State of Iowa

1918

TWELFTH BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1918

H. M. HAVNER
Attorney General

Published By
THE STATE OF IOWA
Des Moines

ATTORNEY GENERAL'S DEPARTMENT

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ATTORNEYS GENERAL 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	1911-1917
H. M. Havner	1917-

LETTER OF TRANSMITTAL.

HON. W. L. HARDING, Governor of Iowa:

Dear Sir: I have the honor to submit herewith, in accordance with law, my report of the transactions of the Department of Justice for the state of Iowa for the biennial period ending December 31, 1918.

H. M. HAVNER, *Attorney General.*

Des Moines, Iowa, December 31, 1918.

REPORT OF THE ATTORNEY GENERAL

The work of the attorney general's office has greatly increased by reason of the increased burdens and duties which have been placed upon it by statute.

In my judgment the enactment of the laws with reference to the attorney general's office and its work has been more than justified, as shown by the results and, by the making of a few amendments, can be strengthened so that the Department of Justice of the state of Iowa can be built up and the same efficient work secured with reference to the enforcement of law as is secured by the federal government through its Department of Justice.

COUNTY ATTORNEYS.

Under the Iowa statute county attorneys become a part of the Department of Justice of this state, and we have tried to conduct the office of attorney general with the idea of building up such a department and making the office of county attorney a part of the department in more than name only.

It is my belief that the development of this idea will produce greater efficiency in the enforcement of the law. The county attorneys have given good response to this idea and we believe there is in the state today a good spirit of co-operation between the office of county attorney and that of attorney general.

IMPORTANT CASES.

In the case of *State ex rel Johnson v. Raph,* the question as to the right of the state to hold automobiles which were being used in connection with the unlawful transportation and sale of intoxicating liquors pending the disposal of an injunction suit was in issue. The supreme court of Iowa held that where the district court made an order directing the sheriff of the county where the cars had been seized, "retain possession of such automobile in his custody to the end that the same may be dealt with as provided by law," that such order might be made without the state giving bond and without any notice to the defendant.

The decision in this case has done much to assist in the stopping

of the unlawful transportation of intoxicating liquors in automobiles into the state, and has given to the state an effective weapon in the fight against such unlawful transportation.

State ex rel Johnson v. Raph, 168 N. W., 259.

The case of *Hoyt v. Keegan* is a very important case so far as the collateral inheritance tax law of the state is concerned.

It has been a much mooted question whether deposits in the banks of this state belonging to non-residents at the time of the death of such non-resident were liable to the imposition of the inheritance tax.

In this case the question as to whether a resident of the state of Illinois whose only heirs were collateral, and who, at the time of his death had money on deposit in Iowa banks was decided, and it was held that the state had the right to collect its usual inheritance tax upon such money. The court in passing on the matter said that "under the clear weight of authority the savings bank deposit was subject to the collateral inheritance tax under our statute."

The decision in this case will save to the state thousands of dollars that it has heretofore lost. From a monetary standpoint to the state this is one of the important cases that has been decided by the supreme court during the last two years.

Hoyt. v. Keegan, 167 N. W., 521.

The case of *Peterson, et al, Legatees of Anderson, v. State of Iowa, ex rel, State Treasurer,* is an important case to the state in connection with the construction of the collateral inheritance tax laws. It is important because it involves the construction of the treaty between Denmark and the United States and the right to tax any property passing from a resident and citizen of this state to a resident and citizen of Denmark.

The decision of the United States Supreme Court gave the state of Iowa the right to impose a tax upon the right of succession in all such estates of ten and twenty per cent of the estate.

Peterson, et al, Legatees of Anderson, v. State of Iowa, ex rel, State Treasurer, 245 U. S., 170.

The case of *Duus, Administrator of Peterson, v. Brown, Treasurer of the State of Iowa,* decided by the Supreme Court of the United States, involved the treaty between the United States and Sweden and gives the state of Iowa the right to impose a tax of ten and twenty per cent upon the right of succession to an estate from a citizen of this state to a resident of Sweden.

This case is important by reason of the great amount of property which is being inherited from time to time from naturalized citizens of this state by citizens of Sweden.

Duus, Administrator of Peterson, v. Brown, Treasurer of the State of Iowa, 245 U. S., 176.

Daniel B. Luten v. J. B. Marsh is also an important case decided favorably to the state within the last two years.

This case was tried in the district court of the United States for the southern district of Iowa at Des Moines. Mr. Wallace R. Lane of Chicago had some years previous been employed as special counsel for the state in this case. The case was prepared for trial under his special direction, and this department is indebted to Mr. Lane for the very efficient manner in which he prepared and presented the case.

The case involves the question of the validity of certain patents which Luten claimed were being infringed by the state of Iowa and contractors representing it in the building of bridges. If his claim had been upheld, it would have cost the state of Iowa hundreds of thousands of dollars.

The court dismissed the entire petition and all of the patents mentioned in the petition were held invalid.

Luten has appealed the case to the Circuit Court of Appeals, but in a recent decision in another case the Circuit Court of Appeals has held other similar claims of Luten invalid, and we feel there is no question but what the opinion of the district court for the southern district of Iowa will be affirmed.

State of Iowa v. Lynn George J. Kelly.

I feel that I should make some report in connection with the above entitled case on account of the vast amount of work which it entailed by this department.

On the night of June 9, 1912, Joe Moore and his wife, their four children, and two daughters of Joe Stillinger were all murdered in the home of Joe Moore in the town of Villisca, Iowa. Up until the time I assumed the duties of the office of attorney general in January, 1917, no person had ever been indicted for this crime. At the time I entered upon the duties of my office, complaint was made to me of the serious condition that existed in Montgomery county by reason of the agitation in connection with this murder. After investigating the situation I became convinced that unless something was done to clear up the situation, that riots and possibly bloodshed

would occur in that community, for it had assumed the proportions of a Kentucky feud.

I conferred with Governor Harding with reference to the situation and told him I believed we should appoint a man to take active charge of the grand jury of Montgomery county at the January, 1917, term and make a thorough investigation of all the facts in connection with this murder.

Hon. F. F. Faville, former United States attorney for the northern district of Iowa, was agreed upon between the governor and myself as the proper person for this work. Mr. Faville was duly appointed by this department and by the district court of Montgomery county to take active charge of the grand jury in the investigation of this murder and commenced his work immediately.

Prior to the commencement of this investigation one J. N. Wilkerson, an employe of the Wm. J. Burns Detective Agency, had been employed by the state of Iowa under the authority of my predecessor in office, Montgomery county and certain private parties for a period of about two and one-half years. He submitted to this office a brief of what he claimed to be the substance of the evidence of certain witnesses he had examined, and gave a brief of the facts to which each of said witnesses would testify. Based upon this brief of evidence, there were called before the grand jury of Montgomery county 160 witnesses whose residences were from the state of Montana on the west to the state of New York on the east. The case was given a most thorough and painstaking investigation. In addition to the witnesses submitted by Wilkerson every person who was known or was thought to have any knowledge with reference to the claimed theory of the case as submitted by Wilkerson was called in before the grand jury and examined, and every effort within the power of this department and its special prosecutor, Mr. Faville, was put forth to ascertain the truth.

At the conclusion of the examination of the 160 witnesses, which examination included every witness submitted by Wilkerson save one, whose residence was in Kansas (the testimony which it was claimed this witness would give being before the grand jury), the grand jury for the February, 1917, term of the district court of Montgomery county made and filed a report as follows:

REPORT OF GRAND JURY.

"We, the grand jury of the county of Montgomery, having had under consideration the matter of the investigation of the murder of Joe Moore, his family, and two Stillinger girls, at Villisca, Iowa, on the 9th day of

June, 1912, would respectfully report to the court, as to our doings in said matter, the following:

"As a grand jury we commenced the investigation on the 5th day of March, 1917, and have prosecuted said investigation practically continuously since said date and have given to said investigation the most careful, painstaking, thorough and conscientious consideration of which we were capable.

"Realizing the heinousness of the crime that was committed and the importance of a proper solution of it, if possible, to the community and to the state, we have spared no effort and no expense to ascertain the truth and to, if possible, bring to justice the person or persons guilty of the offense. For more than two and a half years one J. N. Wilkerson, an operative of the Burns Detective Agency, has devoted at least one-half of his time in an attempt to solve the mystery connected with this crime and to secure the evidence necessary to punish the person or persons guilty of the offense.

"Prior to the commencement of this investigation before this grand jury, Mr. Wilkerson was requested to furnish to the attorney general and to the county attorney, for their use and the use of this grand jury, a list of all of the witnesses whose names he had secured in connection with all of his investigation, together with a written statement of what Mr. Wilkerson said was a true statement of the facts to which such persons would testify to. Every material witness named in said list has been produced before this grand jury for examination and in order to accomplish this it has been necessary to call witnesses from many different states at a great distance and at a great expense, and every one of said witnesses, after having been duly sworn, was subjected to a thorough, searching, careful examination, not only by the attorneys representing the state but by the members of the grand jury themselves, so that no facts or circumstance known by such witnesses would fail to be disclosed. In fact, in view of the peculiarities of this case and the circumstances surrounding it, the grand jury extended its inquiry in great latitude and to a great extent in the hope that even by hearsay testimony (although incompetent in court) some clue might be discovered through which they could secure substantial evidence of the guilt of some person or persons.

"Notwithstanding the careful and painstaking manner in which the investigation has been pursued, many of the material witnesses mentioned by Mr. Wilkerson, when found and summoned before the grand jury, either wholly failed to testify as stated in said statement regarding said witnesses, or disclaimed or denied the statements attributed to them. But this is not true of all witnesses.

"It is a well-known fact that since the commission of this crime, there have been reported rumors of various kinds purporting to be clues as to the identity of the person or persons who committed this offense. We have not discredited these rumors without giving each and every one of them a thorough, full and complete investigation in the hope that we might thereby secure some tangible evidence of guilt on the part of some party. Every available clue that we have discovered or have been ad-

visd of either by Mr. Wilkerson or any other person, or that has come to our knowledge from any source, has been thoroughly pursued and investigated. We have spent 24 days in this investigation and have brought before us and examined under oath 160 witnesses. No feature of the case that has come to our attention from any source whatever has been overlooked, disregarded or slighted in the simplest degree. At all times in connection with said investigation we have tried to keep in mind the importance of finally ascertaining the truth, but up until this time we have been unable to discover any sufficient credible testimony upon which we would be warranted in returning an indictment against any person or persons, or which, in our judgment, would warrant any jury under the law in returning a verdict of guilty against any person or persons.

"We would be pleased if we could return with this report and file in court a complete transcript of all of the testimony as actually given by the various witnesses before us under oath, but this under the law we are not permitted to do.

"We have gone over every item of this evidence with conscientious care and have solicited, received and acted upon the legal advice of the representatives of the state, the attorney general, the assistant to the attorney general and the county attorney.

"Every word of the testimony of each and every witness has been taken down in shorthand by the clerk of the grand jury and a minute of the testimony of the several witnesses has been translated into longhand and subscribed by the various witnesses. In view of the great importance of this case and the fact that it has not yet been solved, and the possibility that in the future this evidence or portions of it may be of great value in the further investigation of this case, we recommend to the court that all of the evidence so taken before this grand jury in shorthand be transcribed and extended into typewriting and certified by the clerk taking the same; and that the minutes of the testimony signed by the several witnesses now be returned with this report of the grand jury and sealed up and placed under lock and key in the custody of the clerk of this court, and that when said shorthand notes and the transcript thereof, together with the exhibits, are so returned, certified and sealed, they shall be placed in the custody of the clerk of this court under lock and key subject to the further order of the court in the future.

Respectfully submitted,

Scott Smith. Zeph Morgan.
O. R. Honnett. Ernest Whiley.
H. H. Farlin. Evan J. Evans.
A. P. Pearson, Foreman.

During the investigation in connection with these witnesses, it was ascertained that one Lynn George J. Kelly was probably the person implicated in this crime, and after a careful investigation of the facts and his connection with the tragedy, an indictment was returned by the grand jury charging him with the crime of murder in the first degree.

In all there were before the grand jury approximately 200 witnesses and approximately thirty days were spent in the investigation of this murder before the grand jury.

Immediately upon the indictment of Kelly there was organized in Montgomery county what was known as the Iowa Protective Association, organized primarily for the purpose of defeating the prosecution of Kelly. J. N. Wilkerson, who had been employed on behalf of the state as above stated, became the spokesman of this so-called protective association and about 35 public meetings were held in Montgomery and adjoining counties, attempting to stir up sentiment against the prosecution of Kelly and making charges against all officers connected with his prosecution. These series of meetings and this agitation were kept up in Montgomery county until it was impossible to secure a fair and impartial jury.

The defendant, Kelly, was taken to the town of Logan and kept there during the summer of 1917, and just prior to the date fixed for his trial in October, 1917, he confessed to having committed the murder, which confession was given in the presence of the county attorney of Harrison county, the clerk of the court and the sheriff. It was dictated by Kelly and is in his own words. It was taken down by the county attorney. The confession is as follows:

CONFESSION.

State of Iowa,
Harrison county, ss:

I, Lynn George J. Kelly, being first duly sworn on oath depose and say that I make the following affidavit and confession, without any promises or threats having been made to me of any kind whatever and that this is a voluntary statement:

That I came to Villisca, Iowa, the night before the murder of the Moore family.

Lou Enerson met me at the depot and I went to his home for supper, I was taken out from there to Henery Enersons, by Lou Enerson, where I stayed over night and I returned to Villisca at six thirty o'clock Sunday evening, coming directly to Reverend Ewing's home where I took supper and afterwards went with him to church.

After church I returned home with Rev. Ewing and his wife and stayed up and visited with him until eleven or eleven thirty o'clock, when he showed me to my room, and asked me if I would mind sleeping alone as they were going to sleep in the tent. I said no, as I was intending to go to sleep at once. I undressed and went to bed but was restless being over tired. I heard a noise outside like a windmill and opened the door of the balcony, stood out side on the balcony to see what the

noise was, but found nothing, then I came back and shut the door and tried to sleep but could not. My head was hot. I began to feel sick and wanted to get a walk, so I dressed and went outside. I went down stairs to the front door and left the house by the front door. I walked across to the Presbyterian church. I did not intend to go any further but my mind was working on a sermon on a text called Quotation "Slay Utterly." As I had been hearing and reading sermons on that text, and a voice said "go on" and I went on because I was in the grip of something that I did not understand, I felt God wanted me to slay utterly and I did not know where I was going or where I was. I got down near the end of the street and saw a shadow on the side of the house going from the back to the front and God told me to follow that shadow. I walked on a little bit further still thinking about my sermon and wanted to know where that shadow began. I went hunting the shadow, the back of the house. I did not know who lived there, but I kept on hearing that voice "slay utterly." I said "Yes, Lord, I will," was walking around in the darkness around the house trying to find that shadow and accidently saw an ax. I picked it up and went to where the shadow went, for God wanted me to follow that shadow. I went around toward the front door. A voice says "Go in, do as I tell you; slay utterly." I saw no light but I had to do as God told me and I dare not turn back because somebody was urging me on. I did not know who, I did not know where I was. I went right ahead because I heard that voice and as soon as I got in the house some one whispered "Come up higher" out of the Bible and I went up a flight of stairs because I thought I was going up Jacob's Ladder. I walked through the middle room into the further room. I don't know what I went there for only I was driven by an impulse and a voice. I saw some children lying there. The Bible says, "Suffer little children to come unto me" and I said "They are coming Lord." Before I knew what I was doing I started sending those children somewhere, I did not know, and I had to do as God told me and slay utterly. And so to obey God, I used the ax, and did not realize where I was hitting them, only I was trying to do what God wanted me to do. After killing the children, I went into the room where the parents were, and I don't remember which one of them I struck first, as my head was all wrong and I kept on hearing voices, I slayed utterly, by using the ax, lead by this impulse that I did not seem able to control.

I then went downstairs, and wanted to lay down and rest and saw a room, and went in not knowing who was there, but found two children in bed, and God said "More work yet." Before I knew what I was doing, I had continued my sacrifices, by killing these two children, with the ax, as I had to offer blood sacrifices.

To the best of my memory, I left the ax in the house and returned to the Ewing home, and went back to bed and I got up in the morning and caught the 5:19 train for Macedonia arriving home about 7:30.

Signed: Lynn George J. Kelly.

Subscribed and sworn to before me this 31st day of August 1917.

SEAL. Signed: Lynn J. Irwin, Clerk.

Immediately following this confession, the attorney general, H. M. Havner, was indicted in Montgomery county for alleged oppression in office of the witness, Alice Willard, in connection with the investigation before the grand jury in the Moore murder case. The indictment was not returned against the attorney general until the morning of the day set for the commencement of the trial of the case of *State v. Kelly,* which trial was proceeded with, resulting in a hung jury, the trial lasting about four weeks.

The state was represented in this trial by H. M. Havner, attorney general; Oscar Wenstrand, county attorney of Montgomery county; F. F. Faville of Storm Lake, and J. J. Hess of Council Bluffs.

At the close of this trial, a change of venue was granted in the case of *State v. H. M. Havner,* and the court transferred the case to Harrison county, Iowa. A trial was had in the case at Logan on the 5th day of November, 1917. The state was represented by Clyde Genung and Oscar Wenstrand, county attorney of Montgomery county. The defense was represented by Hon. Lewis Miles of Corydon, Robert Healy of Fort Dodge and J. M. Parsons of Des Moines.

At the close of the testimony for the state and the defense, *the court directed a verdict in favor of the defendant.*

Immediately following the disposition of this case the case of *State v. Kelly* was tried for the second time in Montgomery county, which trial lasted a little over two weeks and resulted in an acquittal of the defendant.

While there still exists bitter animosity in Montgomery county with reference to this murder case, the investigation which was had before the grand jury and the trial of these cases has cleared the atmosphere and fully justified the action that was taken by the department in connection with the prosecution. The investigation satisfied every man connected with the prosecution of the guilt of Kelly of the crime charged in the indictment, and it has satisfied the great body of fair-minded men who know the facts, and there is no question that the evidence which was secured and which was presented to the grand jury and to the court establishes the fact that the man responsible for the murder of the eight people is Lynn George J. Kelly.

REMOVAL OF PUBLIC OFFICIALS.

During this biennial period thirteen public officials have been removed or have resigned from office at the instance of the Depart-

ment of Justice because of a failure to perform the duties of their various offices.

There are two cases which we believe are worthy of special mention with reference to removals. One is that in connection with the supervisors and the county treasurer of Dubuque county, and the other the removal of the commissioner of public safety at Sioux City.

In Dubuque county the state instituted suit to remove the board of supervisors because of their profligate and unlawful expenditure of money and of their management of the business of the county. The removal suit with reference to the treasurer of Dubuque county was bottomed upon his failure to collect the taxes due Dubuque county and the state, and his failure to collect the proper penalties.

The following comparative record will show that the result of this suit with reference to the treasurer has been constructive and very beneficial so far as the collection of taxes is concerned:

Year advertised.	Amount.
1915	$ 6,730.43
1916	24,918.21
1917	14,594.04
1918	121,484.63

This includes such specials as were advertised each year as well as the regular taxes.

THE STATE CHECKERS FROM THE AUDITOR'S DEPARTMENT.

We desire to acknowledge the great assistance rendered to this department in connection with the cases at Dubuque by the checkers from the auditor's department, and we mention especially in connection with this matter Mr. Joe Wall, chief clerk of the county accounting department, and Mr. H. B. Rosenkrans, assistant county examiner.

Almost a year's hard work was given by the checkers and the special agents working out of this department in order to prepare for the cases. Three members of the board of supervisors resigned when the case was reached for trial. The county treasurer has already paid into the treasury of Dubuque county over three thousand dollars, and it is merely a matter of adjustment with the bonding company with reference to the balance of the amount, which will be about fifty-six hundred dollars, making a total of eighty-six hundred dollars. In addition to this amount, many thousands of dollars have been collected which would have been lost to the state

and Dubuque county but for the activity in connection with these prosecutions.

THE SIOUX CITY REMOVAL CASE.

As a result of the work at Sioux City, this department, assisted by County Attorney O. T. Naglestad, filed a petition asking for the removal of the commissioner of public safety, W. R. Hamilton.

After trial to the court, judgment was entered for removal. Immediately following the removal of Commissioner Hamilton, and as a result of the work of the special agents of the state, there were returned by the grand jury of Woodbury county 163 indictments. There have been assessed fines and costs amounting to $27,300.00. There have been seven years of sentences imposed. Eighty of these cases have been disposed of. There are still pending eighty-three indictments. There have been granted twenty-nine restraining orders with reference to red light and liquor injunctions.

A detailed report is herein set forth with reference to Woodbury county. The work in connection with this matter was commenced the 1st of July, 1918, and has been prosecuted from that time on as rapidly as possible.

We desire to acknowledge the very efficient help given to the department in connection with the removal suit by County Attorney O. T. Naglestad and his assistants, as well as the very efficient work which they have done with reference to the returning of the indictments and to the prosecutions in connection with the same.

WOODBURY COUNTY RECORD.

CONVICTIONS.

Nature of Offense	Amount Assessed	No. Convictions
Maintaining liquor nuisance fines	$21,750.00	58
Illegal sale of liquor fines	400.00	5
Keeping gambling house fines	150.00	2
Lewdness fines	200.00	1
Contempt fines	1,700.00	7
Carrying concealed weapon—jail sentence		1
Lewdness—jail sentence		1
Lewdness—reformatory		4
Keeping house of ill fame—reformatory		1
Attorney fees taxed as costs and part of judgment in favor of county attorney of Woodbury county	3,100.00	
	$27,300.00	80

INDICTMENTS RETURNED—CASES PENDING.

Maintaining liquor nuisance	38
Soliciting for prostitution	11
Prostitution	22
Adultery	1
Gambling	11
Total pending	83

INJUNCTIONS GRANTED.

Liquor injunctions	27
Red light injunctions	2
Total	29

The wisdom of the enactment of this removal law has been more than justified. It has given to the state of Iowa a higher degree of efficiency in its officials than would have been possible to have obtained in any other way. The people of Iowa have come to regard a public office as a public trust, and the removal law enables the law enforcing department to enforce the law if the public officials fail to have that conception of a public office in the performance of their duties.

LAW ENFORCEMENT BY THE GOVERNOR AND THE ATTORNEY GENERAL.

The wisdom of this character of law enforcement is demonstrated by the fact that greater demands are made upon the office of attorney general for special men than it is possible to meet. This department has been compelled to ignore hundreds of requests for special agents from officers and citizens throughout the state with reference to sending help to enforce the law because of our inability to supply the men from the limited number at our disposal.

AMOUNT ALLOWED NOT SUFFICIENT.

The total amount allowed for law enforcement is $25,000 per annum, and this covers all kinds and character of crimes from murder down.

In some of the states of the Union as much as $100,000 has been appropriated for a single year's work in the enforcement of the liquor laws alone, and in some of the states there is an unlimited amount in the way of expenses for the enforcement of law.

We suggested to the legislature two years ago when the amount

was fixed in chapter 231, $25,000 was sufficient with which to make a trial.

The detailed report hereinafter submitted justifies the enactment of the statute and justifies the additional amount for which we are asking in this report.

The amount of fines and penalties assessed has been over $140,000 and this does not take into account the fact that we have done thousands of dollars' worth of work in the way of investigation of crimes where no credit has been claimed by the department.

In order to comply with some of the demands made upon us, we have had to use not only the $25,000 annually, but have had to draw largely upon the contingent fund allowed the department.

The reason for the increase which we are asking is on account of the increased demands for assistance in the various counties in this state, and it is impossible to take care of more than twenty-five per cent of the demands being made upon this department by the law-enforcing officers of the state.

We are asking that chapter 231, acts of the 37th General Assembly, be amended so as to allow the expenditure of not to exceed $75,000 annually. This does not mean that it shall be expended unless it is necessary, but it does mean that the state shall not be hampered for the want of funds in the enforcement of the law.

WORK OF THE SPECIAL AGENTS.

The work of the special agents' department of the state has been systematized.

We herewith submit a detailed statement of the work accomplished by the special agents in the state of Iowa during the last two years, which we think speaks for itself.

This report, covering the period from January 2, 1917, to December 31, 1918, is as follows:

CRIMES RELATING TO INTOXICATING LIQUOR.

Nature of Violation	Penalty Assessed	No. Convictions
Giving liquor to minors—fines	$ 275.00	3
Mulct tax collected	8,550.00	
Mulct tax assessed but not paid	24,150.00	
Maintaining liquor nuisances, etc. (fines, including attorney fees)	108,669.65	109

Nature of Violation	Penalty Assessed	No. Convictions
Bootlegging—fines	$ 11,914.00	100
Contempt—fines	4,800.00	20
Contempt—jail sentences		17
Injunction granted		210
Liquor nuisances abated		29
Druggist permits surrendered and revoked		91
Injunctions—cases pending		76
Giving liquor to minors—pending		1
Value of liquor seized, destroyed or given to Red Cross, hospitals and U. S. Army	298,477.50	

CIGARETTE VIOLATIONS.

Sale or gift of cigarette—fines	$ 675.00	9
Mulct tax assessed—uncollected—pending in Supreme Court	39,000.00	
No. packages of cigarettes seized		412,834
No. packages of cigarette papers		1,220

VIOLATIONS OF LAWS RELATING TO MORALITY.

Rape, sentences for life		2
Keeping house of ill fame—convicted		7
Prostitution—convicted		16
Soliciting for purpose of prostitution—convicted		3
Lewdness—convicted—fines	$1,605.00	87
Arrests for operating immoral shows—fines	1,000.00	11

CASES PENDING.

Rape cases—pending	2
No. persons arrested in vice crusade and examined by state and government physicians under venereal disease statute	4,789

MISCELLANEOUS CRIMES—CONVICTIONS.

Nature of Crime	Penalty Assessed	No. Convictions
Murder		4
Robbery in night time		2
Disturbing peace—fines	$ 540.00	28
Selling "dope"—fines	700.00	7
Obstructing justice		1
False pretenses		2
Larceny		8
Bank robbery		1
Carrying concealed weapon		5
Vagrancy		87
Allowing minors in pool hall		8
Breaking and entering freight cars—fines	1,500.00	4
Gambling—fines	5,798.50	183

CASES PENDING.

	Cases Pending
Murder—pending	2
Dynamiting cases	2
Assault with intent to commit murder	2
"Dope" cases	1
Conspiracy cases	27
Possession of burglar tools	1
Larceny	19
Gambling	29
Reckless driving of auto	1

FURTHER NOTATION.

Nature of Crime		No. Convictions
Value of gambling devices destroyed	$15,450	
Stolen property recovered	10,625	
Confessions secured		135
Indictments returned—cases pending		215
Convictions in federal court		20
Cases pending in federal court		37
Persons returned from other states for trial on charge of felony		5
Assisted in policing State Fair Grounds during fair in 1917 and 1918. Also assisted in policing Interstate Fair in 1918.		

RECAPITULATION.

Fines and mulct tax collected	$146,027.15
Liquor mulct tax assessed	24,150.00
Cigarette mulct tax assessed	39,000.00
Total	$207,977.15
Value of liquor seized (estimated value)	$298,477.50
Stolen property recovered	10,625.00

A vast amount of other work has been accomplished by the special agents not mentioned in this report, such as the investigation of fires of incendiary origin, murders and thefts, in which no arrests have so far been made.

