divided, and, second, for an election in one of the proposed districts where such proposed districts contain less than four government sections, and notwithstanding the fact that it is made the duty of the board of directors of said independent district to establish the boundaries of the districts so formed, yet the election provided for in section 3 of chapter 133 of the acts of the seventeenth general assembly was required in all cases. and the election provided for in the last clause of section 1 of chapter 131 of the eighteenth general assembly was required where less than four government sections were sought to be incorporated into the independent school district.

In other words, if the proposition were to divide one district consisting of eight sections into two districts of four sections each, then the only election required under the law as it existed prior to code of 1897 would be the one election held in the original district upon the proposition to subdivide. Whereas if the proposition were to divide a district previously consisting of six sections into two districts of three sections each, then the election heretofore described on the proposition to subdivide must be held and in addition to that there must also be an election and a majority vote in favor of the proposition in each of the new proposed districts before the subdivision could take place.

Coming down to the present law as found in code section 2798, we still find provision for the last election above referred to, that is, an election in the proposed new districts where the proposition is to include less than two government sections of land where a village is included, or where on account of natural obstacles, the four sections of land are not available for each new district, but the provision for the election in the original district upon the proposition to subdivide is entirely eliminated from this section; unless it was intended to reinstate that provision by the use of the following language:

"And the proceedings for such subdivision shall in all respects be like those provided in the section relating to the organization of cities and towns into independent districts, and *so far as applicable.*"

This provision doubtless has reference to the proceedings referred to in code section 2794. In view of the fact that other and inconsistent provisions are clearly made in section 2798 for a part of the proceedings, and in view of the fact that the latter part of this section, last above quoted, is not clearly applicable to all subdivisions and might be construed simply to apply to elections where the new district contained less than two government sections of land, the meaning of this section is rendered so uncertain as that any conclusion arrived at would be extremely doubtful, except that it is clear that where the new district contains less than two government sections of land the same should not be organized except upon a majority vote of the electors of each of the proposed districts. There seems to be no other provision in the law whereby a district is established except by a vote of the people. On the other hand, there would seem to be no very strong reason why the expense of an election should be required where the proposition is to divide into districts containing four sections or more.

One thing is certain that these sections are so uncertain in their meaning that they should be re-written and the intended meaning more clearly expressed, and until this is done a board or officer whose duty it is to construe these sections might well be justified in construing the same either way as in his own judgment he might think proper.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

TERMS OF OFFICE.—To begin second secular day of January next after the election.

December 24, 1912.

MR. WM. STRAMPE,
Supervisor Elect,
Paullina, Iowa.

DEAR SIR: I am in receipt of your communication of the 23d instant advising that you are the supervisor elect in your county,

and requesting an opinion as to when you assume the duties of your office.

Section 1060 of the supplement to the code, 1907, as amended by chapter 68 acts of the thirty-third general assembly, provides:

> "The term of office of all officers chosen at a general election for a full term shall commence on the second secular day of January next thereafter, except when otherwise provided by the constitution or by statute;" etc.

It is my opinion that you should assume the duties of your office on the second secular day in January, which is Thursday, January 2d.

Yours very truly,

GEORGE COSSON,
Attorney General.

MONOPOLIES—CITY OR TOWN ORDINANCE CONFERRING—ILLEGAL.

December 26, 1912.

MR. S. R. LUCAS,
Anthon, Iowa.

DEAR SIR: Yours of the 23d instant addressed to the attorney general has been referred to me for reply.

You enclose a copy of your present ordinance No. 18 regulating pool and billiard halls and bowling alleys, also copy of a proposed ordinance in which is contained a provision that a license shall be granted for not more than one such pool or billiard hall and bowling alley, and your inquiry is as to whether or not this provision would be legal.

In my judgment your inquiry should be answered in the negative. The law does not favor the creation of a monopoly in any line of business. If this business is to be regarded as lawful it should be open to all on the same terms.

Your second question is, can we pass an ordinance to compel restaurants to close at certain hours or to prevent the allowance of rough and loud language used in such places.