A vast amount of time of the special agents has been spent in assisting the government in connection with the war work in keeping conditions clean around the army cantonment. This included assistance to the government and military police with reference to

the unlawful sale of liquor and its transportation and with reference to prostitution.

I call your attention to the fact that we have spent in the first five months of the present fiscal year $17,000 of the $25,000 per year allowed, and have been unable to meet more than twenty-five per cent of the demands for help made by law-enforcing officers.

STATUTES WHICH SHOULD BE AMENDED, AND NEW LAWS WHICH SHOULD BE ENACTED.

In the operation of the office during the last two years situations have arisen which have directed the attention of the office to the weakness of certain statutes and the necessity for amendments to the same in order that there may be a proper enforcement of the law.

These suggestions for amendments and new laws are miscellaneous in their character and are placed under the one heading.

(1) *The Amendment to the Motor Vehicle Law.*

In this connection I call your attention to pages 24 and 26, inclusive, of this report.

(2) *The Special Agent Law.* (Chap. 231, Acts 37th G. A.)

See page 18 of this report.

(3) *Amendment to Removal Law.*

In this connection I call attention to page 27 of this report. Section 1258-c as amended by chapter 391, acts of the 37th General Assembly, should be amended so that all police officers, and all county, city and town officers shall be subject to removal upon the grounds stated in section 1258-c of the code of 1913.

(4) *The Law with Reference to Jury Commissions.* (Chapter 267, Acts of the 37th General Assembly.)

This law should be amended so as to provide—

(a) For filling vacancies in the commission caused by sickness, death, removal from jurisdiction, or inability to act for any valid reason;

(b) For the allowance of at least one week's time in the selection of the jurors.

The statute with reference to jury commissions has proven to

be one of the good statutes adopted by the 37th General Assembly. The jury commission has given to the larger cities better grand and petit juries than they ever had before in their experience. A better administration of the law has been secured than could have been secured under the old system. The courts have universally commended the plan of the jury commission. It has been found, however, that the time allowed for the selection of juries in the larger cities is entirely inadequate. It has taken the time in many instances of at least a week and the men who have been selected on the jury commission have sacrificed of their time and paid their additional expenses out of their own pockets because under the wording of the statute it is impossible to make them a greater allowance. This ought not to be. A greater amount of time should be allowed, and the experience of the various judges indicates that in the larger places at least one week's time is needed and possibly, in the largest counties, two additional commissioners, because of the inability of the commissioners to know the men from the various parts of the county.

(5) *Change of Place of Trial by the State Authorized, and Change of Place of Trial Upon the Application of the State.*

The experience of this department in the last two years has demonstrated the fact that there arise conditions which make necessary a statute authorizing a change of place of trial upon application by the state.

In at least two instances there has been a gross miscarriage of justice because in the community where the crime was committed, those opposed to the prosecution have gone out and deliberately worked up sentiment to prevent the conviction of persons guilty of crime. There is no valid reason why, when a situation of that kind exists, the state should be compelled to draw a jury from a body of men whose minds have been prejudiced by those friendly to the defense.

In the case of *State v. Kelly*, approximately 150 veniremen were examined before a jury was secured, and it was perfectly apparent to every man connected with the court that notwithstanding the large number of men examined, the minds of the jurors selected were poisoned and fixed by reason of the discussion that had gone on in the community.

If a change of place of trial is allowed to the defendant as it now is under the statute, there is no valid reason why there should not

be a provision made for granting to the state the right to a change of place of trial.

By way of example, we might state that in Montgomery county 25 public meetings were held condemning the prosecution of the defendant, Kelly, in the case of *State v. Kelly,* all of the officers connected with the prosecution being condemned in these various meetings.

(6) *Law Increasing the Penalty for Transporting in Any Manner or Bringing into the State in Any Manner Intoxicating Liquors.*

(7) *The Law with Reference to Transporting into the State Any Intoxicating Liquors Should Be Amended.*

Under our present statute no common carrier can lawfully bring into the state any intoxicating liquors unless it is being transferred to a permit holder. This law has generally been observed by the railroad companies in Iowa. I think it should be said to the credit of the general counsel and managing officers of the railway corporations operating in the state of Iowa that they have tried to observe this law and have generally given to this department their full co-operation with reference to the enforcement of this statute, but there exists a condition which is intolerable. Men who have been engaged in the bootlegging business have driven outside the state with automobiles and are transporting into the state daily hundreds of gallons of intoxicating liquors. The law should make all of the costs in connection with any prosecution for transportation or the parties connected therewith a lien upon the vehicle in which the goods are being transported, and provide that the vehicle may be held and sold for the payment of such costs.

(8) *Chapter 350, Acts of the 37th General Assembly, should be amended so that it shall read "five" instead of "four" assistants in the office of the Attorney General.*

(9) *The Liquor Law should be amended so as to permit the shipment of altar wine to the clergy direct.*

This should receive the prompt attention of the legislature and a statute enacted covering the same to allow interstate shipments of altar wine to the clergy for sacramental purposes.

(10) *Motor Vehicle Law.*

We desire to call your attention to the situation with reference to the Motor Vehicle Law.

The practical operation of this law as it has been administered so far as its enforcement is concerned has been a complete failure, and thousands of dollars have been lost to the state of Iowa.

Section 1571-m-7 provides for the collection of the automobile license by the secretary of state and if the same is not paid on or before April 1st, then makes the further provision as follows:

> "On April 1st of each year a penalty of ten per cent shall be added to all fees not paid by that date, and on May 1st of each year the secretary of state shall send to the county attorney of each county a list of all motor vehicles in said county on which registration fee has not been paid showing the amount of delinquent fee, registration number, make and factory number, together with the name of the owner of each such car as disclosed by his records."

Complaint has come to this department on the part of the county attorneys throughout the entire state of Iowa of their inability to enforce the law under the circumstances as they have existed. The practical operation of this law has permitted the owners of hundreds of automobiles to escape the payment of license fees. We have taken the matter of the enforcement of this law up repeatedly with the various county attorneys and have satisfied ourselves that as the law now stands, it is wholly impracticable in the matter of enforcement. If the collection of this tax is to be enforced by the local officers, a plan something similar to the Hunter's License statute, with an annual plate to be distributed from the county auditor's office, would be a much more workable plan in the enforcement of the law. As the law now stands, the local officers must finally enforce the law, and if they must enforce it, they could do so more easily if they had the authority to administer it as well.

(11) *Automobile Headlight Law.*

I call your attention to chapter 148, acts of the 37th General Assembly, which provides with reference to lights upon motor vehicles. The statute evidently provides exactly the opposite from what was intended. We have made a test case with reference to this statute, but so far the supreme court has not decided the same, and the statute should be amended so that the rays of light 75 feet or more ahead of the vehicle shall not rise above 42 inches from the

level surface on which the vehicle stands under all condition of load.

(12) *Speed of Automobiles on Highways.*

Another matter concerning which there has been serious complaint and for which there is no penalty, is the excessive speed of automobiles upon the highways. The speed of an automobile cannot be regulated upon any highway except that which is inside the corporate limits of an incorporated town, the only penalty at present being that of the presumption of contributory negligence in case an injury occurs if the automobile is traveling at a rate of speed above 25 miles per hour.

We recommend that a statute be passed which will compel the drivers of automobiles on the highways to operate their cars with due regard to the safety of others traveling upon the highway. The automobile has created a new peril in the use of the public highway and this peril has been greatly enhanced by the recklessness of operators who propel the machines with the speed of railway trains. Some statute commensurate with the public safety and not unduly harsh or restrictive upon users of motor cars should be evolved to meet the situation which has arisen.

(13) *The penalty with reference to operating a machine while intoxicated is not sufficient.*

In this connection we call your attention to the fact that a man operating a motor vehicle while in an intoxicated condition is only punishable by a fine of twenty-five dollars.

Section 1571-m-23, supplemental supplement to the code, 1915, provides in part:

> "Whoever operates a motor vehicle while in an intoxicated condition shall be guilty of a misdemeanor."

Section 1571-m-26, supplemental supplement to the code, 1915, provides:

> "Any person violating any of the provision of any section of this act for which no punishment has been specified, shall be guilty of a misdemeanor, punishable by a fine not exceeding twenty-five dollars."

Some of the most serious automobile accidents in this state have occurred through the reckless operation of machines by drunken

drivers. A fine of $25.00 is not sufficient. General complaint with reference to this statute has come to this department from the various district judges throughout the state and the various prosecuting attorneys, and we believe their criticism is well founded, and I call your attention to the matter for that reason.

AMENDMENT TO REMOVAL LAW.

The law as it now stands should be amended. We have been confronted in the last two years with a situation where a man who was a chief of police of a city was in a beastly state of intoxication and so forgot his duties that he rode up and down the streets in an automobile with two women of questionable character.

The law as it now stands does not permit the bringing of a removal suit against such an officer. Scenes of that kind are a disgrace to the community and to the state and the law should be amended so that officers of that kind can be reached. There are other similar instances with reference to chiefs of police and police officers.

I therefore recommend that section 1258-c as amended by chapter 391, acts of the 37th General Assembly, be amended so that all police officers and all county, city and town officers shall be subject to removal.

CEMENT TRUST INVESTIGATION.

With reference to the investigation as authorized by chapter 273 of the acts of the Thirty-seventh General Assembly in regard to illegal combinations of the manufacturers of cement, I beg to report that said investigation has not been completed. Appointment was made with reference to this investigation, but on account of sickness and conditions over which the appointee had no control, the matter was delayed from time to time and the party appointed to make this investigation originally has been compelled to surrender the appointment, since which time I have appointed Hon. Shelby Cullison of Harlan, Iowa, to complete the investigation, and hope to be able to report fully to the legislature before its adjournment with reference to said matter.

COMMENDATIONS.

In this connection I desire to acknowledge the very efficient and loyal work rendered to this department by Assistant Attorneys

General F. C. Davidson of Emmetsburg, Iowa; Mr. W. R. C. Kendrick of Keokuk, Iowa; Mr. J. W. Kindig of Sioux City, Iowa; Mr. H. H. Carter of Corydon, Iowa, and Mr. J. W. Sandusky of New Hampton, Iowa, and of my law clerk and stenographer, Mrs. Jessie H. Courtney of Des Moines, Iowa.

The efficient work of law enforcement could not have been accomplished without the loyal support given the department of justice by the special agents. In this connection, I desire to especially commend the work of Mr. O. O. Rock of Logan, Iowa; Mr. H. W. Terrell of Mt. Ayr, Iowa; Mr. James E. Risden of Cedar Rapids, Iowa; Mr. H. M. Long of Bedford, Iowa; Mr. U. L. Crawford of Des Moines, Iowa; Mr. John B. Hammond of Des Moines, Iowa, and Mr. W. A. Size of Postville, Iowa, who have been with the department during my entire term of office.

SCHEDULE A.

Criminal Cases Submitted and Decided by Supreme Court of Iowa

JANUARY TERM, 1917.

Title of Case	County	Decision	Offense
State v. Ed. Wegner	Polk	Reversed	Robbery
State v. John Clark	Black Hawk	Affirmed	Rape.
State v. J. P. Ward	Polk	Dismissed	Sodomy
State v. Roy Fox	Polk	Dismissed	Larceny.
State v. Elsie Donaghue	Polk	Dismissed	Liquor Nuisance.
State v. James Corbett	Polk	Dismissed	Liquor Nuisance.
State v. Jacob Croatt	Fayette	Affirmed	Bastardy.
State v. O. C. Olsen	Winneshiek	Dismissed	Practice of medicine without certificate.
State v. J. A. Gregory	Pottawattamie	Affirmed	Grand Larceny.
State v. Ulysses Cochran	Linn	Reversed	Carrying concealed weapons.
State v. E. L. Town	Guthrie	Affirmed (Rehearing overruled)	Manslaughter.
State v. Richardson	Poweshiek	Reversed	Assault with intent to commit great bodily injury.
State v. Andrew Jensen	Hamilton	Reversed	Seduction.
State v. Walters	Polk	Affirmed	Liquor Nuisance.

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State v. Pelser	Pottawattamie	Affirmed (Rehearing Denied)	Incest.
State v. Adam Kiefer	Buchanan	Affirmed	Fraudulent Banking.
Statev. Oliver Brooks	Wapello	Reversed	Rape.
State v. Fred Meyer	Madison	Reversed	Murder.
State v. A. W. Chamberlain	Hamilton	Affirmed	Liquor Nuisance.
State v. James Vanscoy	Story	Affirmed	Incest.
State v. Francisco Guidice	Linn	Affirmed	First Degree murder.
State v. Pitro Kurdika	Linn	Affirmed	Rape.
State v. Fred Powers	Cherokee	Reversed	Carrying concealed weapons.

SCHEDULE A—Continued.

SEPTEMBER TERM, 1917.

Title of Case	County	Decision	Offense
State v. E. F. Powers	Carroll	Reversed	Assault with intent to commit rape.
State v. Farmer	Jefferson	Affirmed	Cheating by false pretenses.
*State v. Phillip Boggs	Wapello	Affirmed	Taking auto without consent of owner.
State v. Zona Clough	Union	Affirmed	Keeping house of ill fame.
State v. Theodore Salmer	Woodbury	Reversed	Manslaughter.
State v. Taylor Cowger	Dallas	Dismissed	Bastardy
State v. Ida E. Meyer	Madison	Reversed	Murder.
State v. Geo. Frazer	Madison	Affirmed	First degree murder.
State v. C. C. Carter	Marion	Affirmed (Rehearing denied)	Fraudulent banking.
State v. Roy Yates	Mahaska	Affirmed	Sodomy.
State v. Clarence Bartlett	Mahaska	Affirmed	Assault with intent to commit great bodily injury.
State v. Howell Brewer	Scott	Affirmed	Second degree murder.
State v. Carl Weaver	Polk	Reversed	Lewd act with child.
State v. I. Lazurus	Polk	Reversed	Perjury.
State v. G. E. Knight	Polk	Affirmed	Incest.
State v. Edward Lawson	Polk	Reversed	Adultery.
State v. Minnie Graves	Polk	Dismissed	First Degree murder.
State v. Geo Jarvis	Polk	Affirmed	Liquor nuisance.
State v. Rose Burley	Polk	Affirmed	Keeping house of ill fame.
State v. Solomon Zager	Polk	Affirmed	Receiving stolen property.
State v. F. P. McKay	Polk	Affirmed	Liquor nuisance.
State v. Ed. Forest	Polk	Affirmed	Larceny.
State v. Edward Conway	Polk	Reversed	Wife desertion.
State v. Frank J. Heller	Polk	Dismissed	Arson.
State v. C. C. Taft Co.	Polk	Affirmed	Condemnation Cigarettes.
State v. William Kurtz	Butler	Affirmed (Rehearing denied)	Incest.
State v. Curtis Burns	Fayette	Reversed	Carrying concealed weapons.

State v. P. McGuire	Ida	Affirmed	Selling non-registered stallion.
State v. Adam Kiefer	Buchanan	Rehearing denied	Fraudulent banking.
State v. Chas. Stevenson	Polk	Affirmed	Larceny.
State v. Leonard	Winneshiek	Affirmed	Lewdness.

*State of Iowa the appellant.

JANUARY TERM, 1918.

State v. Clay	Monroe	Affirmed	Larceny.
State v. Frank Dangelo	Appanoose	Affirmed	Murder.
State v. Jess Hamilton	Appanoose	Affirmed	Taking motor vehicle without consent of owner.
State v. J. F. Stansberry	Davis	Affirmed	Assault with intent to commit great bodily injury.
State v. Leo Singmaster	Dallas	Affirmed	Liquor nuisance.
State v. L. H. Sherman	Jasper	Reversed	Obtaining property under false pretenses.
State v. Chas Shaffer	Polk	Affirmed	Liquor nuisance.
State v. Tony Geier	Black Hawk	Affirmed (Rehearing denied)	Rape.
State v. Chas. Oaks	Polk	Affirmed	Liquor nuisance.

MAY TERM, 1918.

State v. Forrest Dillman	Lee	Reversed	Murder.
State v. Edvin Graves	Taylor	Affirmed	Larceny.
State v. Lester Moss	Guthrie	Affirmed	Malicious mischief.
State v. James Dickerson	Dallas	Affirmed	Bootlegging.
State v. J. Allen Cox	Scott	Affirmed	First degree murder.
State v. Frank Fountain	Polk	Affirmed	Liquor nuisance.
State v. Ed. Dimmit	Polk	Affirmed	Murder.
State v. Harry Hatters	Polk	Affiirmed	Larceny.
State v. Joe Bertinelli	Polk	Reversed	Liquor nuisance.
State v. Albert Dickerson	Polk	Affirmed	Liquor nuisance.
State v. John McAnaa	Polk	Affirmed	Liquor nuisance.
State v. James Foley	Polk	Affirmed	Liquor nuisance.

SCHEDULE A—Continued.

Title of Case	County	Decision	Offense
State v. John Leto	Polk	Affirmed	Liquor nuisance.
State v. RalphRaefell	Polk	Affirmed	Liquor nuisance.
State v. Henry Luka	Polk	Affirmed	Carrying concealed weapons.
State v. Jack Cannon	Polk	Affirmed	Liquor nuisance.
State v. O. S. Mundorf	Pottawattamie	Dismissed	Assault with intent to commit murder.
State v. Joe Doe	Page	Dismissed	Liquor nuisance.
State v. C. B. Chismore	Linn	Reversed	Obstructing highway.
State v. Jas. McNamara	Polk	Affirmed	Liquor nuisance.
SEPTEMBER TERM, 1918.			
State v. Lew Small	Mahaska	Reversed	Resisting officer.
State v. Tony Alcro	Polk	Dismissed	Liquor nuisance.
State v. E. E. Pollard	Polk	Dismissed	Larceny.
State v. Ernest Rathbun	Ida	Dismissed	Rape
State v. Allie Dubree	Polk	Affirmed	Liquor nuisance.
State v. I. L. Hobson	Polk	Affirmed	Liquor nuisance.
State v. Dave Kroll	Polk	Affirmed	Larceny in a building.
State v. Walter G. Munkel	Howard	Affirmed	Larceny.
State v. Cecil Cannon	Dickinson	Affirmed	Adultery.
State v. Ben Marquardt	Winnebago	Affirmed	Liquor nuisance.
State v. L. Williams	Polk	Reversed	Carrying concealed weapons.
State v. Rose Shelton	Polk	Affirmed	Liquor nuisance.
State v. Max Strum	Black Hawk	Reversed and remanded	Receiving stolen goods.
State v. W. E. Crawford	Marshall	Affirmed	Keeping house of ill fame.
State v. Andrew Jensen	Hamilton	Affirmed	On motion to dismiss.
State v. A. B. Alexander	Clarke	Affiirmed	Keeping gambling house.
State v. Josie Lewis	Woodbury	Affirmed	Murder.

State v. Daisy Brennan	Woodbury	Reversed	Murder.
State v. Harry Taylor	Wapello	Reversed	Larceny in building.
State v. Herbert Wilcox	Boone	Reversed	Assault with intent to commit rape.
State v. J. F. Waterbury	Benton	Affirmed	False pretenses.

SCHEDULE B.

CRIMINAL PENDING IN SUPREME COURT OF IOWA

Title of Case	County	Offense
State v. H. P. Konzen	Cerro Gordo	False pretenses.
State v. Ray Carson	Lucas	Seduction.
State v. Lester Moss	Guthrie	Malicious mischief—rehearing.
*State v. Louis Nagel	Guthrie	Perjury.
*State v. Robert Steinke	Keokuk	Assault with intent to commit great bodily injury.
State v. A. Gioffredi	Polk	Liquor nuisance—motion to dismiss.
State v. C. H. Snyder	Polk	Liquor nuisance.
State v. Everett Vaughn	Appanoose	Rape.
State v. Irvin Seitz, et al	Wapello	Larceny in building.
State v. J. E. Easter	Mahaska	Perjury.
State v. C. F. Claiborne	Polk	Auto dimmer law.
State v. Frank Aaton	Polk	Liquor nuisance.
State v. Floyd Smith	Delaware	Seduction.
State v. John Butler, et al	Hamilton	Bootlegging.
State v. Quan Sue	Story	Murder.
State v. Gust Kellgren	Winneshiek	Liquor nuisance.
State v. Art Dolson	Pottawattamie	Breaking and entering railroad car.
State v. Jeff Haner	Harrison	Rape.
State v. Fred Cummings	Marshall	Assault with intent to commit murder.

*Fully submitted but no opinion rendered.

SCHEDULE C.

CIVIL CASES SUBMITTED TO SUPREME COURT OF IOWA

JANUARY TERM, 1917.

Title of Case	County	Decision	Nature of Action
State v. Len Silka	Fayette	Modified and affirmed	Liquor injunction.
Geo. Miller v. Marshall Co., et al	Marshall	Affirmed	Quiet title.
C. A. Payette v. Wells S. Rice, et al.	Marshall	Affirmed	Quiet title.

SEPTEMBER TERM, 1917.

J. G. Springstein v. J. C. Sanders, Warden	Lee	Affirmed (Rehearing denied)	Habeas corpus.
Ernest Lewis v. Brown, Treasurer	Taylor	Reversed	Inheritance tax.
Dan Coleman v. James Tierney	Clinton	Reversed on State's Appeal	False imprisonment.
Forbes, et al. v. Executive Council	Polk	Dismissed	Mandamus.
Tony Stajcar v. Dickinson, Receiver	Polk	Dismissed	Workmen's compensation.
In Re Chas. Schrage	Grundy	Affirmed (Rehearing denied)	Inebriate.
Ex rel Attorney General v. Shores Mueller Co.	Bremer	Reversed	Food laws.

JANUARY TERM, 1918

Tom Dickerson v. J. R. Perkins	Lee	Reversed	Habeas Corpus.
Hoyt v. Keegan, Adm. Breen Estate	Clinton	Affirmed	Inheritance Tax.
Great Western Accident Co., v. P. H. Martin, Treasurer	Polk	Reversed	Taxation of corporations.
Gordon W. Noble v. Emory H. English, Insurance Commissioner	Polk	Affirmed	Mandamus.
McKeon v. Morrow, Treasurer	Franklin	Reversed	Escheat.

MAY TERM, 1918.

State ex rel County Attorney v. Raph	Freemont	Affirmed	Liquor injunction.
State ex rel County Attorney v. Myers	Fremont	Affirmed	Liquor injunction.
State ex rel County Attorney v. Stumpf	Fremont	Affirmed	Liquor injunction.
Bruce R. Vale v. Geo. H. Messenger	Polk	Affirmed on plaintiffs appeal	Mandamus.

SEPTEMBER TERM, 1918.

State v. Chas. Schmitch	Jones	Affirmed	Habeas corpus.

SCHEDULE D.

CIVIL CASES PENDING IN SUPREME COURT OF IOWA

Title of Case	County	Nature of Action
C. C. Taft Co. v. Alber, Auditor	Polk	Constitutionality cigarette tax law.
State ex rel Attorney General v. Mullin, Judge	Black Hawk	Certiorari.
T. J. Donohoo v. Sim T. Huber, Sheriff	Woodbury	Anti-tipping law.
Re Will of Max D. Peterson	Scott	Inheritance tax(Pending on rehearing).
Re Estate of Sarah Utt	Wapello	Inheritance tax.
Re Estate of Hetta A. Sanford	Cass	Inheritance tax.
Bertha Eddy v. Short, et al.	Allamakee	Inheritance tax.
Sara Ann Shortall, et al. v. Des Moines Electric Co., et al.	Polk	Construction of dam.
T. E. Watters v. Anamosa-Oxford Junction Light and Power Co.	Jones	Construction of dam (Rehearing)

SCHEDULE E.

Old cases disposed of in supreme court of Iowa, instituted prior to January 1, 1917:

W. C. Brown, Treasurer, v. Hattie N. Gullford;
John Forbes, County Treasurer of Pocahontas County, et al., v. Executive Council;
Geo. Miller v. Marshall County;
C. A. Payette et al., v. Wells S. Rice, et al.;
Dan Coleman v. James Tierney, Deputy Game Warden;
W. C. Brown, Treasurer, v. Nels Peterson;
State of Iowa v. Lena Silka;
Burlingame v. Hardin County, et al.;

SCHEDULE F.

Old cases disposed of in the district court of Iowa, instituted prior to January 1, 1917:

In the Matter of the Drainage Assessment of District No. 60, State of Iowa ex rel Geo. Cosson v. E. J. Hauser, et al;
In re Estate of Jeanette Sims;
State of Iowa v. F. R. Hutchinson;
In re Estate of Margaret McHugh;
In re Estate of Belle R. Hamilton;
In re Estate of John C. Dvorak;
In re Estate of Henry Breen;
In re Estate of Eldora E. Myers;
Ida B. Wise Smith v. Executive Council of State of Iowa;
Geo. C. Lawrence v. C. C. McClaughry, Warden;
L. G. Troutman v. Milda Smith, et al.;
Ella Powell, by her next friend, v. Board of Control;
In re Estate of John Harrington;
In re Estate of Christian Peterson;
Guy A. Broadie v. M. C. Mackin, Superintendent of Inebriate Hospital;
In re Estate of C. J. Erickson;

SCHEDULE G.

Partial list of old cases pending in the district court of Iowa, instituted prior to January 1, 1917:

R. F. Graeber v. A. B. Noble;
In re Estate of T. J. Mitchell;
In re Estate of Sarah Plumer;
State of Iowa ex rel Geo. Cosson v. Meservey Creamery Co.;
In re Estate of Margaret Garmoe;

In re Estate of Harry Higgins;
State of Iowa, ex rel Geo. Cosson v. Joel Hoskins, et al., Trustees;
State of Iowa, ex rel., Geo. Cosson v. Iowa State Mutual Auto Association;
In re Estate of Thomas Wilson;

SCHEDULE H.

Partial list of cases instituted and completed since January 1, 1917:

In re Estate of Geo. B. Gray;
In re Estate of Martha A. Gray;
State of Iowa, ex rel Saley v. C. F. Brockmeyer, Brockmeyer Bros., et al.;
Alva J. Hayes v. Nicholas Cronin, et al.;
State of Iowa, ex rel Vernon Johnson v. W. T. Raph;
State of Iowa, ex rel Vernon Johnson v. H. Batch;
State of Iowa, ex rel Vernon Johnson v. Clyde Myers;
Walter G. Marquis v. F. J. Alber, County Auditor, et al.;
S. J. Nessa v. A. M. Deyoe, Superintendent of Public Instruction;
In re Estate of Charles C. Paige;
In re Estate of D. D. Sturgeon;
State of Iowa v. Dr. Theo. Kleffel;
State of Iowa, ex rel H. M. Havner v. J. N. Wilkerson;
In re Estate of Francis Smiley;
Elizabeth Wood v. State of Iowa, et al.;
State of Iowa v. R. W. McBride;
State of Iowa v. H. S. Downs;
State of Iowa v. C. M. Forney;
State of Iowa v. C. E. Husband;
State of Iowa v. Geo. S. Weirick;

SCHEDULE I.

Partial list of cases pending in district court, instituted since January 1, 1917:

State of Iowa, ex rel H. M. Havner, Attorney General, v. Equity Mutual Fire Insurance Association, et al.;
In re Assessment of Fitchpatrick Investment Co.;
In re Estate E. Hagemann;
Iowa Life Insurance Co. v. Black Hawk County;
Iowa Manufacturers Co. v. Black Hawk County;
C. H. Kelley v. Buffalo Center State Bank, et al.;
Leavitt & Johnson National Bank v. J. J. Rainbow, County Auditor;
In re Estate James A. Parr;
Phoenix Insurance Co. v. State Insurance Co. of Des Moines, et al.;
State v. C. G. W. R. R. Co.;
State of Iowa, ex rel H. M. Havner, Attorney General v .C. E. Mullin;

State of Iowa v. J. N. Wilkerson and Mrs. J. W. Noel;
State of Iowa, ex rel H. M. Havner, et al., v. Churchill Drug Co.;
State of Iowa, ex rel H. M. Havner, et al., v. Hawkeye Clay Works;

SCHEDULE J.

Cases decided by the supreme court of the United States:

Duus, Administrator of Petersen v. Brown, Treasurer of the State of Iowa, 245 U. S. 176;
Peterson, et al., Legatees of Anderson v. State of Iowa, ex rel State Treasurer, 245 U. S. 170;
Rudolph Davis v. William H. Berry, et al., 242 U. S. 468;
J. C. Hawkins v. John L. Bleakly, Auditor of State, et al., 243 U. S. 210;
In re Estate of Abraham Slimmer, —— U. S. ——;

SCHEDULE K.

Cases pending in the supreme court of the United States:

State of Iowa v. C. C. Taft Co.;

SCHEDULE L.

Cases disposed of in the district court of the United States.

Theo Hamm Brewing Co. v C. R. I. & P. Ry. Co.;
Thacher v. Polk County, et al.;

SCHEDULE M.

Cases disposed of in United States circuit court of appeals:

Daniel B. Luten v. J. B. Marsh Engineering Co., et al.;

SCHEDULE N.

Cases pending in the United States circuit court of appeals:

In re Taxation of Mississippi River Power Co. v. R. R. Commissioners, et al.;
Iowa Southern Utilities Co. v. H. M. Havner, Attorney General, et al.;
Clinton, Davenport & Muscatine Ry. Co. v. H. M. Havner, Attorney General, et al.;
Iowa Railway & Light Co. v. H. M. Havner, Attorney General, et al.;
Cedar Rapids & Marion City Railway Co. v. H. M. Havner, Attorney General, et al.;
Mason City & Clear Lake Railway Co. v. H. M. Havner, Attorney General, et al.;

State of Iowa

1918

TWELFTH BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1918

H. M. HAVNER
Attorney General

Published By
THE STATE OF IOWA
Des Moines

ATTORNEY GENERAL'S DEPARTMENT

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ATTORNEYS GENERAL 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	1911-1917
H. M. Havner	1917-

LETTER OF TRANSMITTAL.

HON. W. L. HARDING, Governor of Iowa:

Dear Sir: I have the honor to submit herewith, in accordance with law, my report of the transactions of the Department of Justice for the state of Iowa for the biennial period ending December 31, 1918.

H. M. HAVNER, *Attorney General.*

Des Moines, Iowa, December 31, 1918.

REPORT OF THE ATTORNEY GENERAL

The work of the attorney general's office has greatly increased by reason of the increased burdens and duties which have been placed upon it by statute.

In my judgment the enactment of the laws with reference to the attorney general's office and its work has been more than justified, as shown by the results and, by the making of a few amendments, can be strengthened so that the Department of Justice of the state of Iowa can be built up and the same efficient work secured with reference to the enforcement of law as is secured by the federal government through its Department of Justice.

COUNTY ATTORNEYS.

Under the Iowa statute county attorneys become a part of the Department of Justice of this state, and we have tried to conduct the office of attorney general with the idea of building up such a department and making the office of county attorney a part of the department in more than name only.

It is my belief that the development of this idea will produce greater efficiency in the enforcement of the law. The county attorneys have given good response to this idea and we believe there is in the state today a good spirit of co-operation between the office of county attorney and that of attorney general.

IMPORTANT CASES.

In the case of *State ex rel Johnson v. Raph,* the question as to the right of the state to hold automobiles which were being used in connection with the unlawful transportation and sale of intoxicating liquors pending the disposal of an injunction suit was in issue. The supreme court of Iowa held that where the district court made an order directing the sheriff of the county where the cars had been seized, "retain possession of such automobile in his custody to the end that the same may be dealt with as provided by law," that such order might be made without the state giving bond and without any notice to the defendant.

The decision in this case has done much to assist in the stopping

of the unlawful transportation of intoxicating liquors in automobiles into the state, and has given to the state an effective weapon in the fight against such unlawful transportation.

State ex rel Johnson v. Raph, 168 N. W., 259.

The case of *Hoyt v. Keegan* is a very important case so far as the collateral inheritance tax law of the state is concerned.

It has been a much mooted question whether deposits in the banks of this state belonging to non-residents at the time of the death of such non-resident were liable to the imposition of the inheritance tax.

In this case the question as to whether a resident of the state of Illinois whose only heirs were collateral, and who, at the time of his death had money on deposit in Iowa banks was decided, and it was held that the state had the right to collect its usual inheritance tax upon such money. The court in passing on the matter said that "under the clear weight of authority the savings bank deposit was subject to the collateral inheritance tax under our statute."

The decision in this case will save to the state thousands of dollars that it has heretofore lost. From a monetary standpoint to the state this is one of the important cases that has been decided by the supreme court during the last two years.

Hoyt. v. Keegan, 167 N. W., 521.

The case of *Peterson, et al, Legatees of Anderson, v. State of Iowa, ex rel, State Treasurer,* is an important case to the state in connection with the construction of the collateral inheritance tax laws. It is important because it involves the construction of the treaty between Denmark and the United States and the right to tax any property passing from a resident and citizen of this state to a resident and citizen of Denmark.

The decision of the United States Supreme Court gave the state of Iowa the right to impose a tax upon the right of succession in all such estates of ten and twenty per cent of the estate.

Peterson, et al, Legatees of Anderson, v. State of Iowa, ex rel, State Treasurer, 245 U. S., 170.

The case of *Duus, Administrator of Peterson, v. Brown, Treasurer of the State of Iowa,* decided by the Supreme Court of the United States, involved the treaty between the United States and Sweden and gives the state of Iowa the right to impose a tax of ten and twenty per cent upon the right of succession to an estate from a citizen of this state to a resident of Sweden.

This case is important by reason of the great amount of property which is being inherited from time to time from naturalized citizens of this state by citizens of Sweden.

Duus, Administrator of Peterson, v. Brown, Treasurer of the State of Iowa, 245 U. S., 176.

Daniel B. Luten v. J. B. Marsh is also an important case decided favorably to the state within the last two years.

This case was tried in the district court of the United States for the southern district of Iowa at Des Moines. Mr. Wallace R. Lane of Chicago had some years previous been employed as special counsel for the state in this case. The case was prepared for trial under his special direction, and this department is indebted to Mr. Lane for the very efficient manner in which he prepared and presented the case.

The case involves the question of the validity of certain patents which Luten claimed were being infringed by the state of Iowa and contractors representing it in the building of bridges. If his claim had been upheld, it would have cost the state of Iowa hundreds of thousands of dollars.

The court dismissed the entire petition and all of the patents mentioned in the petition were held invalid.

Luten has appealed the case to the Circuit Court of Appeals, but in a recent decision in another case the Circuit Court of Appeals has held other similar claims of Luten invalid, and we feel there is no question but what the opinion of the district court for the southern district of Iowa will be affirmed.

State of Iowa v. Lynn George J. Kelly.

I feel that I should make some report in connection with the above entitled case on account of the vast amount of work which it entailed by this department.

On the night of June 9, 1912, Joe Moore and his wife, their four children, and two daughters of Joe Stillinger were all murdered in the home of Joe Moore in the town of Villisca, Iowa. Up until the time I assumed the duties of the office of attorney general in January, 1917, no person had ever been indicted for this crime. At the time I entered upon the duties of my office, complaint was made to me of the serious condition that existed in Montgomery county by reason of the agitation in connection with this murder. After investigating the situation I became convinced that unless something was done to clear up the situation, that riots and possibly bloodshed

would occur in that community, for it had assumed the proportions of a Kentucky feud.

I conferred with Governor Harding with reference to the situation and told him I believed we should appoint a man to take active charge of the grand jury of Montgomery county at the January, 1917, term and make a thorough investigation of all the facts in connection with this murder.

Hon. F. F. Faville, former United States attorney for the northern district of Iowa, was agreed upon between the governor and myself as the proper person for this work. Mr. Faville was duly appointed by this department and by the district court of Montgomery county to take active charge of the grand jury in the investigation of this murder and commenced his work immediately.

Prior to the commencement of this investigation one J. N. Wilkerson, an employe of the Wm. J. Burns Detective Agency, had been employed by the state of Iowa under the authority of my predecessor in office, Montgomery county and certain private parties for a period of about two and one-half years. He submitted to this office a brief of what he claimed to be the substance of the evidence of certain witnesses he had examined, and gave a brief of the facts to which each of said witnesses would testify. Based upon this brief of evidence, there were called before the grand jury of Montgomery county 160 witnesses whose residences were from the state of Montana on the west to the state of New York on the east. The case was given a most thorough and painstaking investigation. In addition to the witnesses submitted by Wilkerson every person who was known or was thought to have any knowledge with reference to the claimed theory of the case as submitted by Wilkerson was called in before the grand jury and examined, and every effort within the power of this department and its special prosecutor, Mr. Faville, was put forth to ascertain the truth.

At the conclusion of the examination of the 160 witnesses, which examination included every witness submitted by Wilkerson save one, whose residence was in Kansas (the testimony which it was claimed this witness would give being before the grand jury), the grand jury for the February, 1917, term of the district court of Montgomery county made and filed a report as follows:

REPORT OF GRAND JURY.

"We, the grand jury of the county of Montgomery, having had under consideration the matter of the investigation of the murder of Joe Moore, his family, and two Stillinger girls, at Villisca, Iowa, on the 9th day of

June, 1912, would respectfully report to the court, as to our doings in said matter, the following:

"As a grand jury we commenced the investigation on the 5th day of March, 1917, and have prosecuted said investigation practically continuously since said date and have given to said investigation the most careful, painstaking, thorough and conscientious consideration of which we were capable.

"Realizing the heinousness of the crime that was committed and the importance of a proper solution of it, if possible, to the community and to the state, we have spared no effort and no expense to ascertain the truth and to, if possible, bring to justice the person or persons guilty of the offense. For more than two and a half years one J. N. Wilkerson, an operative of the Burns Detective Agency, has devoted at least one-half of his time in an attempt to solve the mystery connected with this crime and to secure the evidence necessary to punish the person or persons guilty of the offense.

"Prior to the commencement of this investigation before this grand jury, Mr. Wilkerson was requested to furnish to the attorney general and to the county attorney, for their use and the use of this grand jury, a list of all of the witnesses whose names he had secured in connection with all of his investigation, together with a written statement of what Mr. Wilkerson said was a true statement of the facts to which such persons would testify to. Every material witness named in said list has been produced before this grand jury for examination and in order to accomplish this it has been necessary to call witnesses from many different states at a great distance and at a great expense, and every one of said witnesses, after having been duly sworn, was subjected to a thorough, searching, careful examination, not only by the attorneys representing the state but by the members of the grand jury themselves, so that no facts or circumstance known by such witnesses would fail to be disclosed. In fact, in view of the peculiarities of this case and the circumstances surrounding it, the grand jury extended its inquiry in great latitude and to a great extent in the hope that even by hearsay testimony (although incompetent in court) some clue might be discovered through which they could secure substantial evidence of the guilt of some person or persons.

"Notwithstanding the careful and painstaking manner in which the investigation has been pursued, many of the material witnesses mentioned by Mr. Wilkerson, when found and summoned before the grand jury, either wholly failed to testify as stated in said statement regarding said witnesses, or disclaimed or denied the statements attributed to them. But this is not true of all witnesses.

"It is a well-known fact that since the commission of this crime, there have been reported rumors of various kinds purporting to be clues as to the identity of the person or persons who committed this offense. We have not discredited these rumors without giving each and every one of them a thorough, full and complete investigation in the hope that we might thereby secure some tangible evidence of guilt on the part of some party. Every available clue that we have discovered or have been ad-

visd of either by Mr. Wilkerson or any other person, or that has come to our knowledge from any source, has been thoroughly pursued and investigated. We have spent 24 days in this investigation and have brought before us and examined under oath 160 witnesses. No feature of the case that has come to our attention from any source whatever has been overlooked, disregarded or slighted in the simplest degree. At all times in connection with said investigation we have tried to keep in mind the importance of finally ascertaining the truth, but up until this time we have been unable to discover any sufficient credible testimony upon which we would be warranted in returning an indictment against any person or persons, or which, in our judgment, would warrant any jury under the law in returning a verdict of guilty against any person or persons.

"We would be pleased if we could return with this report and file in court a complete transcript of all of the testimony as actually given by the various witnesses before us under oath, but this under the law we are not permitted to do.

"We have gone over every item of this evidence with conscientious care and have solicited, received and acted upon the legal advice of the representatives of the state, the attorney general, the assistant to the attorney general and the county attorney.

"Every word of the testimony of each and every witness has been taken down in shorthand by the clerk of the grand jury and a minute of the testimony of the several witnesses has been translated into longhand and subscribed by the various witnesses. In view of the great importance of this case and the fact that it has not yet been solved, and the possibility that in the future this evidence or portions of it may be of great value in the further investigation of this case, we recommend to the court that all of the evidence so taken before this grand jury in shorthand be transcribed and extended into typewriting and certified by the clerk taking the same; and that the minutes of the testimony signed by the several witnesses now be returned with this report of the grand jury and sealed up and placed under lock and key in the custody of the clerk of this court, and that when said shorthand notes and the transcript thereof, together with the exhibits, are so returned, certified and sealed, they shall be placed in the custody of the clerk of this court under lock and key subject to the further order of the court in the future.

Respectfully submitted,

Scott Smith. Zeph Morgan.
O. R. Honnett. Ernest Whiley.
H. H. Farlin. Evan J. Evans.
A. P. Pearson, Foreman.

During the investigation in connection with these witnesses, it was ascertained that one Lynn George J. Kelly was probably the person implicated in this crime, and after a careful investigation of the facts and his connection with the tragedy, an indictment was returned by the grand jury charging him with the crime of murder in the first degree.

In all there were before the grand jury approximately 200 witnesses and approximately thirty days were spent in the investigation of this murder before the grand jury.

Immediately upon the indictment of Kelly there was organized in Montgomery county what was known as the Iowa Protective Association, organized primarily for the purpose of defeating the prosecution of Kelly. J. N. Wilkerson, who had been employed on behalf of the state as above stated, became the spokesman of this so-called protective association and about 35 public meetings were held in Montgomery and adjoining counties, attempting to stir up sentiment against the prosecution of Kelly and making charges against all officers connected with his prosecution. These series of meetings and this agitation were kept up in Montgomery county until it was impossible to secure a fair and impartial jury.

The defendant, Kelly, was taken to the town of Logan and kept there during the summer of 1917, and just prior to the date fixed for his trial in October, 1917, he confessed to having committed the murder, which confession was given in the presence of the county attorney of Harrison county, the clerk of the court and the sheriff. It was dictated by Kelly and is in his own words. It was taken down by the county attorney. The confession is as follows:

CONFESSION.

State of Iowa,
Harrison county, ss:

I, Lynn George J. Kelly, being first duly sworn on oath depose and say that I make the following affidavit and confession, without any promises or threats having been made to me of any kind whatever and that this is a voluntary statement:

That I came to Villisca, Iowa, the night before the murder of the Moore family.

Lou Enerson met me at the depot and I went to his home for supper, I was taken out from there to Henery Enersons, by Lou Enerson, where I stayed over night and I returned to Villisca at six thirty o'clock Sunday evening, coming directly to Reverend Ewing's home where I took supper and afterwards went with him to church.

After church I returned home with Rev. Ewing and his wife and stayed up and visited with him until eleven or eleven thirty o'clock, when he showed me to my room, and asked me if I would mind sleeping alone as they were going to sleep in the tent. I said no, as I was intending to go to sleep at once. I undressed and went to bed but was restless being over tired. I heard a noise outside like a windmill and opened the door of the balcony, stood out side on the balcony to see what the

noise was, but found nothing, then I came back and shut the door and tried to sleep but could not. My head was hot. I began to feel sick and wanted to get a walk, so I dressed and went outside. I went down stairs to the front door and left the house by the front door. I walked across to the Presbyterian church. I did not intend to go any further but my mind was working on a sermon on a text called Quotation "Slay Utterly." As I had been hearing and reading sermons on that text, and a voice said "go on" and I went on because I was in the grip of something that I did not understand, I felt God wanted me to slay utterly and I did not know where I was going or where I was. I got down near the end of the street and saw a shadow on the side of the house going from the back to the front and God told me to follow that shadow. I walked on a little bit further still thinking about my sermon and wanted to know where that shadow began. I went hunting the shadow, the back of the house. I did not know who lived there, but I kept on hearing that voice "slay utterly." I said "Yes, Lord, I will," was walking around in the darkness around the house trying to find that shadow and accidently saw an ax. I picked it up and went to where the shadow went, for God wanted me to follow that shadow. I went around toward the front door. A voice says "Go in, do as I tell you; slay utterly." I saw no light but I had to do as God told me and I dare not turn back because somebody was urging me on. I did not know who, I did not know where I was. I went right ahead because I heard that voice and as soon as I got in the house some one whispered "Come up higher" out of the Bible and I went up a flight of stairs because I thought I was going up Jacob's Ladder. I walked through the middle room into the further room. I don't know what I went there for only I was driven by an impulse and a voice. I saw some children lying there. The Bible says, "Suffer little children to come unto me" and I said "They are coming Lord." Before I knew what I was doing I started sending those children somewhere, I did not know, and I had to do as God told me and slay utterly. And so to obey God, I used the ax, and did not realize where I was hitting them, only I was trying to do what God wanted me to do. After killing the children, I went into the room where the parents were, and I don't remember which one of them I struck first, as my head was all wrong and I kept on hearing voices, I slayed utterly, by using the ax, lead by this impulse that I did not seem able to control.

I then went downstairs, and wanted to lay down and rest and saw a room, and went in not knowing who was there, but found two children in bed, and God said "More work yet." Before I knew what I was doing, I had continued my sacrifices, by killing these two children, with the ax, as I had to offer blood sacrifices.

To the best of my memory, I left the ax in the house and returned to the Ewing home, and went back to bed and I got up in the morning and caught the 5:19 train for Macedonia arriving home about 7:30.

Signed: Lynn George J. Kelly.

Subscribed and sworn to before me this 31st day of August 1917.

SEAL. Signed: Lynn J. Irwin, Clerk.

Immediately following this confession, the attorney general, H. M. Havner, was indicted in Montgomery county for alleged oppression in office of the witness, Alice Willard, in connection with the investigation before the grand jury in the Moore murder case. The indictment was not returned against the attorney general until the morning of the day set for the commencement of the trial of the case of *State v. Kelly,* which trial was proceeded with, resulting in a hung jury, the trial lasting about four weeks.

The state was represented in this trial by H. M. Havner, attorney general; Oscar Wenstrand, county attorney of Montgomery county; F. F. Faville of Storm Lake, and J. J. Hess of Council Bluffs.

At the close of this trial, a change of venue was granted in the case of *State v. H. M. Havner,* and the court transferred the case to Harrison county, Iowa. A trial was had in the case at Logan on the 5th day of November, 1917. The state was represented by Clyde Genung and Oscar Wenstrand, county attorney of Montgomery county. The defense was represented by Hon. Lewis Miles of Corydon, Robert Healy of Fort Dodge and J. M. Parsons of Des Moines.

At the close of the testimony for the state and the defense, *the court directed a verdict in favor of the defendant.*

Immediately following the disposition of this case the case of *State v. Kelly* was tried for the second time in Montgomery county, which trial lasted a little over two weeks and resulted in an acquittal of the defendant.

While there still exists bitter animosity in Montgomery county with reference to this murder case, the investigation which was had before the grand jury and the trial of these cases has cleared the atmosphere and fully justified the action that was taken by the department in connection with the prosecution. The investigation satisfied every man connected with the prosecution of the guilt of Kelly of the crime charged in the indictment, and it has satisfied the great body of fair-minded men who know the facts, and there is no question that the evidence which was secured and which was presented to the grand jury and to the court establishes the fact that the man responsible for the murder of the eight people is Lynn George J. Kelly.

REMOVAL OF PUBLIC OFFICIALS.

During this biennial period thirteen public officials have been removed or have resigned from office at the instance of the Depart-

ment of Justice because of a failure to perform the duties of their various offices.

There are two cases which we believe are worthy of special mention with reference to removals. One is that in connection with the supervisors and the county treasurer of Dubuque county, and the other the removal of the commissioner of public safety at Sioux City.

In Dubuque county the state instituted suit to remove the board of supervisors because of their profligate and unlawful expenditure of money and of their management of the business of the county. The removal suit with reference to the treasurer of Dubuque county was bottomed upon his failure to collect the taxes due Dubuque county and the state, and his failure to collect the proper penalties.

The following comparative record will show that the result of this suit with reference to the treasurer has been constructive and very beneficial so far as the collection of taxes is concerned:

Year advertised.	Amount.
1915	$ 6,730.43
1916	24,918.21
1917	14,594.04
1918	121,484.63

This includes such specials as were advertised each year as well as the regular taxes.

THE STATE CHECKERS FROM THE AUDITOR'S DEPARTMENT.

We desire to acknowledge the great assistance rendered to this department in connection with the cases at Dubuque by the checkers from the auditor's department, and we mention especially in connection with this matter Mr. Joe Wall, chief clerk of the county accounting department, and Mr. H. B. Rosenkrans, assistant county examiner.

Almost a year's hard work was given by the checkers and the special agents working out of this department in order to prepare for the cases. Three members of the board of supervisors resigned when the case was reached for trial. The county treasurer has already paid into the treasury of Dubuque county over three thousand dollars, and it is merely a matter of adjustment with the bonding company with reference to the balance of the amount, which will be about fifty-six hundred dollars, making a total of eighty-six hundred dollars. In addition to this amount, many thousands of dollars have been collected which would have been lost to the state

and Dubuque county but for the activity in connection with these prosecutions.

THE SIOUX CITY REMOVAL CASE.

As a result of the work at Sioux City, this department, assisted by County Attorney O. T. Naglestad, filed a petition asking for the removal of the commissioner of public safety, W. R. Hamilton.

After trial to the court, judgment was entered for removal. Immediately following the removal of Commissioner Hamilton, and as a result of the work of the special agents of the state, there were returned by the grand jury of Woodbury county 163 indictments. There have been assessed fines and costs amounting to $27,300.00. There have been seven years of sentences imposed. Eighty of these cases have been disposed of. There are still pending eighty-three indictments. There have been granted twenty-nine restraining orders with reference to red light and liquor injunctions.

A detailed report is herein set forth with reference to Woodbury county. The work in connection with this matter was commenced the 1st of July, 1918, and has been prosecuted from that time on as rapidly as possible.

We desire to acknowledge the very efficient help given to the department in connection with the removal suit by County Attorney O. T. Naglestad and his assistants, as well as the very efficient work which they have done with reference to the returning of the indictments and to the prosecutions in connection with the same.

WOODBURY COUNTY RECORD.

CONVICTIONS.

Nature of Offense	Amount Assessed	No. Convictions
Maintaining liquor nuisance fines	$21,750.00	58
Illegal sale of liquor fines	400.00	5
Keeping gambling house fines	150.00	2
Lewdness fines	200.00	1
Contempt fines	1,700.00	7
Carrying concealed weapon—jail sentence		1
Lewdness—jail sentence		1
Lewdness—reformatory		4
Keeping house of ill fame—reformatory		1
Attorney fees taxed as costs and part of judgment in favor of county attorney of Woodbury county	3,100.00	
	$27,300.00	80

INDICTMENTS RETURNED—CASES PENDING.

Maintaining liquor nuisance	38
Soliciting for prostitution	11
Prostitution	22
Adultery	1
Gambling	11
Total pending	83

INJUNCTIONS GRANTED.

Liquor injunctions	27
Red light injunctions	2
Total	29

The wisdom of the enactment of this removal law has been more than justified. It has given to the state of Iowa a higher degree of efficiency in its officials than would have been possible to have obtained in any other way. The people of Iowa have come to regard a public office as a public trust, and the removal law enables the law enforcing department to enforce the law if the public officials fail to have that conception of a public office in the performance of their duties.

LAW ENFORCEMENT BY THE GOVERNOR AND THE ATTORNEY GENERAL.

The wisdom of this character of law enforcement is demonstrated by the fact that greater demands are made upon the office of attorney general for special men than it is possible to meet. This department has been compelled to ignore hundreds of requests for special agents from officers and citizens throughout the state with reference to sending help to enforce the law because of our inability to supply the men from the limited number at our disposal.

AMOUNT ALLOWED NOT SUFFICIENT.

The total amount allowed for law enforcement is $25,000 per annum, and this covers all kinds and character of crimes from murder down.

In some of the states of the Union as much as $100,000 has been appropriated for a single year's work in the enforcement of the liquor laws alone, and in some of the states there is an unlimited amount in the way of expenses for the enforcement of law.

We suggested to the legislature two years ago when the amount

was fixed in chapter 231, $25,000 was sufficient with which to make a trial.

The detailed report hereinafter submitted justifies the enactment of the statute and justifies the additional amount for which we are asking in this report.

The amount of fines and penalties assessed has been over $140,000 and this does not take into account the fact that we have done thousands of dollars' worth of work in the way of investigation of crimes where no credit has been claimed by the department.

In order to comply with some of the demands made upon us, we have had to use not only the $25,000 annually, but have had to draw largely upon the contingent fund allowed the department.

The reason for the increase which we are asking is on account of the increased demands for assistance in the various counties in this state, and it is impossible to take care of more than twenty-five per cent of the demands being made upon this department by the law-enforcing officers of the state.

We are asking that chapter 231, acts of the 37th General Assembly, be amended so as to allow the expenditure of not to exceed $75,000 annually. This does not mean that it shall be expended unless it is necessary, but it does mean that the state shall not be hampered for the want of funds in the enforcement of the law.

WORK OF THE SPECIAL AGENTS.

The work of the special agents' department of the state has been systematized.

We herewith submit a detailed statement of the work accomplished by the special agents in the state of Iowa during the last two years, which we think speaks for itself.

This report, covering the period from January 2, 1917, to December 31, 1918, is as follows:

CRIMES RELATING TO INTOXICATING LIQUOR.

Nature of Violation	Penalty Assessed	No. Convictions
Giving liquor to minors—fines	$ 275.00	3
Mulct tax collected	8,550.00	
Mulct tax assessed but not paid	24,150.00	
Maintaining liquor nuisances, etc. (fines, including attorney fees)	108,669.65	109

Nature of Violation	Penalty Assessed	No. Convictions
Bootlegging—fines	$ 11,914.00	100
Contempt—fines	4,800.00	20
Contempt—jail sentences		17
Injunction granted		210
Liquor nuisances abated		29
Druggist permits surrendered and revoked		91
Injunctions—cases pending		76
Giving liquor to minors—pending		1
Value of liquor seized, destroyed or given to Red Cross, hospitals and U. S. Army	298,477.50	

CIGARETTE VIOLATIONS.