I know of no statute which would confer the power upon a city to enact an ordinance that would compel a restaurant to close within

certain hours of the day or night. However, they clearly have the right to enact an ordinance against rough, loud language as it would tend to create a breach of the peace and would in and of itself be a disturbance of the public quiet.

Your copy of the proposed ordinance is herewith returned.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

DEER—KILLING OF BY GAME WARDEN.—Authority of game warden to kill or distrain vicious deer discussed.

December 27, 1912.

MR. GEO. A. LINCOLN,
State Fish and Game Warden,
Cedar Rapids, Iowa.

DEAR SIR: Yours of the 21st instant, together with an enclosed letter from your deputy at Avoca, has been referred to me for reply.

You call attention to the fact that Walter Delahoide, a person called by Deputy Habicht to assist him, has been convicted in justice court of killing a deer in violation of the game laws of the state; and the questions which you propound, briefly stated, are as follows:

First, whether you or your deputy, or persons called by them to assist, would have authority under section 3 of chapter 118 of the laws of the thirty-fourth general assembly to kill vicious deer that are running at large; and

Second, whether or not the same parties would have a right to kill a wounded deer found running at large; and

Third, whether or not when it is necessary to distrain deer which are running at large, the person authorized to do so may kill them if they are otherwise unable to distrain them.

Code supplement section 2551-a provides:

> "That it shall be unlawful for any person other than the owner or persons authorized by the owner to kill, maim, trap

or in any way injure or capture any deer, elk or goat *except when distrained as provided by law.*"

Section 3 of chapter 118 of the acts of the thirty-fourth general assembly, to which you refer, provides:

> "When it shall become necessary to distrain any deer now running at large within this state it shall be done under the authority and direction of the state fish and game warden, who shall distribute such deer so captured to persons within this state, and the expense of said capture and distribution shall be paid by the person receiving such deer."

It will be observed that this section leaves for the determination of the state fish and game warden the question when it shall become necessary to distrain, and if it were shown that a buck deer running at large were vicious that fact of itself might well be regarded as rendering such deer one necessary to be distrained. And if the said deer could not otherwise be distrained, in my judgment, the state fish and game warden or his deputies or any person called to their assistance would under their direction have authority to kill such deer. I am also of the opinion that the same persons would have authority to kill a wounded deer running at large as this would be an act of mercy much the same as is performed by the humane society in the case of injured animals. However, I am of the opinion that neither you nor your deputies or assistants would have the right to kill deer in order to distrain them unless such deer were vicious or wounded as hereinbefore mentioned.

I herewith return the letter from Mr. Habicht.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

STATE EMPLOYES—SALARY—EXPENSE ACCOUNTS.—Expense account of state employes must be itemized and sworn to but not necessary to swear to salary accounts.

December 28, 1912.

MR. W. B. BARNEY,
State Dairy and Food Commissioner,
State House.

DEAR SIR: Yours of this date addressed to the attorney general has been referred to me for reply.

Your question is:

> "Should the accounts required to be itemized and sworn to be construed to include the salaries of the employes together with expense accounts, or simply expense accounts and not the salaries."

The portion of the section to which reference is made, code supplement section 4999-a15, bearing upon the question reads as follows:

> "They shall be paid a salary of not to exceed sixteen hundred dollars ($1,600) per annum, said salary to be paid in the manner as the salaries of the other state officers and they shall be allowed the expenses necessarily incurred by them in the discharge of their duties.
>
> "Their accounts shall be itemized and sworn to, and when approved by the commissioner and the executive council, shall be paid by warrant of the auditor upon the treasurer out of a sum hereinafter appropriated for carrying out the provisions of this act."

In my judgment the words "their accounts" as found in that portion of the section quoted has reference to the account for expenses necessarily incurred by them in the discharge of their duty, and has no reference to the salaries due the various employes. It will be observed that there is a separate provision for the payment of salaries in the same manner as salaries of other state officers and the claims for such salaries are not required to be itemized or sworn to.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

INDEX

(Figures refer to pages)