Sale or gift of cigarette—fines	$ 675.00	9
Mulct tax assessed—uncollected—pending in Supreme Court	39,000.00	
No. packages of cigarettes seized		412,834
No. packages of cigarette papers		1,220

VIOLATIONS OF LAWS RELATING TO MORALITY.

Rape, sentences for life		2
Keeping house of ill fame—convicted		7
Prostitution—convicted		16
Soliciting for purpose of prostitution—convicted		3
Lewdness—convicted—fines	$1,605.00	87
Arrests for operating immoral shows—fines	1,000.00	11

CASES PENDING.

Rape cases—pending	2
No. persons arrested in vice crusade and examined by state and government physicians under venereal disease statute	4,789

MISCELLANEOUS CRIMES—CONVICTIONS.

Nature of Crime	Penalty Assessed	No. Convictions
Murder		4
Robbery in night time		2
Disturbing peace—fines	$ 540.00	28
Selling "dope"—fines	700.00	7
Obstructing justice		1
False pretenses		2
Larceny		8
Bank robbery		1
Carrying concealed weapon		5
Vagrancy		87
Allowing minors in pool hall		8
Breaking and entering freight cars—fines	1,500.00	4
Gambling—fines	5,798.50	183

CASES PENDING.

	Cases Pending
Murder—pending	2
Dynamiting cases	2
Assault with intent to commit murder	2
"Dope" cases	1
Conspiracy cases	27
Possession of burglar tools	1
Larceny	19
Gambling	29
Reckless driving of auto	1

FURTHER NOTATION.

Nature of Crime		No. Convictions
Value of gambling devices destroyed	$15,450	
Stolen property recovered	10,625	
Confessions secured		135
Indictments returned—cases pending		215
Convictions in federal court		20
Cases pending in federal court		37
Persons returned from other states for trial on charge of felony		5
Assisted in policing State Fair Grounds during fair in 1917 and 1918. Also assisted in policing Interstate Fair in 1918.		

RECAPITULATION.

Fines and mulct tax collected	$146,027.15
Liquor mulct tax assessed	24,150.00
Cigarette mulct tax assessed	39,000.00
Total	$207,977.15
Value of liquor seized (estimated value)	$298,477.50
Stolen property recovered	10,625.00

A vast amount of other work has been accomplished by the special agents not mentioned in this report, such as the investigation of fires of incendiary origin, murders and thefts, in which no arrests have so far been made.

A vast amount of time of the special agents has been spent in assisting the government in connection with the war work in keeping conditions clean around the army cantonment. This included assistance to the government and military police with reference to

the unlawful sale of liquor and its transportation and with reference to prostitution.

I call your attention to the fact that we have spent in the first five months of the present fiscal year $17,000 of the $25,000 per year allowed, and have been unable to meet more than twenty-five per cent of the demands for help made by law-enforcing officers.

STATUTES WHICH SHOULD BE AMENDED, AND NEW LAWS WHICH SHOULD BE ENACTED.

In the operation of the office during the last two years situations have arisen which have directed the attention of the office to the weakness of certain statutes and the necessity for amendments to the same in order that there may be a proper enforcement of the law.

These suggestions for amendments and new laws are miscellaneous in their character and are placed under the one heading.

(1) *The Amendment to the Motor Vehicle Law.*

In this connection I call your attention to pages 24 and 26, inclusive, of this report.

(2) *The Special Agent Law.* (Chap. 231, Acts 37th G. A.)

See page 18 of this report.

(3) *Amendment to Removal Law.*

In this connection I call attention to page 27 of this report. Section 1258-c as amended by chapter 391, acts of the 37th General Assembly, should be amended so that all police officers, and all county, city and town officers shall be subject to removal upon the grounds stated in section 1258-c of the code of 1913.

(4) *The Law with Reference to Jury Commissions.* (Chapter 267, Acts of the 37th General Assembly.)

This law should be amended so as to provide—

(a) For filling vacancies in the commission caused by sickness, death, removal from jurisdiction, or inability to act for any valid reason;

(b) For the allowance of at least one week's time in the selection of the jurors.

The statute with reference to jury commissions has proven to

be one of the good statutes adopted by the 37th General Assembly. The jury commission has given to the larger cities better grand and petit juries than they ever had before in their experience. A better administration of the law has been secured than could have been secured under the old system. The courts have universally commended the plan of the jury commission. It has been found, however, that the time allowed for the selection of juries in the larger cities is entirely inadequate. It has taken the time in many instances of at least a week and the men who have been selected on the jury commission have sacrificed of their time and paid their additional expenses out of their own pockets because under the wording of the statute it is impossible to make them a greater allowance. This ought not to be. A greater amount of time should be allowed, and the experience of the various judges indicates that in the larger places at least one week's time is needed and possibly, in the largest counties, two additional commissioners, because of the inability of the commissioners to know the men from the various parts of the county.

(5) *Change of Place of Trial by the State Authorized, and Change of Place of Trial Upon the Application of the State.*

The experience of this department in the last two years has demonstrated the fact that there arise conditions which make necessary a statute authorizing a change of place of trial upon application by the state.

In at least two instances there has been a gross miscarriage of justice because in the community where the crime was committed, those opposed to the prosecution have gone out and deliberately worked up sentiment to prevent the conviction of persons guilty of crime. There is no valid reason why, when a situation of that kind exists, the state should be compelled to draw a jury from a body of men whose minds have been prejudiced by those friendly to the defense.

In the case of *State v. Kelly*, approximately 150 veniremen were examined before a jury was secured, and it was perfectly apparent to every man connected with the court that notwithstanding the large number of men examined, the minds of the jurors selected were poisoned and fixed by reason of the discussion that had gone on in the community.

If a change of place of trial is allowed to the defendant as it now is under the statute, there is no valid reason why there should not

be a provision made for granting to the state the right to a change of place of trial.

By way of example, we might state that in Montgomery county 25 public meetings were held condemning the prosecution of the defendant, Kelly, in the case of *State v. Kelly,* all of the officers connected with the prosecution being condemned in these various meetings.

(6) *Law Increasing the Penalty for Transporting in Any Manner or Bringing into the State in Any Manner Intoxicating Liquors.*

(7) *The Law with Reference to Transporting into the State Any Intoxicating Liquors Should Be Amended.*

Under our present statute no common carrier can lawfully bring into the state any intoxicating liquors unless it is being transferred to a permit holder. This law has generally been observed by the railroad companies in Iowa. I think it should be said to the credit of the general counsel and managing officers of the railway corporations operating in the state of Iowa that they have tried to observe this law and have generally given to this department their full co-operation with reference to the enforcement of this statute, but there exists a condition which is intolerable. Men who have been engaged in the bootlegging business have driven outside the state with automobiles and are transporting into the state daily hundreds of gallons of intoxicating liquors. The law should make all of the costs in connection with any prosecution for transportation or the parties connected therewith a lien upon the vehicle in which the goods are being transported, and provide that the vehicle may be held and sold for the payment of such costs.

(8) *Chapter 350, Acts of the 37th General Assembly, should be amended so that it shall read "five" instead of "four" assistants in the office of the Attorney General.*

(9) *The Liquor Law should be amended so as to permit the shipment of altar wine to the clergy direct.*

This should receive the prompt attention of the legislature and a statute enacted covering the same to allow interstate shipments of altar wine to the clergy for sacramental purposes.

(10) *Motor Vehicle Law.*

We desire to call your attention to the situation with reference to the Motor Vehicle Law.

The practical operation of this law as it has been administered so far as its enforcement is concerned has been a complete failure, and thousands of dollars have been lost to the state of Iowa.

Section 1571-m-7 provides for the collection of the automobile license by the secretary of state and if the same is not paid on or before April 1st, then makes the further provision as follows:

> "On April 1st of each year a penalty of ten per cent shall be added to all fees not paid by that date, and on May 1st of each year the secretary of state shall send to the county attorney of each county a list of all motor vehicles in said county on which registration fee has not been paid showing the amount of delinquent fee, registration number, make and factory number, together with the name of the owner of each such car as disclosed by his records."

Complaint has come to this department on the part of the county attorneys throughout the entire state of Iowa of their inability to enforce the law under the circumstances as they have existed. The practical operation of this law has permitted the owners of hundreds of automobiles to escape the payment of license fees. We have taken the matter of the enforcement of this law up repeatedly with the various county attorneys and have satisfied ourselves that as the law now stands, it is wholly impracticable in the matter of enforcement. If the collection of this tax is to be enforced by the local officers, a plan something similar to the Hunter's License statute, with an annual plate to be distributed from the county auditor's office, would be a much more workable plan in the enforcement of the law. As the law now stands, the local officers must finally enforce the law, and if they must enforce it, they could do so more easily if they had the authority to administer it as well.

(11) *Automobile Headlight Law.*

I call your attention to chapter 148, acts of the 37th General Assembly, which provides with reference to lights upon motor vehicles. The statute evidently provides exactly the opposite from what was intended. We have made a test case with reference to this statute, but so far the supreme court has not decided the same, and the statute should be amended so that the rays of light 75 feet or more ahead of the vehicle shall not rise above 42 inches from the

level surface on which the vehicle stands under all condition of load.

(12) *Speed of Automobiles on Highways.*

Another matter concerning which there has been serious complaint and for which there is no penalty, is the excessive speed of automobiles upon the highways. The speed of an automobile cannot be regulated upon any highway except that which is inside the corporate limits of an incorporated town, the only penalty at present being that of the presumption of contributory negligence in case an injury occurs if the automobile is traveling at a rate of speed above 25 miles per hour.

We recommend that a statute be passed which will compel the drivers of automobiles on the highways to operate their cars with due regard to the safety of others traveling upon the highway. The automobile has created a new peril in the use of the public highway and this peril has been greatly enhanced by the recklessness of operators who propel the machines with the speed of railway trains. Some statute commensurate with the public safety and not unduly harsh or restrictive upon users of motor cars should be evolved to meet the situation which has arisen.

(13) *The penalty with reference to operating a machine while intoxicated is not sufficient.*

In this connection we call your attention to the fact that a man operating a motor vehicle while in an intoxicated condition is only punishable by a fine of twenty-five dollars.

Section 1571-m-23, supplemental supplement to the code, 1915, provides in part:

> "Whoever operates a motor vehicle while in an intoxicated condition shall be guilty of a misdemeanor."

Section 1571-m-26, supplemental supplement to the code, 1915, provides:

> "Any person violating any of the provision of any section of this act for which no punishment has been specified, shall be guilty of a misdemeanor, punishable by a fine not exceeding twenty-five dollars."

Some of the most serious automobile accidents in this state have occurred through the reckless operation of machines by drunken

drivers. A fine of $25.00 is not sufficient. General complaint with reference to this statute has come to this department from the various district judges throughout the state and the various prosecuting attorneys, and we believe their criticism is well founded, and I call your attention to the matter for that reason.

AMENDMENT TO REMOVAL LAW.

The law as it now stands should be amended. We have been confronted in the last two years with a situation where a man who was a chief of police of a city was in a beastly state of intoxication and so forgot his duties that he rode up and down the streets in an automobile with two women of questionable character.

The law as it now stands does not permit the bringing of a removal suit against such an officer. Scenes of that kind are a disgrace to the community and to the state and the law should be amended so that officers of that kind can be reached. There are other similar instances with reference to chiefs of police and police officers.

I therefore recommend that section 1258-c as amended by chapter 391, acts of the 37th General Assembly, be amended so that all police officers and all county, city and town officers shall be subject to removal.

CEMENT TRUST INVESTIGATION.

With reference to the investigation as authorized by chapter 273 of the acts of the Thirty-seventh General Assembly in regard to illegal combinations of the manufacturers of cement, I beg to report that said investigation has not been completed. Appointment was made with reference to this investigation, but on account of sickness and conditions over which the appointee had no control, the matter was delayed from time to time and the party appointed to make this investigation originally has been compelled to surrender the appointment, since which time I have appointed Hon. Shelby Cullison of Harlan, Iowa, to complete the investigation, and hope to be able to report fully to the legislature before its adjournment with reference to said matter.

COMMENDATIONS.

In this connection I desire to acknowledge the very efficient and loyal work rendered to this department by Assistant Attorneys

General F. C. Davidson of Emmetsburg, Iowa; Mr. W. R. C. Kendrick of Keokuk, Iowa; Mr. J. W. Kindig of Sioux City, Iowa; Mr. H. H. Carter of Corydon, Iowa, and Mr. J. W. Sandusky of New Hampton, Iowa, and of my law clerk and stenographer, Mrs. Jessie H. Courtney of Des Moines, Iowa.

The efficient work of law enforcement could not have been accomplished without the loyal support given the department of justice by the special agents. In this connection, I desire to especially commend the work of Mr. O. O. Rock of Logan, Iowa; Mr. H. W. Terrell of Mt. Ayr, Iowa; Mr. James E. Risden of Cedar Rapids, Iowa; Mr. H. M. Long of Bedford, Iowa; Mr. U. L. Crawford of Des Moines, Iowa; Mr. John B. Hammond of Des Moines, Iowa, and Mr. W. A. Size of Postville, Iowa, who have been with the department during my entire term of office.

IMPORTANT OPINIONS

OF THE

ATTORNEY GENERAL

FOR

Biennial Period
1917-1918

OPINIONS TO THE GOVERNOR

PROHIBITORY AMENDMENT.

Failure of the Legislature to provide in a proposed amendment to the Constitution for the submission of the same to the voters for approval does not affect its validity.

The fact that a comma appears in the proposed amendment as ratified by one session of the Legislature and not in the one ratified at a previous session does not affect the validity of the proposed amendment.

The fact that a difference existed in the capitalization of certain words of a proposed amendment as ratified at two sessions of the Legislature does not affect its vaidity.

January 27, 1917.

Hon. W. L. Harding, Governor.

Dear Sir: Your favor of January 23d received, calling upon this department for an opinion in regard to Senate Joint Resolution No. 3, with reference to the following:

First: Whether the last quoted clause therein will be a failure to provide for submission to the electorate, and be no more than a referring of the same to the next general assembly.

Second: Whether the insertion of the comma after the word "resolved" in the quoted portion of the resolution, differs from the one passed by the 36th General Assembly in the insertion of such comma, and if it does so differ, whether it would affect the validity of the joint resolution.

Third: Whether the failure to capitalize certain words which were capitalized in Senate Joint Resolution No. 6 of the 36th General Assembly, as the same is set out and referred to in Senate Joint Resolution No. 3 of the 37th General Assembly would invalidate such joint resolution.

The department of justice has examined the records as they exist in connection with said resolution, and reports the following:

Senate Joint Resolution No. 6, introduced by the 36th General Assembly, as to capitals and punctuation, is as follows, to-wit:

SENATE JOINT RESOLUTION NO. 6—By Wilson and Thomas.

SENATE JOINT RESOLUTION.

JOINT RESOLUTION PROPOSING TO AMEND ARTICLE ONE (1) OF THE CONSTITUTION OF

IOWA BY ADDING THERETO A PROVISION PROHIBITING THE MANUFACTURE, SALE OR KEEPING FOR SALE OF INTOXICATING LIQUORS, AS A BEVERAGE, WITHIN THIS STATE.

Be it resolved by the General Assembly of the State of Iowa:

That the following amendment to Article One (1) of the State of Iowa be and the same is hereby proposed: To add thereto following Section twenty-six (26) thereof and as Section twenty-seven (27) of Article One (1) of said constitution the following, to-wit:

"Sec. 27. The manufacture, sale, or keeping for sale, as a beverage, of intoxicating liquors, including ale, wine and beer, shall be forever prohibited within this state. The General Assembly shall by law prescribe regulations for the enforcement of the prohibition herein contained, and shall provide suitable penalties for the violation of the provisions hereof."

Resolved further, That the foregoing proposed amendment be and the same is hereby referred to the legislature to be chosen at the next general election for members of the next General Assembly, and that the Secretary of State cause the same to be published for three months previous to the day of said election, as provided by law.

Senate Joint Resolution No. 6, as it appears on pages 326 and 327 in the certified copy of the Senate Journal of the 36th General Assembly, filed with the secretary of state, with reference to capitals and punctuation, is as follows, to-wit:

SENATE JOINT RESOLUTION NO. 6.

Joint Resolution Proposing to Amend Article One (1) of the Constitution of Iowa by Adding Thereto a Provision Prohibiting the Manufacture, Sale or Keeping for Sale, of Intoxicating Liquors, as a Beverage, within This State.

Be It Resolved by the General Assembly of the State of Iowa:

That the following amendment to article one (1) of the constitution of the state of Iowa be and the same is hereby proposed: To add thereto following section twenty-six (26) thereof and as section twenty-seven (27) of article one (1) of said constitution the following, to-wit:

"Sec. 27. The manufacture, sale, or keeping for sale, as a beverage, of intoxicating liquors, including ale, wine and beer, shall be forever prohibited within this state. The General Assembly shall by law prescribe regulations for the enforcement of the prohibition herein contained, and shall

provide suitable penalties for the violation of the provisions hereof."

Resolved, Further, That the foregoing proposed amendment be and the same is hereby referred to the legislature to be chosen at the next general election for members of the next general assembly, and that the secretary of state cause the same to be published for three months previous to the day of said election, as provided by law.

Senate Joint Resolution No. 6 of the 36th General Assembly, as it appears on page 589 in the certified copy of the House Journal of the 36th General Assembly on file with the secretary of state, with reference to capitals and punctuation, is as follows, to-wit:

SENATE JOINT RESOLUTION NO. 6.

Joint Resolution Proposing to Amend Article One (1) of the Constitution of Iowa by Adding Thereto a Provision Prohibiting the Manufacture, Sale, or Keeping for Sale, of Intoxicating Liquors, as a Beverage, Within This State.

Be It Resolved by the General Assembly of the State of Iowa:

That the following amendment to article one (1) of the constitution of the state of Iowa be and the same is hereby proposed: To add thereto following section twenty-six (26) thereof and as section twenty-seven (27) of article one (1) of said constitution the following, to-wit:

"Section 27. The manufacture, sale, or keeping for sale, as a beverage, of intoxicating liquors, including ale, wine, and beer, shall be forever prohibited within this state. The General Assembly shall by law prescribe regulations for the enforcement of the prohibition herein contained, and shall provide suitable penalties for the violation of the provisions hereof."

Resolved Further, That the foregoing proposed amendment be and the same is hereby referred to the legislature to be chosen at the next general election for members of the next General Assembly, and that the secretary of state cause the same to be published for three months previous to the day of said election, as provided by law.

Senate Joint Resolution No. 3 of the 37th General Assembly, as originally introduced, and as the same now appears of record in the Senate Journal of the 37th General Assembly, with reference to capitals and punctuation, is as follows, to-wit:

SENATE JOINT RESOLUTION NO. 3—By Wilson.

Joint Resolution agreeing to a proposed amendment to article one (1) of the constitution of Iowa by adding thereto

a provision prohibiting the manufacture, sale or keeping for sale, of intoxicating liquors, as a beverage, within this state.

Whereas, by senate joint resolution number six (6) of the resolutions of the thirty-sixth general assembly, which resolution was approved March 8, 1915, an amendment to the constitution of the state of Iowa was proposed, and,

Whereas, the said proposed amendment was agreed to by a majority of the members elected to the house of representatives of said thirty-sixth general assembly and entered upon its journal at page five hundred eighty-nine (589) thereof, and was agreed to by a majority of the members elected to the senate of said general assembly and entered upon its journal at pages three hundred and twenty-six (326) and three hundred and twenty-seven (327) thereof, and,

Whereas, the said resolution has been published as provided by law and has now been referred to this, the 37th General Assembly, now, therefore,

Be It Resolved by the General Assembly of the State of Iowa:

That the proposed amendment to the constitution of the state of Iowa as contained in and proposed by said senate joint resolution number six (6) of the resolutions of the thirty-sixth general assembly, which resolution, including its title, was and is in words and figures as follows, to-wit:

"Joint resolution proposing to amend article one (1) of the constitution of Iowa by adding thereto a provision prohibiting the manufacture, sale, or keeping for sale, of intoxicating liquors, as a beverage, within this state.

Be It Resolved by the General Assembly of the State of Iowa:

That the following amendment to article one (1) of the constitutions of the state of Iowa be and the same is hereby proposed: To add thereto following section twenty-six (26) thereof and as section twenty-seven (27) of article one (1) of said constitution the following, to-wit:

"Section 27. The manufacture, sale, or keeping for sale, as a beverage, of intoxicating liquors, including ale, wine, and beer, shall be forever prohibited within this state. The general assembly shall by law prescribe regulations for the enforcement of the prohibition herein contained, and shall provide suitable penalties for the violation of the provisions hereof."

Resolved, further, that the foregoing proposed amendment be and the same is hereby referred to the legislature to be chosen at the next general election for members of the next general assembly, and that the secretary of state

cause the same to be published for three months previous to the day of said election, as provided by law.

be and the same is hereby agreed to, enacted and adopted.

In connection with the first proposition, namely: whether the last quoted clause herein will be a failure to provide for submission to the electorate, and be no more than a referring of the same to the next general assembly, it might be well for us to review the history of the adoption of some of the amendments to our state constitution, and which have gone unchallenged with reference to the method of their adoption.

(1) We call your attention to the acts of the 11th General Assembly in which there is found a proposal to amend the state constitution in chapter 98 on page 106. This is referred to as an act of the 11th General Assembly, and not as a resolution or joint resolution. This act was referred to the 12th General Assembly by what is known in the acts of the 11th General Assembly as chapter 101, appearing on page 108. The 12th General Assembly ratified the proposed amendment by a joint resolution, No. 11, which appears on page 290 of the acts of the 12th General Assembly.

You will notice that the 11th General Assembly proposed this amendment by an act and referred it to the 12th General Assembly by another act, and then it was agreed to by a joint resolution of the 12th General Assembly.

(2) Another amendment to the constitution was proposed by the 17th General Assembly and also referred to the next general assembly by joint resolution No. 5, appearing on page 178, reading as follows:

NUMBER 5.

PROPOSING to Amend Section four (4) of Article three (3) of the Constitution of the State of Iowa, and to Provide for its Reference and Publication.

Be it Resolved by the General Assembly of the State of Iowa:

That the following amendment to the constitution of the state, be, and the same is hereby proposed, viz.:

Strike out the words, "free white," from the third line of section four (4) of article three (3) of said constitution, relating to the legislative department.

Resolved, further, That the foregoing proposed amendment to the constitution of the state of Iowa, be, and the same hereby is referred to the legislature, to be chosen at

the next general election for members of the general assembly, and that the secretary of state cause the same to be published for three months previous to the day of such election, in two weekly newspapers in each congressional district in the state.

This proposed amendment was agreed to and referred to the people by joint resolution No. 6 of the 18th General Assembly, appearing at page 214, which joint resolution is as follows, to-wit:

NUMBER 6.

JOINT RESOLUTION Agreeing to, Ratifying, and Confirming an Amendment to Section Four (4) of Article Three (3) of the constitution of the State of Iowa, Relating to the Legislative Department.

Whereas, The seventeenth general assembly of the state of Iowa, in due form, by a majority of the members elected to each of the two houses, agree to a proposed amendment to the constitution of this State, to strike the words "free white" from the third line of section four (4) of article three (3) of said constitution, and the same was entered on the journals thereof, and was referred to the legislature to be chosen at the next general election, and the same having been published as provided by law; therefore,

Be it Resolved by the General Assembly of the State of Iowa:

That the following amendment to the constitution of the state be and the same is hereby agreed to, ratified, and confirmed: Strike out the words "free white" from the third line of section four (4) of article three (3) of said constitution, relating to the legislative department.

Resolved, further, That the foregoing proposed amendment to the constitution be and the same is hereby submitted to the qualified electors of this state for their approval at the next ensuing general election, in the manner provided by law.

You will note that the 17th General Assembly referred the proposed amendment to the 18th General Assembly by a resolution which was a part of the same joint resolution proposing the amendment. You will also note that the 18th General Assembly, as a part of the joint resolution agreeing to and ratifying said proposed amendment, referred the same to the people.

(3) Another amendment to the constitution was proposed by joint resolution No. 6 of the 18th General Assembly, found on page 215. This joint resolution contained the resolution re-

ferring it to the 19th General Assembly, and this proposed amendment was agreed to by joint resolution No. 8 of the 19th General Assembly, found on page 178, which joint resolution in the preamble contained a quotation from the joint resolution of the 18th General Assembly proposing the amendment, and this joint resolution did not contain any resolution of reference of the proposed amendment to the people. The reference of this proposed amendment to the people was made by an act of the 19th General Assembly, and not by joint resolution. (See chapter 172, page 164, of the acts of said general assembly.) This act of reference contained the provisions in regard to the method of holding the election and the form of the ballot.

(4) Another constitutional amendment was proposed by joint resolution No. 12 of the 19th General Assembly, found on page 180, and the reference of this amendment to the next general assembly was a part of the said joint resolution. This amendment was agreed to by the 20th General Assembly by joint resolution No. 13, at pages 234 and 235, and the preamble contained quotations from the original joint resolution of the 19th General Assembly which were not set out in quotation marks. In the joint resolution of the 19th General Assembly there were fifteen commas in the proposed amendment as therein set out. The proposed amendment was quoted in the preamble of the joint resolution of the 20th General Assembly and eleven commas are found in the proposed amendment as set out in the preamble, and these are not distributed in the same way or places as in the original resolution of the 19th General Assembly, and the proposed amendment as agreed to following the resolution making the agreement as set out in joint resolution No. 13 of the 20th General Assembly, has only eight commas.

You will note there was no resolution of reference to the people in connection with joint resolution No. 13 of the acts of the 20th General Assembly, this having been rendered unnecessary by section 56 of the code, which was chapter 7 of the 19th General Assembly, and provided for submission at the next general election, if it was not otherwise provided for by the legislature agreeing to the proposed amendment.

(5) Another amendment to the constitution was proposed by joint resolution No. 22 of the 29th General Assembly, shown at page 198, and the resolution of reference referring it to the 30th General Assembly was a part of the joint resolution.

The same amendment is found in joint resolution No. 2 at page 208 of the acts of the 30th General Assembly, but instead of the 30th General Assembly by joint resolution No. 2 agreeing to the amendment proposed by the 29th General Assembly, they reproposed the same amendment with this exception; instead of the resolution of reference referring it to the next general assembly, the following resolution is found as a part of joint resolution No. 2:

> Be it further resolved: That this resolution and the foregoing amendment to the constitution of the state of Iowa, having been adopted by the 29th General Assembly, in manner and form, and by the majority required by the constitution of the state of Iowa, and the statutes thereof, shall be submitted for ratification or rejection, by the electors of the state of Iowa, at the general election for state officers, to be held in November, 1904.

(6) Another constitutional amendment was proposed by joint resolution No. 5 of the acts of the 29th General Assembly on page 199, and the resolution of reference referring it to the next general assembly, was contained in such joint resolution. This amendment was reproposed and agreed to by the 30th General Assembly by joint resolution No. 1 at page 207 of the acts of the 30th General Assembly, and the resolution referring it to the people was contained in said joint resolution, and was in substantially the same form as joint resolution No. 2 last above referred to of the acts of the 30th General Assembly.

(7) Another proposed amendment to the constitution is found in joint resolution No. 6 of the 30th General Assembly at page 210. This joint resolution contained the resolution of reference referring it to the next general assembly, which resolution of reference is as follows:

> Resolved further that the foregoing proposed amendment to the constitution of the state of Iowa be, and the same is hereby referred to the legislature to be chosen at the next general election for members of the General Assembly and that the secretary of state cause the same to be published for three (3) months previous to the day of such election as provided by law.

This same constitutional amendment was not agreed to by the 31st General Assembly, but was reproposed, and appears in the acts of the 31st General Assembly as an original proposition to amend the constitution, and is known and referred to as joint

resolution No. 1, on page 210, and contains the same resolution of reference to the next General Assembly, and is found in joint resolution No. 6 of the 30th General Assembly.

This same proposed amendment is found in the acts of the 32d General Assembly at page 282, as house joint resolution No. 2, and in this joint resolution the former joint resolution was not agreed to, but it appears to be an original proposition to amend the constitution, except for the last paragraph which contains the resolution of reference to the voters of the state, which resolution of reference is as follows:

> Be it further resolved: That the foregoing proposed amendment to the constitution of the state of Iowa having been adopted by the Thirtieth (30th) and the Thirty-first (31st) General Assemblies, in manner and form, and by the majority required by the constitution of the state of Iowa, and the statutes thereof, shall be submitted for ratification or rejection, by the electors of the state of Iowa, at the general election for state officers to be held in November 1908.

You will note the language used. "Having been adopted," etc., not being the language of the constitution "agreed to."

(8) Another amendment was proposed to the constitution of the state by the 30th General Assembly by the house joint resolution No. 6. This proposed amendment did not carry with it the resolution of reference to the next general assembly, but the resolution of reference to the next general assembly is found in the acts of the 35th General Assembly at page 431, as senate joint resolution No. 10.

By senate joint resolution No. 7 of the 36th General Assembly, this proposed amendment was agreed to and was incorporated in full in the resolution agreeing thereto. (See pages 338 and 339, senate journal of the 36th G. A.)

We have set out the foregoing for the purpose of showing that no fixed plan has been followed in the adoption of the amendments to the constitution, and indeed none is fixed by the constitution itself, except that—

> Any amendment or amendments to this constitution may be proposed in either house of the general assembly, and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment shall be entered on their journals with the yeas and nays taken thereon and referred to the legislature to be

chosen at the next general election. (See constitution, Art. 10, section 1, page 104 of the code of 1897.)

Any method which complies with these requirements is sufficient method for the adoption of an amendment to the constitution.

In connection with the first proposition as to whether the last quoted clause will be a failure to provide for submission to the electorate, etc., I call your attention to section 56 hereinabove quoted, which automatically and by force of the statute would compel the submission of the same to the electorate at the next general election, unless it is otherwise provided by this general assembly.

We also call your attention in this connection to that part of senate joint resolution No. 3 which is as follows:

> Be it Resolved by the General Assembly of the State of Iowa:
>
> That the proposed amendment to the constitution of the state of Iowa AS CONTAINED IN AND PROPOSED BY SAID SENATE JOINT RESOLUTION NUMBER SIX (6) OF THE RESOLUTIONS OF THE THIRTY-SIXTH GENERAL ASSEMBLY * * * be and the same is hereby agreed to, enacted and adopted.

That which is agreed to, enacted and adopted is the proposed amendment as contained in and proposed by senate joint resolution No. 6, and inasmuch as the resolution of reference is no part of the proposed amendment, but is the mere vehicle by which the proposed amendment was referred to this general assembly, under no reasonable or fair construction of the language of the resolution could it be said that resolution of reference was re-enacted by senate joint resolution No. 3.

We call your attention further to the fact that senate joint resolution No. 3 provides as follows:

> Be it resolved by the general assembly of the state of Iowa: That the proposed amendment to the constitution of the state of Iowa, as contained in and proposed by senate joint resolution No. 6 of the resolutions of the thirty-sixth general assembly, *which resolution, including its title, was and is in words and figures as follows, to-wit*:

Then follows an entire copy in haec verba of senate joint resolution No. 6 of the 36th General Assembly, and inasmuch as the resolution of reference was a part of senate joint resolution

No. 6 of the 36th General Assembly, it would have been improper to have said that a copy of the resolution was included, and then have failed to have included the entire resolution.

The setting out of senate joint resolution No. 6 of the 36th General Assembly in toto has only the effect of connecting and showing that the steps required by the statute had been complied with in the adoption of senate joint resolution No. 6, and in its reference to the 37th General Assembly and the resolution of reference to the 37th General Assembly as therein set out, shows upon its face that it speaks in regard to the matter of reference from the date of its enactment by the 36th General Assembly, and not as a matter of reference by the 37th General Assembly.

We therefore hold that the resolution of reference referred to in the first ground is not a resolution referring it to the 38th General Assembly, and is proper in the form in which it is found in senate joint resolution No. 3, and will not have the effect of delaying the submission of the proposed amendment to the electorate.

Upon the question as to whether the insertion of the comma after the word "resolved" in the quoted portion of the resolution, differs from the one passed by the 36th General Assembly in the insertion of such comma, and if so, whether it would affect the validity of the joint resolution, we would say that the place where said comma occurs is following the word "resolved" in the resolution of reference which is no part of the proposed amendment, and hence could not under any circumstances affect the same, but even if it were a part of the proposed amendment, inasmuch as it does not change the sense or meaning, it could not possibly affect the validity of the proposed amendment.

We call your attention at this time to the fact that in the certified copy of the senate journal of the 36th General Assembly, the comma following the word "resolved" appears exactly as it is found in senate joint resolution No. 3. The comma does not appear following the word "resolved" in the house journal of the 36th General Assembly as the same appears at page 589 of the certified copy. Senate file No. 3 is introduced in the same branch of the legislature and is an exact copy, so far as the punctuation is concerned, as the original senate joint resolution No. 6 of the 36th General Assembly.

There can be no question but what it would be equally as proper to follow the punctuation as shown in the certified copy of the senate journal, as it would to follow the punctuation as shown in the certified copy of the house journal.

I call your attention to the condition of the records. The connection in which this is used, is, as stated above, in the resolution of reference, which is no part of the amendment, a part of which is as follows:

> "Resolved further, that the foregoing proposed amendment," etc.

Could any sane court for one moment justify a position that the placing of a comma after the word "resolved" would change in the slightest degree the sense or meaning of this expression? Note the connection:

> "Resolved further, that the foregoing proposed amendment," etc.
>
> "Resolved, further, that the foregoing proposed amendment," etc.

We challenge any man to read these two expressions at last above quoted with the punctuation different as it appears, and reach any conclusion other than that there is no difference between them. The insertion or omission of punctuation marks in a statute has no effect whatever to alter or change it. They are in no way of the substance. True, courts will aid themselves at times in the construction of an act by referring to the punctuation marks, but they are only aids, as in all written matter, to determine what the meaning of the writer is; they may be entirely omitted and the expression would have the same force and effect. The rule of the common law is to pay no attention to punctuation for it is contended that it would be a most dangerous thing to make any rights depend upon a punctuation mark, for, among the most learned men there might be a difference of opinion as to which punctuation was most proper, and in a case like the present joint resolution, how much more reason for the rule, for it is not to be supposed that the members of both houses would consult or would agree upon what punctuation was most fitted to express the meaning of the resolution. Even as to words, disagreements arise as to what is the exact meaning. How much more then, would it encumber the construction of a writing if the punctuation marks are to be regarded as of the substance of the writing?

We might cite for your consideration a multitude of authorities upon the proposition that punctuation is to be disregarded in the construction of statutes, and inasmuch as the punctuation complained of is no part of the proposed amendment, but only a part of the resolution of reference, we have no hesitancy whatever in saying that in our opinion, so far as the question of punctuation is concerned, senate joint resolution No. 3 of the 37th General Assembly is in proper form.

Regarding your third inquiry as to whether the failure to capitalize certain words which were capitalized in senate joint resolution No. 6 of the 36th General Assembly, as the same is set out and referred to in senate joint resolution No. 3 of the 37th General Assembly would invalidate such joint resolution, it is our opinion that every argument which was used in connection with the question of punctuation marks applies with even greater force to this inquiry, and that no court in the construction of a statute, or of the constitution, would ever say, and so far as we have been able to determine, has ever said, that a difference in capitalization would make any difference in the matter of the construction.

We think this question is well answered by the suggestion that if the journal of the senate should be kept in typewriting, and the journal of the house should be kept in longhand, and if a resolution were set out and incorporated, in a new joint resolution in typewriting, no man could contend, in our opinion, that there was any variance between the house and senate journals, or between the resolution as set out, because the one was in typewriting and the other in longhand, and yet he would have as much justification for that kind of a contention as he would for a contention in regard to the matter of capitalization.

One of the variations complained of in connection with the capitalization is that in the copy as set out in senate joint resolution No. 3 of the 37th General Assembly, the words "General Assembly" were not capitalized in the proposed amendment, while in the certified copies of the senate and house journals of the 36th General Assembly these words are capitalized.

There are hundreds of places in the code of this state where the words "general assembly" appear, and they are never capitalized. There could, in our judgment, be no successful contention that in the slightest degree changes the sense or mean-

ing by the capitalization of these words in the one place, and the failure to do so in the other.

We have examined the records in connection with the many amendments to the constitution, to which we have already called your attention, and in practically none of these amendments is the capitalization the same, yet, during all these years, in connection with the litigation that has arisen concerning these various amendments, no man has ever suggested or contended that the failure to have the capitalization the same has in any way changed the sense or meaning, or would in any wise invalidate them.

In this connection, we think it might not be out of place to call attention to the cases that have been decided by the court under the section of the constitution providing for amendments. The case of

Kahler & Lange vs. Hill, 60 Iowa, 543,

is probably the most noted of all decisions in our state on the matter of constitutional amendments, and while it is very doubtful whether the court of this state would ever again be as technical in the construction of the constitution with reference to the right to amend, as it was in that case, yet in the case of Kahler & Lange vs. Hill, the court at no time referred to, or considered the question of punctuation, although that was referred to and argued in the briefs of counsel. The reasons assigned for holding the constitutional amendment as therein discussed invalid was, 1st, that the amendment as passed by the senate forbid the use of intoxicating liquor in any manner and the constitutional amendment as passed by the house forbid its use only as a beverage; and 2d, that the proposed amendment was not spread upon the journals of the house and senate as required by the constitution, and that these two things must be complied with in order that the amendment might be held valid.

The difference between the amendment as proposed and as passed in the senate and in the house is best illustrated by an examination of the section as passed by the senate and as passed by the house.

> "Sec. 26. No person shall manufacture for sale, or sell or keep for sale as a beverage, OR TO BE USED, any intoxicating liquor whatever including ale, wine and beer," etc.

The part written in capital letters is the part that was at issue in the case of Kahler & Lange vs. Hill, supra.

The words "or to be used" were in the joint resolution, as passed by the senate, and these words were not in the proposed amendment as passed by the house or agreed to by the house.

There is no question that the constitution was not complied with in reference to the spreading of the proposed amendment upon the senate and house journals, and yet, in the case of Kahler & Lange vs. Hill, supra, there was a dissenting opinion in which it was contended that with the variations noted above, the proposed constitutional amendment should have been sustained.

We have the question of the amendment to the constitution discussed by our court in the case of

State vs. Brookhart, 113 Iowa, 259.

In that case, however, the only question which was involved that is pertinent to this matter, was that the joint resolution containing the proposed amendment should be spread upon the journals of both houses, and in that case this had not been done.

In the case of Kahler & Lance vs. Hill, supra, the court said:

> "When the object intended to be accomplished is considered, we think there is no doubt that it is the design and intent of the constitution that a proposed amendment thereto should be so entered on the journals that it can be known by an examination of the journals what it is that has been agreed to by each house of the general assembly which first acts thereon, to the end that the succeeding general assembly may certainly know what its predecessor did. . . . There is no provision requiring a bill to be entered on the journal, but the constitution does require that a proposed amendment thereto shall be entered on the journal with the 'yeas and nays.' This must mean that the amendment shall be spread at length thereon, and the yeas and nays set out in the journal in full or at length."

This is the same rule as followed in the case of State vs. Brookhart.

We call your attention to the language of this opinion and to the grounds upon which it is bottomed to show you that it was things of substance as provided by the constitution itself as to the manner of amendment which were omitted in the cases to which we have called your attention, and the matter of the punctuation and of capitalization is not of the substance, nor does it in any wise change the meaning of the language used in the proposed amendment.

We therefore say that with reference to punctuation and to capitalization, senate joint resolution No. 3 is in proper form.

There is a matter that we have discovered in our examination of the record that was not called to your attention and concerning which we were not asked to give an opinion, which we think ought to be remedied by an amendment in the house.

Senate Joint Resolution No. 3 in the recitation in the preamble with reference to senate joint resolution No. 6, recites that senate joint resolution No. 6, was approved March 8, 1915. This recitation of fact is not correct.

Senate Joint Resolution No. 6 was approved March 6, 1915, as shown by the original record and also by the certified copy of the senate Journal of the acts of the 36th General Assembly, on page 603 of said senate journal.

We therefore recommend that an amendment be offered in the house, changing the figure "8" to the figure "6," to make this recitation of fact conform to the truth.

We recommend but this one amendment for the reason we do not believe any other amendment is necessary, and every time an amendment is added, it gives added opportunity for mistakes to creep into the record, and gives added opportunity to the enemies of the amendment to raise questions as to its proper passage when the matter is to be finally tested in the courts, and it is important to know that its passage is carefully guarded in this manner in order that the opportunity for mistakes in connection with its passage is reduced to the minimum.

We recognize the importance of having this proposed amendment properly submitted to the people in order that there shall be no miscarriage of the will of the people when expressed by the ballot.

While it may seem that we have gone into this matter more at length than under ordinary circumstances would be expected or required, we have felt the importance of the matter to the people of the state justifies the effort.

H. M. HAVNER,
Attorney General.

ADJOINING COUNTIES DEFINED.

It is not necessary that counties physically adjoin each other in order to entitle a notary public to file a certified copy of appointment in an

adjoining county, as the word "adjoining" in such cases is not to be taken in a restrictive sense.

January 30, 1917.

Hon. W. L. Harding, Governor.

Dear Sir: We have your letter of the 24th instant, asking this department for an opinion as to what constitutes "adjoining counties" within the meaning of Sec. 377, 1913 Supplement to the Code, pertaining to the appointment of notaries public.

The section referred to is as follows:

> "Sec. 377. Powers. Each notary is invested with powers and shall perform the duties which pertain to that office by the custom and law of merchants within the county of his appointment or in an adjoining county in which he has filed in the office of the clerk of the district court a certified copy of his certificate of appointment. (34 G. A., ch. 19, Sec. 1) (C. '73, Sec. 262; R. Sec. 196; C. '51, Sec. 79.)"

From the letter attached to your request we take it that the party applying for the commission resides in Wapello county and desires to file certified copies of his commission in Monroe, Davis and Appanoose counties.

As to the first three named, there can be no question of his right to do so, and the only doubt that arises is as to Appanoose county, which only corners with Wapello county.

Webster defines the word "adjoining" as "joining to," "contiguous," "adjacent," "as in an adjoining room."

In Bouvier's dictionary, we find the following definition of the word "adjoining:"

> "The word in its etymological sense means 'adjoining' or 'contiguous' as distinguished from 'lying near' or 'adjacent',"

citing the 52 N. Y. 397.

> "The words 'along' and 'adjoining' are used as synonymous terms and as used in a statute implies 'contiguity', 'contact',"

and cites 67 Mo. 58.

The New York case arose over assessing cost of street improvements upon adjoining property. The Missouri case arose over the question of double damages for killing live stock by a railroad where it was the road's duty to fence between its right of way and adjoining lands.

In Vol. I, on page 188, of the West Publishing Company's edition of "Words and Phrases," we find the following:

"In Laws 1893, C. 73, Sec. 2, providing that territory outside of limits of any city or town 'adjoining' thereto, may be attached to such city or town for school purposes on application by a majority of electors of such adjacent territory. 'Adjoining' being used in connection with the word 'adjacent,' will be held to be used with the same meaning and as so used will be territory contiguous to, though not necessarily actually 'adjoining' the limits of such city. Sherwood District No. 74, vs. Long, 37 Pac. 603; 2 Okla 460."

"'Adjoining' means close to or near to, contiguous, the term may be of the same meaning as 'adjacent,' conveying the idea merely of nearness and not of immediate proximity. In Mathews vs. Kimball, 66 S. W. 651, 70 Ark. 467, the supreme court of Arkansas construed the provisions of the Constitution, Art. XIX, Sec. 27, authorizing special assessments for local improvements in cities and towns under such regulation as may be prescribed by law, to be based upon the consent of the majority in value of the property holders owning property 'adjoining' the locality to be affected, and holds that the use of the word 'adjoining' does not limit the power of the municipality to make a special assessment for park purposes to the property which actually touches the park grounds."

On page 190 of the above authority

"'Adjoining' as used in the statute giving jurisdiction to a justice of the peace to try an action either in the county where the plaintiff resides or before some justice of another town next 'adjoining' should be construed to mean that when the corners of four towns meet at one point the diagonal towns adjoined each other at the corner. Holmes vs. Carley, 31 N. Y. 289."

Prior to the 34th General Assembly the section of the statute referred to embraced only the following:

"Sec. 377. Powers. Each notary is invested with the powers and shall perform the duties which pertain to that office by the custom and law of merchants."

That legislature amended the section by adding thereto the following:

"within the county of his appointment or in any adjoining county in which he has filed in the office of the clerk of the district court a certified copy of his certificate of appointment."

The purpose of the amendment was to enlarge the area in which notaries public might perform the duties pertaining to that office. We are of the opinion that a restrictive construction of the statute would not be in keeping with the legislative intent

and therefore feel constrained to hold that the county of Appanoose "adjoins" the county of Wapello as regards the question of the right of a notary public appointed in the former county to file a certified copy of his commission in the latter county and perform the duties pertaining to such office in said county.

J. W. SANDUSKY,
Assistant Attorney General.

APPROPRIATIONS FOR MILITARY PURPOSES.

Under the provisions of Sections 1 and 2, Chapter 207, acts of the 37th General Assembly, the state of Iowa may provide for the equipping of a hospital unit.

June 20, 1917.

Hon. W. L. Harding, Governor.

Dear Sir: Your favor of the 20th inst., addressed to the attorney general containing an application of Doctor J. Fred Clarke asking for an appropriation of $5,000 with which to equip a hospital unit, and inquiring whether or not the legislative act authorizing one million dollars ($1,000,000.00) appropriation for military purposes may be used for such purpose has been referred to me for answer.

In reply thereto, I beg to call your attention to sections one and two, chapter 207 of the acts of the 37th General Assembly, being the act appropriating the one million dollars ($1,000,000.00) for military purposes.

> Section 1. Appropriation—purposes. There is hereby appropriated out of any money in the state treasury not otherwise appropriated, the sum of one million dollars ($1,000,000.00) or so much thereof as may be necessary and authorized, to be used under this act; the same to be used as provided in this act in providing, equipping, and raising, and for the benefit of any military organization of the state of Iowa for service in the armies of the United States, on call of the president.
>
> Section 2. Purposes for which expended. That said funds herein appropriated may be used to pay the necessary expenses in securing enlistments, physical examinations, transportation and sustenance, and all other necessary and advisable expenses connected with the organization of such military organizations. The adjutant general of the state of Iowa is hereby authorized to pay to each company, troop, battery, or other similar unit, while in service, for the welfare and comfort of the men, a sum not to exceed the amount now allowed to such units as a total miscellaneous fund

under the military laws of the state of Iowa. Such payments may be made, however, monthly instead of semi-annually. The commanding officer of each unit shall account to the adjutant general for all such funds received by him.

You will observe that section one (1) of said act provides that the appropriation or so much as may be necessary thereof, may be used in "providing, equipping, and raising, and for the benefit of any military organization of the state of Iowa, for services in the armies of the United States on call of the president."

You will also observe that section two (2) of said act provides "that said funds herein appropriated may be used to pay the necessary expenses in securing enlistments, physical examinations, transportation and sustenance and all other necessary and advisable expenses connected with the organization of such military organizations."

It is the opinion of this department that the language used in section 1 of said act is sufficiently broad to authorize the expenditure of $5,000.00 for the purposes asked in Doctor Clarke's communication to you.

You will notice that section 1 specifically provides that this fund may be used for the "equipping" and "benefit of any military organization of the state of Iowa" and it certainly would seem that a hospital unit such as outlined in Doctor Clarke's communication to you is a necessary part of the equipping of a military organization, such as is described in said section.

It would seem also clear that money thus expended would be for the "benefit" of such military organization, and for that reason the hospital unit described in said communication would come within the provisions of the act.

You will observe also that section two (2) of said act provides, among other things, that said funds may be used to pay "the necessary expenses in securing enlistments, physical examinations, transportation and sustenance, AND ALL OTHER NECESSARY AND ADVISABLE EXPENSES CONNECTED WITH THE ORGANIZATION OF SUCH MILITARY ORGANIZATIONS."

It is the opinion of this department that a hospital unit such as described in the communication to you is a necessary and proper part of the military organization and any expenses necessary for the equipment and sustaining of such hospital unit would

be a necessary and advisable expense connected with the organization of such military organization, as is contemplated by said section.

H. H. CARTER,
Assistant Attorney General.

APPROPRIATIONS FOR EQUIPMENT OF RED CROSS HOSPITAL UNIT.

The provisions of Chapter 207, Acts of the 37th General Assembly, appropriating one million dollars for war purposes does not authorize the expenditure of any portion of the money for the equipment of a hospital unit to be operated under the direction of the Red Cross, since the same is not a military organization of the state of Iowa. Any sum advanced to finance the organization of a hospital unit to be operated under the direction of the Red Cross could not be recovered from the U. S. Government, nor does the act provide for the advancing of any money for such a purpose.

June 28, 1917.

Hon. W. L. Harding, Governor,

Dear Sir: Your esteemed favor of the 22d instant, addressed to the attorney general, asking for a construction of chapter 207 of the acts of the 37th General Assembly, relating to the appropriation of $1,000,000 for war purposes, has been referred to me for answer.

In your inquiry you say:

1. Is this hospital Unit R a military organization of the state of Iowa?

2. My information is that the state has no authority over, or nothing to say in reference to, the officers or organization of these Red Cross units and that, as a matter of fact, they are voluntary organizations, not subject to the state or connected with the state, but are essentially and primarily a part of the regular army after they have been equipped and accepted.

3. If the above is the case and the state pays this sum of $5,000 to Unit R, could we get the money back from the United States government?

4. Further, if Unit R is permitted to use this money, would we be legally bound to reimburse other Red Cross units that have been organized within the state?

5. I am advised that a Red Cross hospital unit has been organized at Council Bluffs and equipped by voluntary subscription in the sum of $30,000, and that there are other Red Cross units in the state similarly equipped.

6. Putting the question in another form: If we now use this fund for the organization of Unit R, would we not

be duty bound to reimburse other units that have been organized and equipped by voluntary contribution?

7. Is it not the meaning of the language in section one, "and for the benefit of any military organization of the state of Iowa for services in the army of the United States on call of the president" that the money used can be recovered from the United States upon presentation of the claim, duly authenticated?

8. If this is the meaning of this statute and the Red Cross is voluntary and not financed by the federal government, and a warrant is drawn on the treasury for this money, and paid, could not the money be recovered from the bondsmen of those responsible for the issuance and payment of said warrant?

9. In my first inquiry I did not set out the legal status of the Red Cross and its method of organization, nor have I attempted to do so in this communication, for I assume that you have this information at your command and are familiar with the organization.

In answer to the inquiries therein contained we beg to call your attention to your letter of June 20, addressed to the attorney general, and the opinion in answer thereto.

> You say in your first inquiry you "did not set out the legal status of the Red Cross and its method of organization, nor have I attempted to do so in this communication, for I assume that you have this information at your command and are familiar with the organization."
>
> You also say in your present inquiry:
>
> "My information is that the state has no authority over, or nothing to say in reference to, the officers or organization of these Red Cross units and that, as a matter of fact, they are voluntary organizations, not subject to the state or connected with the state, but are essentially and primarily a part of the regular army after they have been equipped and accepted."

In this case we have to say that our former opinion was based on the theory that the Red Cross unit referred to in your letter of June 20 became a part of the military organization of the state. You will notice that section one of chapter 207 of the acts of the 37th General Assembly, among other things, provides:

> The same to be used as provided in this act in providing, equipping, and raising, and for the benefit of any military organization of the state of Iowa for service in the armies of the United States, on the call of the president.

You will also observe that in your former letter you used the following language:

> I write for an opinion from you as to whether or not the legislative act authorizing this appropriation provides that a Red Cross hospital unit shall be regarded as the character of military organizations that should receive aid from this appropriation. In other words, does the authorization of the president and the machinery employed in effecting Dr. Clarke's unit bring said organization within the scope of the measure under which the doctor makes application for funds?

You will observe also that in the communication of Dr. Clarke to you asking for this appropriation of $5,000.00 with which to equip the hospital, he said:

> It is my desire to be so equipped as to be able to answer the earliest call and give such efficient service as will be a credit to the state of Iowa.

It was the thought of the writer of the former opinion that the hospital unit referred to in your former letter, and also in the communication of Dr. Clarke to you, was to become a part of the military organization of the state of Iowa, and it seems very clear that if such were the fact there could be no question but that it would come within the terms of section one above referred to. It was not the thought, however, that this hospital unit should be entitled to the exact sum of $5,000.00 from such appropriation, but such sum as should be determined was proper for such purpose.

In your letter of June 22, however, you stated in paragraph 2 that it is your information that the state has no authority over, or nothing to say in reference to, the officers or organization of these Red Cross units, and that, as a matter of fact, they are voluntary organizations not subject to the state or connected with the state, but are essentially and primarily a part of the regular army after they have been equipped and accepted.

Assuming that the information which you have is true and authentic, it is the opinion of this department that hospital Unit R would not be a military organization of the state of Iowa as contemplated by chapter 207 of the acts of the 37th General Assembly, and that it would, therefore, not be entitled to receive any portion of the appropriation therein made.

In paragraph 3 of your present inquiry, you ask if the state paid the sum of $5,000.00 to Unit R, whether we could get the

money back from the United States government. In answer, we have to say that it could not be recovered back in an action against the government, and whether we could be reimbursed for such expenditure would depend entirely upon the will of the United States congress.

In answer to paragraph 4 of your inquiry as to whether if Unit R is permitted to use this money we would be legally bound to reimburse other Red Cross units that have been organized within the state, we have to say that it is the opinion of this department that no Red Cross unit would be entitled to receive any portion of this appropriation unless it became a part of the military organization of the state.

In answer to paragraph 6 of your inquiry, we have to say that we believe the answer we have given to paragraph 4 fully answers this inquiry.

In answer to paragraph 7 as to the meaning of the following language used in section one:

> And for the benefit of any military organization of the state of Iowa for services in the army of the United States on the call of the president.

and asking whether the money used can be recovered from the United States on the presentation of the claim duly authenticated, we have to say that it is evidently the meaning of the language thus used that the same shall be recovered from the United States, but as we have heretofore said, it may not be recovered by a suit against the United States, but only by the voluntary action of congress. The appropriation made in chapter 207 is purely voluntary upon the part of the state and creates no liability against the government of the United States, so that any moneys expended by virtue of said act could not become a binding obligation on the part of the United States government to repay the same, and the only way in which the same may be recovered is by the voluntary act of the United States government.

In answer to paragraph 8 of your inquiry, we have to say that if the Red Cross is purely voluntary and no part of the military organization of the state, it is not entitled to any part of this appropriation, and we assume that no warrant will be drawn upon the treasury for any portion of this appropriation for such purpose, and therefore, the question as to the liability of the

bondsmen of those who might issue and pay such warrants cannot possibly arise.

H. H. CARTER,
Assistant Attorney General.

SOLDIER VOTE AT SPECIAL ELECTIONS.

Chapter 29 of the 9th General Assembly providing method for enabling soldiers in the field to vote at certain elections does not apply to special elections.

October 1, 1917.

Hon. W. L. Harding, Governor.

Dear Sir: Complying with your oral request for an opinion whether the provisions of chapter twenty-nine, laws of the 9th Assembly of Iowa should be followed in procuring the votes of the electors in the military service of the state or of the United States at the special election to be held on October 15, 1917, at which the proposed amendment to the constitution, known as the prohibitory amendment, is to be submitted, as provided by chapter 321, laws of the 37th General Assembly, I beg to say:

In view of the language of the act itself, to which I shall call attention, I find that your question, whether this act is applicable to the coming special election, can be fully answered without determining whether or not the law is still in force. While it is of the utmost importance that every facility possible should be extended so as to permit our soldiers to vote upon the constitutional amendment to be submitted at the special election, still care must be taken not to leave the result of the election open to attack because an illegal method of procuring the vote has been employed. With this thought foremost, I call your attention to the following excerpts from said act, to-wit:

> Sec. 1. That every white male citizen of the United States, of the age of twenty-one years, and who shall have been a resident of Iowa six months, and of some county therein sixty days next preceding his entering the military service of this state, or of the United States, shall be entitled to vote at all the elections authorized by law, *as provided in this act,* and every such citizen shall thus be entitled, in the manner herein prescribed, whether at the time of voting he shall be within the limits of the state or not.
>
> Sec. 2. Every volunteer or soldier in the military service of this state or the United States, including officers and their staffs, surgeons and assistant surgeons, chaplains and commissioners appointed under this act, shall, if possessed

of the qualifications set forth in section one (1) of this act, be entitled to the benefits of the provisions thereof.

Sec. 3. Each elector voting by virtue of the provisions of this act, shall be considered as voting in the county in which he has resided for sixty days next preceding his entering the military service; *that is, he shall have the right (so far as authorized by this act) to vote for the same officers, and no others, that he might lawfully have voted for in the county in which he had resided at the time of his entering the military service.*

Sec. 4. *The elections under this act shall be held on the same day that is provided for by title IV of the revision for similar elections within the state.*

Sec. 5. At the election to be held on the second Tuesday of October, A. D. 1862, each elector authorized to vote by this act, shall have the right to vote for the following officers, to-wit: Secretary of state, auditor of state, treasurer of state, attorney general, registrar of the land office, member of congress of the proper district, judges of the district court, district attorney and member of the board of education of the proper district, and clerk of the district court, or any county officer, except constables, justices of the peace and county supervisors.

At the general election for A. D. 1863 and afterwards at other elections, all persons authorized to vote under this act so long as it shall be in force, *may vote for all the officers to be chosen at such elections, except constables, justices of the peace, township officers and county supervisors.*

Sec. 6. The provisions of title IV of the revision of 1860, so far as applicable and not qualified by the provisions of this act, *shall be applied to all elections held under and by virtue of this act.*

Sec. 7. The governor of the state is hereby charged with the duty of seeing that this act shall be properly executed and carried out, and for that purpose is authorized and required to take such steps from time to time as may be necessary, not inconsistent with law, on this act.

Sec. 8. *At the elections herein provided for* a poll shall be open at every place, whether within or without the state, where a regiment, battalion, battery or company of Iowa soldiers may be found, or stationed; and *at such election* all persons may vote who are thereto entitled by law and by the provisions of this act. * * *

Sec. 15. The ballots to be voted at the election held under this act, shall have printed or written at the top of each ballot, the name of the county in which the person offering to vote is a voter. Each ballot, in addition to the

> name of the county, shall have printed or written on it all of the officers which may properly be voted for. The ballot on its face to be arranged thus: 1st—The name of the county, as above; 2d—Names of the governor, lieutenant governor and state officers to be voted for; 3d—For congress (naming the number of congressional district of which the county at the head of the ballot is a part); 4th—For district judge, district attorney and members board of education (naming in each instance the number of judicial district of which the county at the head of the ticket is a part); 5th—*All other officers to be voted for under this act,* etc.

Your attention is especially called to the words which are in italics as bearing upon the construction to be given it in connection with your inquiry.

Evidently the legislature in adopting this act had in mind the general election of 1862 and later general elections. The only election mentioned by the act in the several sections from which I have quoted are those in which certain "officers" are to be voted for, and these officers are specially designated in section 5 as above set forth. It does not have any application to city or town elections.

There was a reason for the legislature not to make this act applicable to special elections. Section 6 of the act provides that the provisions of title IV of the revision of 1860, so far as applicable "not qualified by the provisions of this act, shall be applied to all elections held under and by virtue of this act."

Section 672 of title IV of the revision of 1860, relating to filling vacancies, provides:

> Vacancies occurring in township offices, ten days; in county offices, fifteen days; and in all other public elective offices, thirty days prior to the day of a general election; shall be filled at such general election; provided, that should a vacancy occur in the office of representative in congress, senator or representative in the general assembly, member of the board of education, and the body in which the vacancy exists will convene in a general or extra session prior to such election, then it shall be the duty of the governor to order a special election to fill such vacancy, to be held at the earliest practicable time and ten days' notice of such election shall be given.

It is evident that the legislature did not contemplate that the special provisions made with reference to securing the soldier vote should be resorted to in the case of such special elections and we think the wording of the act as above quoted clearly

shows this intention. The ten days' notice required for a special election would be too short within which to procure the vote by the methods suggested in the act. Again, it is not likely that the legislature would provide such an expensive method of getting the soldier vote in case of a special election to fill a vacancy in a board of education. These and other reasons might be suggested for believing that the act was not intended to cover special elections.

In view of this situation, I am constrained to hold that the procedure set forth in chapter 29, laws of the 9th General Assembly, would not be applicable to the special election to be held on October 15, 1917. The right of the soldiers to vote is not abridged by this holding, but they can exercise that privilege by complying with the provisions of chapter 3-B, supplemental supplement to the code, 1915, relating to the exercise of the right of suffrage by voters who are absent or who expect to be absent from the counties where they reside, on election day.

In addition to the foregoing provisions, the last legislature has provided that an absent or disabled voter may register by filling out the affidavit printed upon the envelope sent him by the county auditor for the return of his ballot. Sec. 2, chap. 419, acts 37th G. A.

H. M. HAVNER,
Attorney General.

GOVERNOR HAS NO POWER TO APPOINT A DEPUTY SHERIFF.

The governor does not have power to appoint additional deputies to assist in preserving peace in the respective counties during the present war. That power is vested in the sheriff, with the approval of the board of supervisors.

February 1, 1918.

Hon. W. L. Harding, Governor.

Dear Sir: You ask:

1st. Whether or not there is any method by which you may appoint a person in each county whose special duty it shall be, during the present war, to generally preserve the peace and assist the citizens in each county generally in being most effective in the said crisis.

2nd. Who such person shall be in order that he may be paid from the treasury of the county for his services.

It is our opinion that the sheriff of each county is duty bound by section 499 of the supplement of 1913 to preserve the peace

in his county, 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 in his county, and present the same to the county attorney and to the grand jury and to perform all other duties pertaining to the office of sheriff, or enjoined upon him by law.

The evil, as we understand, that you are now trying to reach had its origin in the situation which has been brought forth by the present war. That is to say, there are unusual labor disputes, there are congregations of dissatisfied men in the various cities of the state, there are those who are unduly sympathetic with enemy nations and are manifesting such feeling by public speeches and acts that are not patriotic, all of which lead to disputes, disturbances and possible riots. The presumption is, of course, that the present sheriff and his deputies are busy and entirely occupied with performing those duties occasioned by the ordinary peace conditions; then the unusual conditions brought about the war present duties with which the sheriffs and their present deputies are not equal to cope with and in order to meet the newly arisen emergencies, it is necessary that other deputies be appointed.

Section 510-b of the supplement of 1915 provides that in all counties the sheriff shall, in writing, appoint one or more persons not holding a county office as deputy or deputies for whose acts he shall be responsible, and from whom he shall require a bond, which appointment and bond shall be approved by the officer having the approval of the principal's bond, and such appointment may be revoked in writing, which upon revocation shall be filed and kept in the auditor's office. In all cases the board of supervisors shall fix the number of deputies and shall fix the salaries of such deputies. In counties in which the district court is held in two places, the first and the second deputies shall receive one-half of the salary received by the sheriff. All deputies shall be paid by the county.

It would seem, therefore, that under the section just quoted, the sheriff with the consent of the supervisors of the county, would have the authority to appoint this special deputy to perform these extraordinary and unusual duties which have arisen under the present crisis. The fact that the peace has not been disturbed by an actual riot, or that some one has not actually been lynched does not alter the condition so far as the situation

demands a peace officer to preserve the peace to the end that there may be no actual riots and that there may be no lynching. Such officer, under his duty as preserver of the peace, might well disperse unusual collections of persons, and such dispersing could well be done by sending such persons to parts of the state where their services as laborers would be welcome.

Such officer in the performance of his official duties might take such caution as to him might be best to prevent quarrels and riots between citizens who are patriotic and loyal to the government, and those persons, whether citizens or aliens, who are inclined to be friendly to the enemy countries.

While it is undoubtedly true that such appointment cannot be made directly by you, yet it can be made as suggested by the sheriff with the approval of the board of supervisors, and such deputy shall be paid by the county.

J. W. KINDIG,
Assistant Attorney General.

SOLDIERS ENTITLED TO VOTE.

Soldiers in the military service have the right to vote and the governor has the power to appoint a commission to take their vote under Chapter 29, Acts 9th G. A. (Extra Session).

August 31, 1918.

Hon. W. L. Harding, Governor.

Dear Sir: Agreeable to your oral request for a little more detailed statement of the law relating to the taking of the vote of the soldiers, I beg to say—

Section 1 of chapter 29 of the extra session of the 9th General Assembly provides in substance that every male citizen who has been a resident of Iowa six months, and of some county therein for sixty days next preceding his entering the military service shall be entitled to vote at all elections authorized by law as provided in said act. The term, "in the military service," we think should be construed to cover those who may be in the naval, marine or aerial service.

Section 3 provides that each elector voting under the provisions of this act shall be considered as voting in the county in which he has resided for sixty days next preceding his entering the military service.

Section 6 provides that such elector may vote for all officers

except constables, justices of the peace, township officers, and county supervisors.

Section 7 provides that the governor is charged with the duty of seeing that the provisions of the act are carried out and for that purpose is required to take such steps from time to time as may be necessary not inconsistent with law or this act. In this connection, I would call your attention to section 34 of the act, which provides:

> No mere informality in the manner of carrying out or executing of any of the provisions of this act shall invalidate any election held under the same or authorize the judges of the election or the state or county canvassers to reject the returns or set the same aside. Nor shall any failure on the part of the commissioners to reach or visit any regiment or company or the failure of any regiment or company to vote, invalidate the election.

It is evident from the language quoted that many things may be done which are not expressly authorized by law, provided they are not inconsistent with it, and in view of the changed conditions a good many things will have to be done to make the law workable for which there is no express provision in said act.

Section 8 provides that a poll shall be opened at every place whether within or without the state where a regiment, battalion, battery or company of Iowa soldiers may be found or stationed, and section 9 permits any company or detached portion of a regiment to open a separate poll, the electors present to choose three judges from the qualified electors present whose duty it shall be to act as such judges and in the same section this language is used:

> It is the object and design of this act that every regiment and every company on detached service shall have an opportunity to enjoy its privileges, whether visited by the commissioners or not.

Section 10 provides that judges shall appoint clerks of the election and both judges and clerks are required to take the oath prescribed in section 11, which may be administered by any commissioner or by any judge of election under the provisions of section 12.

Section 13 provides that the polls shall open at nine o'clock a. m., or sooner or later, if necessary, and to remain open at least three hours, and if necessary to receive all votes until six o'clock

p. m., proclamation as to the time of closing to be made at the time of opening the polls.

Section 15, which provides for the printing of the ballots, must yield to the present statute; in other words, it will be necessary to have ballots from every county in Iowa at each polling place in a sufficient number to supply the soldiers from each of the respective counties.

By way of suggestion, it occurs to us that it would be a good plan to appoint a commission at this time in order that the members of the commission could work out the provisions of the act in conjunction with the secretary of state, who is to attend to certain printing, and in conjunction with the county auditors of the several counties.

You will note that by the provisions of section 30 a commissioner is to be appointed for each regiment and if, in your opinion, it is necessary, you "may appoint additional commissioners." These other commissioners could be added later in such number as you might think necessary.

There is no provision for paying these commissioners a salary, but they are to receive "ten cents per mile in going to and returning from their respective regiments."

F. C. DAVIDSON,
Assistant Attorney General.

OPINIONS TO THE SECRETARY OF STATE

COLLATERAL INHERITANCE TAX ON BONDS.

Municipal bonds are not exempt from taxation for inheritance tax purposes.

Aug. 3, 1918.

Hon. W. S. Allen, Secretary of State.

Dear Sir: Replying to the letter of George White, president of the White Company, Davenport, Iowa, July 17, 1918, submitted by you to this department for attention, and in which he asks whether an Iowa municipal bond owned by a resident of this state at the time of his death would be subject to the collateral inheritance tax in the event the estate descended to collateral heirs, and if so, whether the tax could be paid in such bonds, beg to advise that municipal bonds are not exempt, nor would the treasurer of state be authorized to accept such bonds in lieu of cash in payment of the tax.

By reference to Section 1481-a supplement to the Code 1913, you will note that all estates of deceased persons, under the conditions specified in said section, are subject to the tax. The inheritance tax is not a tax on the property, but on the right of succession to the property. This doctrine will find support in the following authorities:

Cohen vs. Brewster, 203 U. S. 543;

Plummer vs. Coler, 178 U. S. 115;

In the matter of Sherman, 153 N. Y. 1.

W. R. C. KENDRICK,
Assistant Attorney General.

AUTOMOBILE EXPENSE FUND.

Five per cent of automobile license fees set apart for maintenance of automobile department.

Sept. 25, 1918.

Hon. W. S. Allen, Secretary of State.

Dear Sir: Under date of September 24, 1918, I have your request for an opinion in the form of a letter, which is as follows:

"Under the provisions of Section 1571-m 7 of the Supplemental Supplement, 1915, the secretary of state is required to,

"On or before January first of each year the secretary of state shall cause to be mailed to each owner of a motor vehicle subject to registration as disclosed by his records, a notice and blank for return calling attention to the annual tax, when due and accruing penalties in case of failure to pay, but failure to give such notice shall not constitute a defense against proceedings hereunder."

We have now nearly 340,000 persons in the state of Iowa to whom it will be necessary under this section to send out blank applications for registration of automobiles, together with the letter of instructions and a return envelope for transmission of such applications to this department, to facilitate and expedite the registration of motor vehicles in Iowa as contemplated by the law.

With the limited help now at hand in this department, or which may be available under the law, it will be impossible to comply with the provisions of the aforesaid section in time for such supplies to reach all the automobile owners of the state before January first, next.

There are establishments in this city, as I understand, supplied with extra help, whose business is largely to do work of this character, and where it may be procured at a minimum rate or charge. The amount of work necessary to register the motor vehicles of this state has become so large that the number of clerks allotted to this branch of our work is totally inadequate to accomplish the same with any degree of promptness or satisfaction.

The provisions of the law above quoted are of such an extraordinary character and so unusual in their demands, on a department of state, that I have thought that I might avail myself under the law of the help above mentioned, in order to leave no doubt about my being able to comply with the statutory requirements pertaining to this matter.

The legislation passed from time to time by the different general assemblies for several sessions back, while providing for certain portions of the automobile fees to be paid over for different objects, has always been based upon the idea or presumption that a certain percentage of the same should remain for deferring the expenses or costs of such registration.

The statutes of the state now permit as I interpret the law the 5% of such fees, constituting a fund for this purpose, that is to pay the expenses of registering motor vehicles of the state. I would refer here particularly to the provisions of Chapter 212 of the Acts of the 37th General Assembly.

> The determination of this question is of such importance to the office, and the time is now drawing so near the date for the registration of these vehicles for the coming year, that I would most respectfully request an early expression or opinion on the subject."

The portion of Chapter 212 of the Acts of the 37th General Assembly to which you refer is as follows:

> "Any moneys remaining in the state highway maintenance fund at the end of a biennial period, as well as any portion of the remaining five per centum of the moneys paid into the state treasury, not required for the maintenance of the automobile department, shall be apportioned among the several counties in the same manner as the ninety (90) per cent of said funds is apportioned and shall be distributed and constitute part of the county motor vehicle road fund as hereinbefore provided."

This is the only provision of the statute which mentions the 5% of the automobile fund to be used "for the maintenance of the automobile department." An examination of the law indicates very strongly that the legislature intended that some portion of the fund should be retained for some purpose, but failed to specify that purpose in the original act, or in any of the subsequent acts, until the reference is made to it by the 37th General Assembly in the section just quoted.

Section 33 of Chapter 72 of the laws of the 34th General Assembly provided that 85% of all moneys paid into the state treasury "pursuant to 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." There is no further reference made to the remaining 15% of the moneys to be collected.

The 35th General Assembly amended this section providing in Section 1 of Chapter 133 that 8% of the moneys paid into the state treasury after January 1, 1913, "shall be set aside and shall constitute a maintenance fund for the state highway commission," but there was still a failure to make any provision with reference to the use to be made of the remaining 7%.

The 36th General Assembly repealed Section 1571-m32 Supplement to the Code 1913, which embodied the provisions above referred to of the Acts of the 34th and 35th General Assemblies, and in lieu thereof provided in substance that 90% of all money

paid into the state treasury "pursuant to provisions of this act shall be apportioned among the several counties, etc." And further provided:

> "five per cent of all moneys paid into the state treasury on and after the taking effect of this act and pursuant to its provisions, shall be set aside and shall constitute a maintenance fund for the state highway commission,"

still leaving 5% of the money paid into the state treasury unappropriated for any purpose.

It is my understanding that ever since the Act of the 34th General Assembly became effective that it has been the custom of the executive council to approve the expenditures of funds for the clerk hire and other expenses in connection with the maintenance of the automobile department in your office, and that such clerk hire and expenses have been paid by warrants drawn in the usual way. The legislature must have believed that a maintenance fund of 5% of the moneys paid into the state treasury from automobile fees had been provided for, otherwise they would have not made the reference to such a fund in Chapter 212 of the 37th General Assembly, above quoted. This act undoubtedly recognizes the right to use so much as may be necessary of the 5% of moneys paid into the state treasury for the maintenance of the automobile department.

It is my opinion that with the approval of the executive council first obtained, you would be authorized to make the expenditure referred to in your letter, and that the auditor of state would be justified in issuing his warrant for the payment of such expense.

H. M. HAVNER,
Attorney General.

AFFIDAVITS OF CANDIDATES.

The provision in section 1087-a 10, supl. 1913, requiring a candidate to file with the nomination papers an affidavit, is directory only.

April 30, 1918.

Hon. W. S. Allen, Secretary of State.

Dear Sir: As I understand your oral inquiry, you desire our opinion upon the following state of facts, viz.:

Certain candidates for state offices have failed to file the affidavit referred to in Section 1089-a10 Supplement to the Code of 1913, forty days before the date set for holding the primary.

As I understand it, nomination papers, however, have been filed in accordance with the provisions of said section on or prior to the 24th inst., and, therefore, within the statute requiring the same to be filed forty days before the holding of the primary. The portion of Section 1087-a10 relating to this matter is as follows:

> "No candidate for an elective county office shall have his name printed upon the official primary ballot of his party unless at least thirty days prior to the day fixed for holding the primary election a nomination paper shall have been filed in his behalf in the office of the county auditor; and no candidate for nomination for an elective state office, or for representative in the congress of the United States, 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; and no member of a political party desiring or intending to be a candidate for the office of senator in the congress of the United States, or a candidate for the office of elector of the president and vice president of the United States, shall have his name printed upon the official primary ballot of his party in any election precinct 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. A candidate for an office to be filled by the voters of any subdivision of a county, or a candidate for party committeeman, shall not be required to file any nomination paper or papers. * * * Each and every candidate shall make and file his affidavit stating that he is eligible to the office for the township, county, district or state in which he is and 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. If no such paper or papers are required, then he shall file such affidavit alone, or there shall be filed a nomination paper signed by ten qualified voters of any subdivision of a county, with the county auditor, at least fifteen days prior to such primary election, and the filing of such affidavit or such nomination paper shall entitle such candidate to have his name printed on the official primary ballot of his party."

In the same connection we would also call attention to the language of Section 1087-a12 Supplement to the Code 1913, a portion of which is as follows:

> "At least thirty days before any such primary election, the secretary of state shall transmit to each county auditor

> a certified list containing the name and postoffice address of each person for whom a nomination paper has been filed in his office, in accordance with the provisions of section 10 of this act and entitled to be voted for at such primary election by the voters of such county, together with a designation of the office for which he is a candidate, and the party from which he seeks a nomination."

You will observe that in Section 1087-a10, the statute specifically requires the nomination paper of a candidate for state office to be filed forty days before the holding of the primary, and that no candidate for such office shall have his name printed upon the official primary ballot of his party unless the nomination paper has been so filed. There is no specific reference in this section to the filing of the affidavit of the candidate as one of the requirements necessary for the placing of his name upon the ballot. In the language of the same section relating to the filing of the affidavit, the requirement is that such affidavit shall be filed "with the said nomination paper or papers when such paper or papers are required."

We can not believe that the legislature meant that expression to be taken literally. In other words the nomination paper, or the nomination paper filed before the affidavit, would not be held a failure to comply with the law. The purpose of requiring the affidavit is to show that the candidate is eligible; that he requests his name to be placed upon the ballot, and that he will qualify for the office in case of his nomination and election.

Turning now to Section 1087-a12 which requires the secretary of state to transmit to the county auditor a certified list of the candidates "for whom a nomination paper has been filed in his office in accordance with the provisions of section ten of this act," we find no reference to the affidavit of the candidate as one of the pre-requisites to the making of such certificate. Nevertheless, we think it is clear that before this certificate is made, the affidavit of the candidate must be filed in order to show his eligibility and his willingness to accept the office, otherwise you could not certify that he is "entitled to be voted for at such primary election by the voters of such county."

While the question is not free from doubt, I am inclined to the opinion that the statute is directory with relation to the filing of the affidavits of the candidate, and that there is a substantial compliance with the statute, provided that affidavit is filed in

time, so that you may make your certificate to the county auditors of the state required by Section 1087-a12.

F. C. DAVIDSON,
Assistant Attorney General.

CERTIFYING CANDIDATES TO COUNTY AUDITOR.

Where the nomination papers and the affidavit of the candidate leaves the question in doubt as to the particular office the person is a candidate for and a telegram is received by the secretary of state from the candidate clearly designating the office for which he is a candidate the secretary should certify such nomination to the county auditor. Construing sec. 1087-a 12, sup. 1913.

May 24, 1918.

Hon. W. S. Allen, Secretary of State.

Dear Sir: We have your request for the opinion of this department on the question of your certifying to the auditor of Dubuque county, Iowa, the nomination of John A. Cunningham for the office of state representative.

The nomination paper in this instance is headed as follows: "For the office of member of general assembly." Technically speaking, there may be some doubt as to whether there is such an office, or what office it is that the signers of the nomination papers intended to nominate Mr. Cunningham for. However, they do show an intention to nominate him for an office in the general assembly. His affidavit corresponds in form with the nomination paper, and taking the nomination paper and the affidavit together the matter may have been left in doubt in your mind as to what office Mr. Cunningham was a candidate for, but we think that doubt was removed by the telegram he sent you on April 24, which is as follows:

> I am candidate for representative lower house. Will not be home before Sunday. If under the law you can correct papers if need so to return you are authorized to do so, unless I may file amended affidavit upon return. Wire answer.

It is true that the statute provides "A nomination paper when filed shall not be withdrawn nor added to," yet we do not think that the affidavit which seeks to make plain the doubt in this case should be held to be an addition to the paper. It is a mere explanation, making it clear and apparent to you as secretary of state that Mr. Cunningham is a candidate for the office of state representative, and while the matter is involved in grave doubt, yet this department feels constrained to hold in view of all the

facts, and the further fact that no objections have been filed, that it is apparent Mr. Cunningham is a candidate for state representative, and you should certify the nomination to the county auditor of Dubuque county.

J. W. SANDUSKY,
Assistant Attorney General.

OPINIONS TO THE AUDITOR OF STATE

COUNTY AUDITOR MAY CORRECT TAX LIST.

The county auditor has authority to correct assessments or tax lists, but if the correction increases the amount of the tax to be paid he must notify the taxpayer, otherwise no notice is necessary.

May 31, 1917.

Hon. F. S. Shaw, Auditor of State.

Dear Sir: Your request for the opinion of this department on the following questions has been referred to me for attention:

> Under section 1385, supplement to the code, 1913, the county auditor is authorized to correct errors in the assessment and assess omitted property. In case an error is found in computing the assessment of bank stock, should the auditor in correcting the error serve notice by registered mail as provided therein?
>
> If such notice is required, must such notice be served on every stockholder, or will notice to the bank officers be sufficient?

The section referred to reads as follows:

> "The auditor may correct any error in the assessment or tax list, and may assess and list for taxation any omitted property, but before assessing and listing for taxation any omitted property, he shall notify by registered letter the person, firm, corporation, or administrator or other person in whose name the property is taxed, to appear before him at his office within ten days from the time of said notice and show cause, if any there be, why such correction or assessment should not be made, and should such party feel aggrieved at the action of said auditor he shall have the right of appeal therefrom to the district court. * * *"

The plain purpose and effect of the statute is to confer upon the county auditor the authority to correct errors in the assessment, or tax list, and also assess and list for taxation any omitted property. It is made his duty to correct errors which occurred in assessing or listing the property which was listed or assessed, however and wherever the error occurred, and it is also made his duty to assess and list for taxation any omitted property however the omission occurred. It is doubtless true that mere cler-

ical or other errors, the correction of which would not increase the assessment of a party, may be made by the auditor without mailing to such party the registered notice, but if the correction of the error would have the effect of either increasing the assessment or the amount of tax that would or might be levied upon the property of such person, then the registered notice becomes indispensable, and must be given. It is, so to speak, jurisdictional and without which the auditor's acts would be void. The doubt, if it could be claimed any exists, arises from the following words of the statute: "* * but before assessing and listing for taxation any omitted property he shall notify by registered letter, etc." But this is entirely removed by the context which expressly provides that the party notified may appear and "show cause, if any there be, why such correction or assessment should not be made." The opportunity is here afforded the party whose assessment is or may be increased by the correction of an error in the assessment or tax list to show cause why the same should not be done, to the same extent and in the same manner as is given to the party whose assessment is or may be increased by assessing and listing for taxation any of his property which may have been omitted. He is given his "day in court" and may appeal to the district court if he feels aggrieved at the action of the auditor.

As to the remaining question there is little room for doubt that notice to the corporation is all that there is required. It is true that by the provisions of section 1322 of the 1913 supplement shares of stock of the corporations therein enumerated shall be assessed to the individual stockholders at the place where the institution is located and to enable the assessor to do so it is made the duty of the officers of the corporation to "furnish the assessor with lists of all the stockholders and the number of shares owned by each, and the assessor shall list to each stockholder under the head of corporation stock the total value of such shares," but "to aid the assessor in fixing the value of such shares, the said corporation shall furnish him a verified statement of all the matters provided in section thirteen hundred twenty-one of the supplement to the code, 1907, which shall also show separately the amount of the capital stock and the surplus and individual earnings and the assessor from such statement shall fix the value of such stock based upon the capital, surplus and undivided earnings." Provision is also made for deducting

the amount of capital actually invested in real estate and that the property of the corporation shall not be otherwise assessed. The officers of the corporation are acting for it and for the individual stockholders, they list the property and furnish the information upon which the assessment and valuation is based. The assessor does not meet or in any manner come in contact with the stockholders, as such; he deals with the officers and has no means of knowing the residence or postoffice address of the stockholders and by express provision of section 1325 of the code the corporation "shall be liable for the payment of the taxes assessed to the stockholders of such corporation 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." It is true that the corporation may reimburse itself from any dividends on such stock, which may remain in its hands, or sale of the stock, but not otherwise.

A question quite similar arose in the case of First National Bank vs. Independence, 123 Ia., 482, in which the court uses this language:

> The officers of the bank are required to furnish a list of the stockholders, together with the number of shares owned by each, and to furnish the assessor with all data in its possession to enable him to arrive at the assessable value of the stock. As an ultimate proposition, the financial condition of the bank must dominate the amount of the assessment. So, too, by statute the bank is required to pay the taxes levied upon the stock pursuant to the assessment made, code section 1325. In a sense, therefor, and by force of the statute, the bank is the agent of its stockholders respecting the matter of assessment for taxation purposes and the payment of taxes levied.

Again in the case of the assessment of the Sioux Stock Yards Company, 149 Iowa, 5, the court was required to pass upon a question involving a similar principle to the one herein presented in which it approved the doctrine announced in above case and held that:

> As the corporation was in this instance the person required to make the return on which the tax based upon the shares of stock should be made, and also was required to pay the tax thus levied, we are satisfied that notice to the corporation was sufficient.

From the authorities cited and upon principle I am clearly of

the opinion that notice to the individual stockholders is not required and that notice to the officers of the bank is sufficient.

J. W. SANDUSKY,
Assistant Attorney General.

ISSUE OF WARRANTS BY COUNTY AUDITOR.

Warrants for jury fees, etc., may be issued on certification of the county clerk before the fee bill is acted upon by the board of supervisors.

June 25, 1917.

Hon. Frank S. Shaw, Auditor of State.

Dear Sir: Your request for the opinion of this department on the following questions has been referred to me for attention:

> Will you please give me your official opinion as to the proper interpretation of chapter 356, laws of the 37th G. A. in regard to the issuance of county warrants by the county auditor?
>
> Section 1300 of the code provides that no fees or compensation provided for by the code can be audited or paid until an itemized bill verified by affidavit has been properly filed in the auditor's office.
>
> Chapter 356, laws of the 37th G. A., authorizes the county auditor to issue warrants in certain cases before bills for the same have been audited and allowed by the board of supervisors, upon certificate of certain officers who have knowledge of the service rendered. For instance, the auditor is authorized to issue warrants for the per diem of the shorthand reporter of the district court upon certificate of the judge holding such court.
>
> Does this in any way modify section 1300 requiring an itemized bill, or is it merely supplementary to said section 1300? In other words, is the requirement of the itemized and verified bill abolished in such cases? Or is said chapter 356 an additional requirement in that the bill must be certified to by the officers named therein before same can be allowed or paid?

Chapter 356, acts of the 37th General Assembly, amends section 4661 of the code, pertaining to witness and jury fees, by striking from line seventeen (17) thereof, the following words: "grand or;" repeals section 353 of the code, pertaining to the payment of jurors in the district court, and repeals and enacts a substitute for section 471 of the code, which prohibited the county auditor from issuing warrants without the recorded vote

of the board of supervisors, except for jury fees, which substitute is as follows:

> Except as otherwise provided, the auditor shall not sign or issue any county warrant, unless the board of supervisors by recorded vote or resolution shall have authorized the same, and every such warrant shall be numbered and the date, amount and number of the same, and the name of the person to whom issued, shall be entered in a book to be kept in his office for that purpose.

The chapter further provides for the issuance of warrants for jury fees, witness fees and per diem of court reporters, and the part pertaining thereto is as follows:

> Sec. 4. The county auditor is hereby authorized to issue warrants before bills for same have been passed upon by the board of supervisors.
>
> 1. For jury fees and mileage on certificate of the clerk of the court upon which they were in attendance, which certificate shall be issued when the juror entitled thereto shall have been discharged or excused by the court.
>
> 2. For witness fees and mileage for attendance before the grand jury upon certificate of the county attorney and foreman of such jury.
>
> 3. For witness fees before the district court or trial jury therein in criminal cases, when such fees are payable by the county, upon certificate of the clerk of the court upon which they were in attendance.
>
> 4. The per diem of the shorthand reporter of the district court upon certificate of the judge holding said court.
>
> 5. For expense of the grand jury upon order of the judge of the district court.
>
> Sec. 6. All bills paid under the provisions of this act shall be passed upon by the board of supervisors at the first meeting following such payment and shall be entered on the minutes as other claims allowed by the board.

Section 1300 of the code, to which you refer, is as follows:

> In all cases where fees are compensation, except a fixed salary, are by the provisions of this code to be paid any officer or other person out of the county or state treasury, no part of the same shall be audited or paid until a particular account has been filed in the auditor's office of the county or state, verified by affidavit and showing clearly for what services such fees or compensation is claimed, and when the same was rendered.

The last section is what is termed a "general statute" as dis-

tinguished from a "special statute." The former is of general application, and, except in specific instances provided by special statutes, applied to and controls and governs the filing and allowances of all claims for fees or compensation, except fixed salaries, which are to be paid to any officer or person out of the county or state treasury. It requires, as a condition precedent, that a particular account, duly verified, of every such claim shall be filed in the auditor's office of the county or state, as the case may be, before it shall be audited or paid, and, in the absence of any other statute modifying the language of this section, no claim for fees or compensation could be lawfully audited or paid without compliance with said requirements. Under the provisions of section 353, a "special statute," which was repealed by the chapter in question, section 1300, was modified to the extent that the auditor might issue warrants for jury fees, upon the certificate of the clerk of the district court without the same being audited by the board of supervisors, and by the provisions of section 471, also a "special statute," which the new act likewise repeals, the auditor was permitted to issue county warrants for jury fees without recorded vote or resolution of the board of supervisors authorizing the same, and provision also was made for the payment of witness fees in criminal cases in section 4661, upon certificate of the clerk or justice. Different constructions were placed by county officers upon these various sections, some of which we have termed "special statutes," as to the extent they limited or modified section 1300, and in many, if not all, the counties of the state, jury fees for services in the district court were paid upon the certificate of the clerk of the court, without verified bills being filed with the county auditor or warrants issued therefor, and in some counties, witness fees in state cases, and for attendance before the grand jury, were likewise paid upon the certificate of the clerk of the court or of the foreman of the grand jury. It was enacted, doubtless, for the purpose of establishing a uniform system among the several counties of the state governing the issuance of warrants in payment of compensation and fees in these several classes of cases, as well as providing for the payment of the court reporter of the district court.

It would not be correct, as I view the matter, to say that the chapter supplements section 1300, for, as above stated, the section is general and applies to all cases and, therefore if it is affected at all, as it surely is, it modified or limits it, and the only question is to what extent.

General statutes, as heretofore defined, may be modified or limited as to their scope and operation, by special statutes or acts, and in that sense only should the chapter be considered in its relation to and effect upon the general statute. It was the legislative intent to provide a way by which fees and compensation, in certain cases, could be paid out of the county treasury prior to their auditing or authorization by the board of supervisors, the reason therefor undoubtedly being that the persons entitled thereto should not be required to wait until such time as the board would regularly meet and audit them, and, therefore, the extent to which the general statute is modified or limited and should be determined largely, if not entirely, by what is necessary to accomplish the object sought, in this case being the payment at the time rendered of certain services. It is neither necessary or important that any other formality required by section 1300, excepting auditing by the board of supervisors prior to issuing warrants, should be dispensed with in order that the new act may have full force and effect. It is an elementary and indisputable principle of statutory construction that special statutes or acts should not be held to modify or limit general statutes beyond the clear import and meaning of the language used. In other words, the rule of strict construction should always be applied, and I am of the opinion that in all cases where fees or compensation, except fixed salaries, are to be paid any officer or person out of the county treasury that no warrant should be issued for any part thereof until a particular account has been filed with the auditor of the county, verified by affidavit, and showing clearly for what services such fees or compensation is claimed and when the same was rendered. In other words, that the certificate of the various offices, enumerated in the new act, only dispenses with the auditing by the board of supervisors of such claims before warrants may be issued therefor by the county auditor, and that in all other particulars the provisions of section 1300 must be complied with before warrants for such claims can be issued.

J. W. SANDUSKY,
Assistant Attorney General.

HOLDING OF TWO OFFICES.

The holding of the office of mayor and captain in army is not incompatible nor prohibited by law.

July 30, 1917.

Hon. Frank S. Shaw, Auditor of State,

Dear Sir: We have your request for an opinion upon the two following questions:

1. Can a person legally hold the civil position of mayor of the city and at the same time accept a military commission in the United States army?

2. If so, can said person draw the salary of the civil office when he devotes his entire time to the military office?

Prior to the 37th General Assembly the laws of Iowa provided that a civil office became vacated upon the following contingency, to-wit:

> "The acceptance by the incumbent of a commission to any military office, either in the militia of this state or in the service of the United States, which requires the incumbent in the civil office to exercise his military duties out of the state for a period not less than sixty days."—Sec. 1266, Par. 7, Code of 1897.

Pursuant to the foregoing statutory provision the courts held, generally, that the acceptance of a military commission by the incumbent of a civil office vacated the civil office, provided said military commission took the incumbent of said civil office out of the state for a period of sixty days or longer. (Bryan v. Cattell, 15 Iowa, 538.)

However, the 37th General Assembly repealed paragraph seven, section 1266 of the code, leaving the law in that respect the same as it was prior to the enactment of said paragraph. (See chapter 12, 37th General Assembly.)

Generally speaking, one person may hold more than one civil office, unless,

First: The duties of the respective offices are incompatible and inconsistent; or

Second: The holding of the same is expressly prohibited by law.

Applying the foregoing rules to the instant case we must reach

the conclusion that the law does not expressly prohibit the incumbent of a civil office from accepting a position in the army, and unless the offices are incompatible they can legally be held by one person at the same time.

Are the two offices incompatible. The better line of authorities hold that two offices are incompatible when the nature of the duties of the two offices are such as to render it improper, from consideration of public policy, for him to retain both. For instance, when one office is subordinate to the other as judge and clerk. (Bryan vs. Cattell, 15 Iowa, 538; State vs. Beis, 135 Mo. 325; State vs. Coff, 15 R. I., 507; People vs. Green, 58, N. Y., 295.)

The supreme court of Iowa has expressly held that there is nothing in the nature of the duties of district attorney and captain in the army incompatible with each other. (Bryan vs. Cattell, supra.) If the offices of district attorney and captain in the army are not incompatible, then the natural conclusion would be that the offices of mayor and captain are not incompatible. There is absolutely no conflict in the duties pertaining to either office, nor does the one exercise any supervisory powers over the other.

The only question then remaining is, can the salary attached to the office of mayor be collected by the possessor of a military commission, when the duties pertaining to the office of mayor are not performed by said person? In the case of Bryan vs. Cattell, supra, our supreme court has passed upon this question, wherein, at page 552, it is said:

> "The better and safer rule doubtless is, that if he is in point of law actually in office, he has a legal right to the salary pertaining to it. His conduct may be such as to render him liable to removal, but when the statute makes no deduction for absence or neglect of duty, and the state takes no step as a consequence of such absence or delinquency, we suppose it is the legal right of the officer to demand the full salary allowed him by law."

It is therefore the opinion of this department that the two questions first above set out should be answered in the affirmative.

W. R. C. KENDRICK,
Assistant Attorney General.

COMPENSATION OF COURT REPORTERS.

County auditors may issue warrants for compensation of court reporters without the claim being verified.

July 31, 1917.

Hon Frank S. Shaw, Auditor of State,

Dear Sir: I have been requested to grant a rehearing upon the opinion of this department rendered you under date of June 25, 1917, with reference to the construction of chapter 356, acts of the 37th General Assembly, which rehearing has been granted, and the matter has been fully presented and argued to this department.

The question presented is:

> Will you please give me your official opinion as to the proper interpretation of chapter 356, laws of the 37th G. A. in regard to the issuance of county warrants by the county auditor?
>
> Section 1300 of the code provides that no fees or compensation provided for by the code can be audited or paid until an itemized bill verified by affidavit has been properly filed in the auditor's office.
>
> Chapter 356, laws of the 37th G. A. authorizes the county auditor to issue warrants in certain cases before bills for the same have been audited and allowed by the board of supervisors, upon certificate of certain officers who have knowledge of the service rendered. For instance, the auditor is authorized to issue warrants for the per diem of the shorthand reporter of the district court upon certificates of the judge holding such court.
>
> Does this in any way modify section 1300 requiring an itemized bill, or is it merely supplementary to said section 1300? In other words, is the requirement of the itemized and certified bill abolished in such cases? Or is said chapter 356 an additional requirement in that the bill must be certified to by the officers named therein before same can be allowed or paid?

Chapter 356, acts of the 37th General Assembly amends section 4661 of the code pertaining to witness and jury fees, by striking from line seventeen thereof the following words: "grand or"; repeals section 353 of the code pertaining to the payment of jurors in the district court, and repeals and enacts a substitute for section 471 of the code, which prohibited county auditors from issuing warrants without the recorded vote of the board of supervisors, except for jury fees, which substitute is as follows:

> Except as otherwise provided, the auditor shall not sign or issue any county warrants, unless the board of supervisors by recorded vote or resolution shall have authorized the same, and every such warrant shall be numbered and the date, amount and number of the same, and the name of the person to whom issued, shall be entered in a book to be kept in his office for that purpose.

The chapter further provides for the issuance of warrants for jury fees, witness fees and per diem of court reporters, and the part pertaining thereto is as follows:

> Sec. 4. The county auditor is hereby authorized to issue warrants before bills for same have been passed upon by the board of supervisors. (1) For jury fees and mileage on certificates of the clerk of the court upon which they were in attendance, which certificate shall be issued when the juror entitled thereto shall have been discharged or excused by the court. (2) For witness fees and mileage for attendance before the grand jury upon certificate of the county attorney and foreman of such jury. (3) For witness fees before the district court or trial jury therein in criminal cases, when such fees are payable by the county upon certificate of the clerk of the court upon which they were in attendance. (4) The per diem of the shorthand reporter of the district court upon certificate of the judge holding said court. (5) For expense of the grand jury upon order of the judge of the district court.
>
> Sec. 6. All bills paid under the provisions of this act shall be passed upon by the board of supervisors at the first meeting following such payment and shall be entered on the minutes as other claims allowed by the board.

Section 254-a2 of the Code Supplement, 1913, among other things, provides as follows:

> Shorthand reporters of the district court shall be paid $8.00 per day for each day's attendance upon said court under direction of the judge out of the county treasury where such court is held, upon the certificate of the judge holding courts * * * where a shorthand reporter is required in the discharge of his official duties to leave the county of his residence or the city or town of his residence to perform such duties, he shall be paid his actual and necessary hotel and living expenses, not to exceed the sum of three dollars per day and transportation expenses as shall be incurred, not exceeding in all two hundred dollars per year, which account shall be itemized and approved by the presiding judge of the district court and certified to the county auditor of the county in which such expenses are incurred, and shall be paid in the same manner as the per diem of such reporter is paid.

Section 1300 of the code, to which you refer, is as follows:

> In all cases where fees or compensation, except a fixed salary, are by the provisions of this code, to be paid any officer or other person out of the county or state treasurer, no part of the same shall be audited or paid until a particular account has been filed in the auditor's office of the county or state, verified by affidavit and showing clearly for what services such fees or compensation is claimed, and when the same was rendered.

The last section is what is termed a "general statute," and except in specific instances provided by special statutes, applies to and controls the filing and allowances of all claims for fees or compensation, except fixed salaries, which are to be paid to any officer or person out of the county or state treasury.

It requires, as a condition precedent, that a particular account, duly verified, of every such claim shall be filed in the auditor's office of the county or state, as the case may be, before it shall be audited or paid, and, in the absence of any other statute modifying the language of the section, no claim for fees or compensation could be lawfully audited or paid without compliance with said requirements. Under the provisions of section 353, a "special statute," which was repealed by the chapter in question, section 1300 was modified to the extent that the auditor might issue warrants for jury fees, upon the certificate of the clerk of the district court without the same being audited by the board of supervisors, and by the provisions of section 471, also a "special statute," which the new act likewise repeals, the auditor was permitted to issue county warrants for jury fees without recorded vote or resolution of the board of supervisors authorizing the same, and provision also was made for the payment of witness fees in criminal cases in section 4661, upon certificate of the clerk or justice.

Different constructions were placed by county officers upon these various sections, some of which we have termed "special statutes," as to the extent they limited or modified section 1300, and in many, if not all, the counties of the state, jury fees for services in the district court were paid upon the certificate of the clerk of the court without verified bills being filed with the county auditor or warrants issued therefor, and in some counties, witness fees in state cases, and for all attendance before the grand jury, were likewise paid upon the certificate of the clerk of the court or of the foreman of the grand jury, and it was doubtless for the purpose of establishing a uniform system among the several counties of the state governing the issuance of warrants in payment of compensation and fees in these several classes

of cases, as well as providing for the payment of the court reporter of the district court, that the special statute was passed.

In the construction of section 1300, we must give meaning and force not only to chapter 356, acts of the 37th General Assembly, but to section 254-a2, supplement to the code of 1913, and if, in the construction of these two sections last above referred to, it is found necessary to hold they are an exception to section 1300, they can all be given force and effect; otherwise, they could not be given full force and effect. General statutes, as heretofore defined, may be modified or limited as to their scope and operation by special statutes or acts, and chapter 356, acts of the 37th General Assembly, and section 254-a2, supplement to the code of 1913, are both special statutes enacted subsequent to section 1300, and as they are both in conflict with section 1300 code of 1917, they must be held to be exceptions to said section.

We think in construing section 353 of the code of 1897 prior to its repeal, that it was universally held to be an exception to section 1300 of the code of 1897, and if it was an exception to section 1300, there is clearly as strong reason for holding that chapter 356, acts of the 37th General Assembly and section 254-a2, supplement to the code of 1913, are also exceptions to section 1300 of the code of 1897.

Section 1300, of the code of 1897, provides:

> In all cases where fees or compensation, except a fixed salary, are by the provisions of this act to be paid any officer or other person out of the county or state treasury, no part of the same shall be audited or paid until a particular account has been filed in the auditor's office.

Section 4 of chapter 356, acts of the 37th General Assembly, provides for the auditing of the account for jury fees and witness fees by the clerk of the court in divisions 1, 2 and 3 of said section 4, and when these are audited by the clerk and certified to by him, the auditor is bound to pay the amount so certified, and section 8 of chapter 356, acts of the 37th General Assembly, makes the clerk liable upon his official bond for an erroneous certificate in connection with said fees, thereby giving to the county greater security with reference to witness and jury fees than it has ever had under the law prior to the enactment of chapter 356.

There is nothing in chapter 356, acts of the 37th General Assembly, in our opinion, to warrant a court in holding that it was the intention of the legislature to change the rule with reference to jurors from what was originally provided in section 353, code of 1897,

which was repealed by chapter 356. If this conclusion is correct, then jury fees are collectible upon the certificate of the clerk without any verified account as they originally were collectible under section 353.

Division 4 of section 4 provides for the per diem of the shorthand reporter of the district court to be paid upon the certificate of the judge holding said court. Section 2549-a2, supplement to the code 1913, to which your attention has heretofore been called, provides for the payment of the reporter's per diem and expenses upon the certificate of the judge. It surely is clear that this was the intention of the legislature to place the per diem of the shorthand reporter of the district court upon the same basis as witness and jury fees, and inasmuch as they are on the same basis, and witness and jury fees must be paid upon the certificate of the clerk of the court without the filing of an affidavit, then the per diem of the shorthand reporter is to be paid upon the certificate of the judge without the filing of the verified account.

The repealing of section 471 of the code and the enactment of the substitute therefor, which is provided in chapter 356, acts of the 37th General Assembly, shows that it was the intention to add to the exceptions of section 1300 all of the items mentioned in divisions 1, 2, 3, 4 and 5 of section 4, chapter 356, acts of the 37th General Assembly.

I call your attention also in this connection to divisions 1 and 2 of section 5, chapter 356, acts of the 37th General Assembly, which also supports the conclusion which we have reached in this matter.

Division 1 provides for the payment of bills without the same being audited by the board, upon the filing of "duly verified bills," in certain cases, with the county auditor.

Division 2 of section 5 provides for the payment of salaries and pay rolls which have been previously filed by the board of supervisors "upon certificate of officer or foremen" under whom such compensation shall have been earned, showing that the legislature had in mind the difference between the term "verified bills" and "certified bills" in the enactment of chapter 356, acts of the 37th General Assembly.

What is the situation with reference to the accounts referred to in chapter 356, acts of the 37th General Assembly? When these accounts have been certified by the clerk or by the judge, or by the county attorney, or foreman of the grand jury, as provided in section

4, then the auditor is bound to pay the amount so certified by these different officers. If the certificate is erroneous, all of the officers certifying, except the judge, have an official bond, and they are liable upon their bonds for a false or erroneous certificate. These officers are made the auditing board as to the bills or accounts referred to in said section 4, and the board could not disallow any of these claims if they are properly certified to by such officers. There remains nothing to be done by the board except to place these in their minutes and pass them merely as a perfunctory matter; and if they did disallow them, what would it avail, because they have already been paid lawfully by the county auditor.

It is, therefore, the holding of this department that the per diem of the shorthand reporters of the district court should be paid upon the certificate of the judge holding said court, without the filing of any verified account in connection therewith with the county auditor.

H. M. HAVNER,
Attorney General.

MARSHAL'S FEES.

The marshal is entitled to collect fees in criminal cases in the superior court where the prosecution fails or where such fees cannot be made from the person liable to pay the same.

October 29, 1917.

Hon. F. S. Shaw, Auditor of State,

Dear Sir: Your request for the opinion of this department on the following question has been referred to me for attention:

> I desire your opinion on the following question: In a criminal case tried under the state law in the superior court should the city marshal's fees in such case be paid by the county supervisors as part of the costs in such case and then turned over to the city treasurer?

Section 280, pertaining to superior courts, as amended by chapter 12, acts of the 34th General Assembly, provides as follows:

> The marshal shall receive the same fees and compensation for serving the process of said court, and for other services required of the sheriff in the district court, as the sheriff receives for like services. But in all criminal cases in said court the marshal shall receive the same fees for his services as are paid to the constable in justice court.

Section 512, being a part of chapter 6, title IV of the code, pertaining to the duties of the sheriff and the fees of such officer, is as follows:

> In all criminal cases where the prosecution fails, or where the money cannot be made from the person liable to pay the same, the facts being certified by the clerk or justice as far as their knowledge extends, and verified by the affidavit of the sheriff, the fees allowed by law in such cases shall be audited by the county auditor and paid out of the county treasury.

Sections 4597 and 4598 of the code, pertaining to justices of the peace and their courts, fixes the amount of fees to be charged in such courts by the justice and constable, or other peace officer executing the processes of the court, and section 4599 refers to the fees enumerated in the two sections above and is as follows:

> The fees contemplated in the two preceding sections, in criminal cases, shall be audited and paid out of the county treasury in any case where the prosecution fails, or where such fees cannot be made from the person liable to pay the same, the facts being certified by the justice and verified by affidavit.

Section 260 confers upon superior courts jurisdiction concurrent with the district court, except in certain specified matters, exclusive original jurisdiction in all actions, civil and criminal for violation of city ordinances, as well as all jurisdiction conferred upon police courts and concurrent jurisdiction with justices of the peace.

Section 267 fixes the fees in civil actions in the superior court the same as in the district court, except as otherwise provided, and requires the clerk to account for and pay over to the city all fees that may be paid into the court and also all fines for the violation of city ordinances. Of all other fines he shall render the same account as is provided for justices of the peace. In actions for the violation of city ordinances, if unsuccessful, the city is required to pay all costs, the same as provided by law for the county in criminal actions prosecuted in the name and on behalf of the state and the fees in such cases shall be the same as in justice courts and be paid and accounted for as above stated and as otherwise provided by law for justices of the peace and their courts.

It will be observed that by the provisions of section 4599 it is only the fees in criminal cases where the prosecution fails, or where the money cannot be made from the party liable to pay the same, that the county is made liable therefor, and a like provision is contained in section 312, and section 267 makes the fees in criminal cases in the superior court the same as in justice court and to be paid and accounted for as provided by law for justices of the peace and their courts, and I am, therefore, of the opinion that the marshal's fees in criminal cases, brought for and on behalf of the state and where the

prosecution fails, or where such fees cannot be made from the person liable to pay the same, and such facts are certified by the proper court and a duly certified claim is filed therefor that such fees may be paid out of the county treasury.

As to whether or not such fees, when collected by the marshal, shall be turned over by him to the city treasurer, depends entirely upon the contract or arrangement between such officer and the city of which he is marshal.

J. W. SANDUSKY,
Assistant Attorney General.

EXEMPTION FROM TAXATION OF PROPERTY OF SOLDIERS.

The law exempting homesteads, or other property in the event of no homestead, of soldiers, sailors and other persons in the military service of the U. S. does not require persons entitled to such exemption to make claim therefor, but it becomes the duty of taxing officers to ascertain from trustworthy and reliable sources of information who are entitled to such exemptions and see that the same is granted.

December 29, 1917.

Hon. Frank S. Shaw, Auditor of State,

Dear Sir: This department has had numerous inquiries from various county auditors in reference to the exemption of soldiers and sailors, and in relation thereto, I desire to call your attention to the fact that chapter 380, acts of the 37th General Assembly provides:

> The homestead of all soldiers, sailors or other persons in the military or naval service of the United States shall be exempt from taxes during their term of service in the present war; or other property to the actual value of ten thousand (10,000) dollars in the event of no such homestead.

You will observe from the reading of this provision that it is not incumbent upon the soldier or sailor, or person in the service of the United States to claim this exemption, and inasmuch as many of them who are entitled to this exemption are now in the trenches in France, and others of them are in the great centralization camps in this country, it is, in my judgment, the duty of the taxing officers to ascertain those who are entitled to this exemption and to see that the exemption is given to the various persons entitled thereto.

I call your attention to the fact that this department has already ruled that the exemption does not apply to any part of the taxes for the year 1916, but that the exemption above provided is granted to any person engaged in the military or naval service of the United States who served any part of the year 1917, which tax will be pay-

able after January 1, 1918, and for the full term of the service of such soldier or sailor.

I suggest that you direct the county auditors of the various counties to ascertain what persons from their counties were engaged in the military or naval service of the United States for the year 1917, or any part of said year, and as to such person, to see that the exemption provided by statute is given and proper action taken by the board of supervisors of the various counties with reference thereto, remitting such taxes for the year 1917 as are covered by the exemption above provided.

The county auditors should be required to direct the assessors to ascertain, through proper questioning all persons who are now in the military or naval service of the United States government for the purpose of completing the list of those entitled to the exemption for the year 1918 as far as possible. This should be carefully done to the end that the exemption is granted to every man entitled thereto, and also to see that the exemption is not allowed to those not entitled thereto.

H. M. HAVNER,
Attorney General.

TAXATION IN CERTAIN CASES.

General discussion as to fixing value of shares of stock on insurance companies for taxation; appeal from city council acting as board of review; and surplus whether considered money or credits.

February 21, 1918.

Hon. F. S. Shaw, Auditor of State,

Dear Sir: I am directed to answer your letter of recent date addressed to Attorney General Havner.

You ask, first:

> In fixing the value of the shares of stock of insurance companies having capital stock and named and referred to in section 1333-a of the code of 1913, should non-ledger assets of interest due and accrued on mortgages, bonds, etc., and uncollected deferred premiums be considered, in fixing the value?

It is our opinion that these items should be considered in fixing the taxable value of said property. Such insurance corporations are assessed by express statutory provision under sections 1323-24 and 25 of the code of 1897.

Section 1324 of the code provides that if the assessor is not satisfied with the appraisement and valuation furnished by the institution, he may make a valuation of the shares of stock based upon the facts contained in the statements required, or upon any information within his possession, or that shall come to him.

Section 1323 provides that the assessment is to be on the value of the shares of stock of such corporations on the first day of January in each year.

In arriving then at the value of the shares of stock, it would be necessary to take into consideration all the property and assets of the corporation, of whatever nature and kind. It would be unfair and inaccurate to fix the value of the shares of stock of such corporation upon any other basis.

You ask, second:

> In case the city council, acting as a board of review, has permitted companies in the past to deduct these items specified, has that any binding force on county authorities if such deduction is found to be illegal?

The deduction referred to, we assume, relates to the items of the corporations above referred to. This being true, it is our opinion that the action of the board of review is conclusive and absolutely binds the county authorities, unless the proper county authorities appeal from the action of the board of review to the district court as by law provided. This is not a case of omitted property or failure of taxation, it is a question of erroneous valuation of property that has been listed and taxed and the remedy for such illegality is not by section 1835 or section 1374, but, as before stated, by appeal to the district court.

You ask, third:

> Under section 1333-c, can the surplus of mutual insurance companies be taxed as moneys and credits and assessed at $5.00 per thousand? Same query as to stock companies.

Under section 1333-c, moneys and credits of all mutual insurance companies and stock companies engaged in the insurance business should be assessed, except county mutual and fraternal beneficiary associations not organized for pecuniary profit; the surplus or other funds named in said section, which is to be deemed a debt is to be deducted under section 1311 of the code, includes only the surplus or other funds accumulated by such corporation or other association for the purpose of fulfilling its policies, certificates or other contracts of insurance and which can be used for no other purpose.

Before this section was amended by section 258 of the acts of the 37th General Assembly it was necessary that the said surplus or other funds which were to be deducted under section 1311 of the code to be accumulated "pursuant to law, its contract of insurance, or its articles of incorporation" and the exceptions of taxation did not apply to surplus or other funds of the insurance company otherwise acquired.

Ins. C. vs. Board of Review, 131 Iowa 254.

The exemption now is broader and not so limited as it was before the amendment made by the 37th General Assembly so that now the surplus or other funds accumulated by such association or corporation is such as is accumulated for the purpose of fulfilling its policies, certificates or other contracts of insurance, and which can be used for no other purpose.

It is not necessary now that such surplus or other funds be accumulated by said corporations or associations pursuant to law, its contracts of insurance or its articles of incorporation. Therefore, the surplus or other funds of the insurance company collected and held by such company for the purpose of fulfilling its policies, certificates or other contracts of insurance, and which can be used for no other purpose, is not assessable under section 1333-c as moneys and credits, but the surplus or other funds of such corporation or association, which is not for the purpose of fulfilling its policies, certificates or contracts of insurance and which is not dedicated for that purpose and that purpose only, may be assessed; that is, in order to obtain the exemption mentioned in section 1333-c, it is necessary that the surplus or other funds be dedicated for the specific purpose and the use only of fulfilling its policies, certificates or other contracts of insurance.

J. W. KINDIG,
Assistant Attorney General.

DOG LICENSE FEE.

Dog license fee collected under chapter 50, laws 37th General Assembly not to be collected annually.

July 27, 1918.

Hon. F. S. Shaw, Auditor of State,

Dear Sir: We have a request from you for an opinion, on date of July 26th, as follows:

We desire an interpretation of the meaning of chapter 50 of

the laws of the 37th General Assembly upon two points relating to the county officers' duty in the matter of handling the proceeds of the dog license fee provided for by the above-mentioned chapter.

First. Is the registration fee provided for by section second of chapter 50 to be collected annually, or is it a perpetual license fee?

Second. Should the proceeds of said license, when collected by the county auditor and turned over to the county treasurer, be deposited in the county funds or as a fee of the office of the county auditor, or should it be treated as a tax and deposited in the domestic animal fund?

In answer to your first question, I do not find anything in chapter 50 of the laws of the 37th General Assembly, which requires the license fee to be collected annually, and apparently this is not the intention of the legislature, the apparent purpose being to afford a means of identification of those dogs upon which a license fee has been paid as distinguished from those upon which it has not been paid. I am also inclined to this opinion by reason of the fact that other statutes provide for the collection of a regular tax upon dogs.

In answer to your second question, I beg to say that I do not regard the license fee, when collected, as a tax to be placed in the domestic animal fund, but on the other hand, it is more in the nature of a fee to be collected by the county auditor and turned over to the county treasurer as a part of the county fund.

F. C. DAVIDSON,
Assistant Attorney General.

DEDUCTION OF REAL ESTATE IN ASSESSMENT OF BANK STOCK.

The value of real estate as fixed by the assessor is the value to be taken when a deduction is made from capital stock of bank or other corporation.

May 16, 1917.

Hon. F. S. Shaw, Auditor of State,

Dear Sir: Your request for the opinion of this department on the following proposition has been assigned to me for attention:

In the deduction of the value of real estate from the total value of capital stock of banks or other corporations, should the value of such real estate to be deducted be the value fixed by the assessor or other taxing officer or should it be the value returned by the bank or other corporation of such real estate?

Section 1322 of the 1913 supplement to the code provides that

shares of capital stock of national, state and savings banks and loan and trust companies shall be assessed to such banks and trust companies.

To aid the assessor in fixing the value of such shares the corporation is required to furnish him a verified statement of the various matters mentioned in section 1321 of the 1907 supplement which shall also show separately the amount of capital stock and the surplus and undivided earning, and from such statement and other information obtainable, he is to fix the value of such stock.

In arriving at the total value of the 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.

Section 1324 provides that if the assessor is not satisfied with the appraisement and valuation furnished as provided in sections 1321 and 1322, he may make a valuation of the shares of stock based upon the facts contained in the statements furnished him under the provisions of said sections, or upon any information within his possession and in either case assess the stock at the valuation made by him. This section further provides that,

> In deducting, under the provisions of this chapter, the value of real estate from the actual value of the properties, shares or capital stock of any person, firm, association or corporation, the actual value at which said real estate is valued by the assessor or other taxing officer or body where the same is assessed, shall be the value thereof.

It is from the apparent or possibly apparent conflict between the provisions of section 1322, 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.

with the provisions of section 1324, which reads as follows:

> In deducting, under the provisions of this chapter, the value of real estate from the actual value of the properties, shares or capital stock of any person, firm, association or corporation, the actual value at which said real estate is valued by the assessor or other taxing officer or body where the same is assessed shall be the value thereof.

that the doubt or uncertainty arises as to whether the amount "actually invested in real estate," as provided in section 1322 or "the actual

value at which said real estate is valued by the assessor," as provided by section 1324, is to control or govern.

I am free to say that the language is somewhat confusing, but, as the supreme court has had occasion to pass upon the question and to construe the two sections, I shall be content with giving the construction placed upon them by the court in the case of Valley Investment Co. vs. Board of Review, 152 Iowa 84. In that case the question was whether the value of the real estate to be deducted from the capital stock of the corporation was to be determined by section 1322 or by section 1324, and the court, in an exhaustive opinion by Judge Deemer, held that the latter section controlled. It therefore follows that it is the value of the real estate, as fixed by the assessor, that may be deducted from the value of the capital stock.

J. W. SANDUSKY,
Assistant Attorney General.

WHEN MOTOR VEHICLE FUND APPORTIONED TO CITIES.

Motor vehicle fund should not be apportioned among cities failing to file certified statement showing number of miles of unpaved streets. Treasurers should not delay to make his apportionment to cities so complying with law awaiting the delayed statements.

April 13, 1917.

Hon. F. S. Shaw, Auditor of State,

Dear Sir: I have your request for the opinion of this department on the following questions:

> Will you please give me your official opinion on the following question?
>
> Section 1571-m32, supplemental supplement to the code, 1915, provides that the county treasurer shall apportion the motor vehicle fund received from the treasurer of state on the basis of unpaved roads and streets. It also provides that "for the purpose of making such apportionment the city or town shall file in the office of the county treasurer a certified statement of the number of miles of unpaved streets within such city or town, and the county auditor shall make a like statement of the number of miles of highway outside the limits of cities and towns.
>
> First. If a city or town does not file a certificate within the time fixed by the statute, is it entitled to its proportion of such fund? Provided such certificate is filed before distribution by the treasurer?
>
> Second. If a city or town fails to file any certificate at all,

even after fair notice, is it entitled to participation in the distribution of this fund? If so, on what basis?

Third. Inasmuch as this certificate is the basis of the apportionment, must the treasurer delay the apportionment to the inconvenience of cities which have complied with the law or should he proceed to make the apportionment on the basis of the certificates which have been properly filed?

I enclose herewith copy of opinion we rendered C. H. Stafford, county attorney of Muscatine county, which answers your first question.

As to the second question, I am of the opinion that the filing of the certified statement, on or before the dates fixed in the statute, cannot be dispensed with or unreasonably delayed, and when a city or town fails and refuses to file with the county treasurer the certified statement showing the number of miles of unpaved streets within the corporate limits of such city or town, it would be proper for the treasurer to proceed to make the apportionment of the funds in his hands among the several cities and towns of the county that had complied with the law, by filing their respective statements with him, regardless of what the rights of any city or town so failing to file such statements would have been had they filed the same and complied with the law in that respect. The statute does not require or contemplate that the treasurer should send notice to a city or town, that he might have reason to believe would be entitled to receive a portion of said fund, if it had complied with the law, by filing the necessary certified statement, and had failed so to do, but it would, doubtless, be wise and but a reasonable precaution, for the treasurer, at the expiration of the time for filing such statements, to send a ten-day written notice, by registered mail, to the proper officer of such city or town, calling attention to his failure to file such statement, and that, at the expiration of the time fixed in said notice, the city's right to any portion of such fund would be forfeited.

As to the remaining question there can be but one answer. No provision is made in the statute for the treasurer to delay or postpone the apportionment and distribution of the funds in his hands, after the dates fixed in the statute, therefore, he should and must proceed to determine the apportionment on the basis of the number of miles of unpaved streets within the corporate limits of the cities and towns of his county, as shown by the certified statements on file in his office.

J. W. SANDUSKY,
Assistant Attorney General.

MUNICIPALLY OWNED PUBLIC UTILITIES EXEMPT FROM TAXATION.

Municipally owned waterworks, gas and electric light and power plants, although charging rental to patrons are exempt from taxation.

April 13, 1917.

Hon. Frank S. Shaw, Auditor of State.

Dear Sir: We have your request for the opinion of this department on the following facts:

> Are municipally owned waterworks plants, gas plants and electric light and power plants exempt from taxation as property owned by a city and devoted to the use of the public when patrons are charged for water, gas and electricity?

Section 1304 of the 1913 supplement to the code, paragraph 1, pertaining to the assessment of taxes, is as follows:

> The following classes of property are not to be taxed:
>
> 1. The property of the United States and this state, including university, agricultural college and school lands; the property of a county, township, city, town or school district or militia company, when devoted entirely to public use and not held for pecuniary profit; municipal, school and drainage bonds or certificates hereafter issued; public grounds, including all places for the burial of the dead, crematoriums, the land on which they are built and appurtenant thereto not exceeding one acre, so long as no dividends or profits are derived therefrom; fire engines and all implements for extinguishing fires, with the grounds used exclusively for their buildings and meetings of the fire companies; no deduction from the assessment of the stock of any bank or trust company shall be permitted because of such bank or trust company holding such bonds and certificates as may be exempted above;

There is a conflict of authorities on the question of exempting plants of the character you describe from taxation. There is a line of cases in New Hampshire, New York and Pennsylvania holding that such properties are not exempt from taxation while, on the other hand, in the states of Colorado, Connecticut, Kansas, Kentucky, Massachusetts, Michigan, New Jersey, Tennessee and Virginia such institutions are held to be exempt from taxation under statutes similar to our own.

In the case of Sumner County Commissioners et al vs. City of Wellington, Kansas, reported in 60 L. R. A. 850, the question of the right of a municipally owned waterworks plant to be exempt from taxation was determined and numerous authorities from the several states above named were reviewed and the court held as follows:

A waterworks plant owned and operated by a city is exempt from taxation and the fact that water is furnished by the city to citizens and other consumers at prescribed rentals does not affect the exemption.

This we believe to be good law and we are, therefore, of the opinion that municipally owned waterworks plants, gas plants and electric light and power plants serving the public at prescribed rentals or charges are exempt from taxation under our statutes.

J. W. SANDUSKY,
Assistant Attorney General.

TAXATION OF POWER PLANTS.

The valuation of a power plant may be taken at any date between January 2d and April 1st for taxation purposes.

April 30, 1917.

Hon. F. S. Shaw, Auditor of State,

Dear Sir: Your request for the opinion of this department on the following facts has been assigned to me for attention:

Within the city of Nashua there is located a dam and power plant, erected on land owned by the Citizens Gas Co. This land is known as lot 1 and is all located within the incorporated town of Nashua and includes the river bed and some land adjacent on either side. This dam and power house were erected, the work beginning the first part of the year 1916, and is about completed at the present time. The water was not held by the dam until about the first week in March, 1917, but since that time has been in operation and electrical current produced. Before erecting this dam, it was necessary to purchase a large acreage of land above the river for overflow purposes, the land being purchased by the Cedar Valley Light and Power Company, the same company that originally owned lot 1 now owned by the Citizens Gas Company. These two companies are both foreign corporations and appear to be working under the same local management. The transfer of lot 1 by the Cedar Valley Power Company to the Citizens Gas Company was made some few months prior to the beginning of work on the new dam and power house. There was also a large tile drain built and erected during the summer of 1916 by the Cedar Valley Light and Power Company draining certain lands north of the city and emptying into the river immediately below the dam. This tile drain is all located within the incorporated town of Nashua and also erected for the purpose of reducing the amount of land that otherwise would have had to be purchased for overflow purposes, the cost of said drain and dike being considerable, possibly $10,000 to $15,000.

All of this land that has been purchased for overflow purposes and which cost the company in the neighborhood of $100,000, is now non-productive excepting as it is necessary for the maintenance of the dam and power house located within the town of Nashua. This property belonging to the Citizens Gas Company was assessed by the Nashua assessor on March 31, 1917, and at a value given by the manager of said company. The board of equalization at its regular meeting in April raised said assessment, taking into consideration in said increased assessment the value of said flowage rights, dike and tile drain as being a part of the value of the local plant. The company owning said overflow lands objected to the increased assessment, contending that all of said overflow lands should be taxed in the taxing district where located. The city of Nashua contends that in the light of the case City of Oskaloosa vs. Water Company, 84 Iowa 407, the value of the flowage rights, dike and tile drain would be considered in the light of appurtenances to the main plant located within the town and that the entire property of both of said companies should be taxed at the situs of the main plant which is located within said town.

First. What we wish to know is whether or not the town of Nashua is justified in taking into consideration all of the appurtenances above mentioned which are used in connection with the operation of said dam and power plant and which are a necessary part.

Second. Is it not a fact that in the case above cited the land purchased for overflow purposes, whether within or outside the incorporated town of Nashua, has now lost its value as land and in that taxing district would it, if taxed at all, be not taxed at simply a nominal value?

Third. Is not all of the money expended by either or both of said companies for the purchase of overflow lands or other expenditures for improvements made, all incident to the erection and maintenance of said dam to be considered as a part of the value of the dam and power house located on lot 1 of said town?

Fourth. If at said adjourned meeting it should be found that said town should consider the value of said flowage rights located outside of said town as a part of local valuation and it should be found that the assessment as raised is still too low, would have the power at its adjourned meeting to further increase said assessment?

Fifth. Another question that has been raised in this matter relates to the time at which real estate is actually assessed. The property above mentioned was under process of construction on January 1, 1917, but not in operation, but it was in operation on March 31, 1917, the day of assessment. For purposes of taxation, will the town be permitted to determine the valuation as of the day of assessment or on the day of January preceding?

The principal question of the town of Nashua is one relating to its right to tax the value represented by the purchase of the overflow lands located outside of the corporate limits of the town.

Sixth. In the event that you hold all overflow land located outside the Nashua taxing district should be taxed where located, would it be permissible to consider the enhanced value that might attach to the property located within the town because of its proximity to the reservoir lying immediately above the dam and in another taxing district?

Seventh. In other words, may the city in arriving at the actual value of the dam and power plant consider the original cost of the plant, their location, their access to the necessary water supply, the time of duration of franchise, the demand for electric current produced, the capacity of the plant, the actual revenue derived therefrom together with the actual physical value of the property?

Eighth. Will the town in arriving at the actual value of the plant located within the city necessarily view the plant in its entirety in arriving at the actual value of that portion of the plant located within the city?

I will endeavor to answer, as best I can, the several questions in the order propounded. The rule which would otherwise, doubtless, govern the assessment and taxation of property of this character, has, as I view the situation, been changed by section 1343 of the code, and the questions propounded must be solved in accordance with the provisions of that statute the part thereof expressly pertaining to the propositions presented is as follows:

* * * the lands, buildings, machinery, tracks, poles and wires belonging to individuals or corporations furnishing electric light or power * * * shall be listed and assessed in the assessment district where the same are situated. But where any such property except the capital stock, is situated partly within and partly without the limits of a city or town, such portions of the said plant shall be assessed separately, and the portion within the said city or town shall be assessed as above provided, and the portion without the said city or town shall be assessed in the district or districts in which it is located.

Notwithstanding the foregoing provisions, I am of the opinion that the first question may be answered in the affirmative. That is, the assessor may take into consideration all of the appurtenances described in arriving at the value to be placed upon the property in the taxing district of Nashua, though the consideration of the property as a whole, will not permit adding the value of such part situated out-

side the Nashua district, to the part within such district for the purpose of taxation.

As to the second question, I am of the opinion that it must be answered in the negative at least so far as the lands situated outside the taxing district of Nashua are concerned, for by express provision of the statute such lands shall be assessed in the taxing district in which they are located.

As to the third question, I am of the opinion that it must, with certain qualifications, be answered in the negative. 'Tis true that the flowage right as well as the embankment and the tile drain are appurtenances to the dam and power house and would, doubtless, pass with a conveyance thereof, but to the value and extent that they may be regarded as lands, the portions thereof situated outside the taxing district of Nashua must be assessed in the district in which they are located.

As to the fourth question there can be no doubt, I think, about the board of review having the right to increase or diminish the valuation of any property in the taxing district prior to its final adjournment, but if any part thereof is raised notice thereof and time and opportunity to make objections thereto must be given the same as though such raise or increase had been made at the first or earlier meeting of the board. And in this connection I deem it wise in view of the fact that the notice and time necessary to be given might extend beyond the date fixed in the statute for the completion of the duties of the board, to call your attention to the case of Hawk Eye Lumber Co. vs. Board of Review of the City of Oskaloosa, 161 Iowa 504, where it is ruled that section 1370 of the code, which provides that local boards of review shall meet on the first Monday of April and sit from day to day until its duties are completed, which shall be not later than the first day of May, is not mandatory but directory.

As to the fifth question there appears to be a diversity of opinion concerning the time of assessment of real estate, whether it should be valued as of the first day of January, or, as of the day on which the assessment is actually taken or made. The statute, section 1350, provides that,

> Property shall be taxed each year and personal property shall be listed and assessed each year in the name of the owner thereof on the first day of January. Real estate shall be listed and valued in each odd numbered year, and in each year in which real estate is not regularly assessed the assessor shall list and assess any real property not included in the previous as-

sessment, and also any building erected since the previous assessment, with a minute of the tract or lot of land whereon the same are situated.

This section provides that personal property shall be listed and assessed each year in the name of the owner thereof on the first day of January, but no such provision is made concerning real estate. Section 1352 provides that, "Each assessor shall enter upon the discharge of the duties of his office immediately after the second Monday in January," and section 1365 provides that "the assessment shall be completed by the first day of April, and the assessor shall attach to the assessment rolls his oath, etc." Section 1350 provides that "property shall be taxed each year," and the word "year," as therein used, doubtless means calendar years, beginning on the first day of January and ending on the thirty-first day of December. Section 1356 makes it the duty of the assessor at the time of making the assessment to inform the person assessed, in writing, of the value put upon his property, and notify him if he feels aggrieved, to appear before the board of review and show why the assessment should be changed. And, while the value of the property for the purposes of taxation, might not materially change between the first day of March following, it might so change by improvements being placed thereon, in many instances the value thereof might far exceed the value of the land upon which they were placed, and hence the necessity of there being a time certain when such valuation should be fixed. A single illustration will be sufficient to demonstrate the wisdom and justice thereof. Suppose "A" and "B" owned tracts of real estate of equal value in the same taxing district on the first day of January, and on the first day the assessor entered upon his duties, being the day following the second Monday in January, he would value and assess the real estate belonging to "A," who in the time interventing between the taking of his assessment and the thirty-first day of March following would erect improvements thereon increasing the value thereof five thousand dollars, and on the thirty-first day of March the assessor would value and assess the real estate of "B," upon which there had been erected improvements since the date when the property of "A" was valued and assessed, increasing the value thereof five thousand dollars, and his assessment was made on such increased valuation, would the law permit such an unfair distribution of a public burden?

To answer the question we must look to the statute. The time to commence the assessment is immediately after the second Monday in January, and it must be completed by the first day of April following.

As before stated, the statute requires personal property to be listed and assessed each year in the name of the owner thereof on the first day of January. This does not require the assessment to be made on that date. It is to be assessed in the name of the owner thereof on that date. The wording of that portion of the statute pertaining to the assessment of real estate is as follows:

> Real estate shall be listed and valued each odd numbered year, and in each year in which real estate is not regularly assessed the assessor shall list and assess any real property not included in the previous assessment, and also any buildings erected since the previous assessment.

By the terms of the statute there is practically three months in which the assessment may be made, and, as before stated, unfair distribution of the burden of taxation will be imposed frequently upon the owners of real estate if the valuation thereof is made by the assessor as of the day on which the assessment is made, and yet this is frequently, if not generally done, and results in more or less confusion, inequalities and uncertainties, which might be avoided if the first of January or other day certain were fixed to which the assessment would relate and as of which the valuation would be made. I have not been able to find that the statute fixes such date. It does, however, make it the duty of the assessor, at the time of making the assessment, to notify the owner of the value placed upon his property. He calls upon him for the purpose of assessing his property and to do so intelligently, he views it, looks it over, fixes the value thereof, for the purposes of taxation, enters the same on the assessment rolls and notifies the owner of the value placed thereon, and, the statute being silent as to the time to which the assessment then taken shall relate, it must be held to be on the date the assessment was made, which as before stated may be any time between the dates named for the beginning and completion of the assessment. This view is strengthened by that part of the section which requires the assessor in the years in which real estate is not regularly assessed to list and assess any buildings erected since the previous assessment, not buildings erected since the first day of January, but since the previous assessment.

However desirable it would be to have the first day of January, or other day certain, fixed as of which real estate should be valued and assessed, or in other words, to which the assessment should relate, I am constrained to believe that the statute does not do so, and that it is permissible thereunder to value and assess real estate as and of any date between the time when the assessment shall begin and be completed, namely between the day following the second Monday in Jan-

uary and the first day of April and for this department to hold otherwise would, as it appears to me, be usurping the proper and exclusive functions of the legislature. In other words the statute does not directly, nor by reasonable inference or implication fix such time, and it would, in effect, be legislation for this department to do so.

Questions six and seven are so related and present but one question, as I understand them, that they may be considered and answered together. Namely: May the city of Nashua, or rather the assessor, in fixing the value of the dam and power plant, consider the cost thereof, their location and access to the water supply, duration of franchise, demand for electric current, capacity for furnishing same, amount of revenue derived together with the actual physical value of the property? These are all proper and legitimate elements to be considred in arriving at the value of the dam and power house, situated on lot 1 in the Nashua taxing district, but the value of the land, wires and poles, if any, located in another taxing district, may not be added to the value of the property located in the Nashua district, for, under the statute, such parts of the property as are situated in another taxing district shall be assessed in such district. The franchise itself may not, under the law of this state, be taxed as such, but that does not prevent it being considered in arriving at the value of the property.

Question eight is answered in the affirmative. While it is true the entire property may not be taxed in the Nashua district, it is proper to view it in its entirety in arriving at the value of the portion they have the right to assess and tax.

J. W. SANDUSKY,
Assistant Attorney General.

TAXATION OF BANK STOCK.

The assessor fixes the value of bank stock for taxation. The county auditor may correct errors in tax lists.

March 2, 1917.

Hon. Frank S. Shaw, Auditor of State.

Dear Sir: In yours of the 13th ult., you propounded the following questions:

> 1. Under section 1322 of the supplement to the code, may the assessor value bank stock for taxation upon the basis of his own judgment or should he value such stock on the basis of capital stock, surplus and undivided earnings from which he should deduct capital actually invested in real estate?

I think the assessor should value the stock according to his judgment, and he is to take into account matters specified in the statute, namely, the capital, surplus and undivided profits, and should deduct from the value thus arrived at the amount of capital actually invested in real estate; that is to say, the assessed value of such real estate.

> 2. If the township or city assessor in valuing bank stock values it on the basis of his own judgment or makes deductions from the valuation of such stock of government bonds or any other credits not permitted under the statute and returns to the county auditor illegal valuation of such stock, is this an error that may be corrected by the county auditor under section 1385-b of the supplement to the code?

In my judgment this question should be answered in the affirmative, assuming that the amount of the erroneous deduction appears upon the face of the returns.

> 3. If the county auditor is empowered to make correction in the computing of the value of such stock, how far back would his authority extend in making such correction on the tax list after same has been turned over to the treasurer?

In my judgment the statute fixes no limit beyond which the auditor might not go in making such correction. Our supreme court has held that in assessing omitted property which is authorized by this same section, he may only make that assessment during the current year. See

Thornburg vs. Cardell, 123 Iowa 313,
Heath vs. Albrook, 123 Iowa 559,
Mead's Estate, 119 Iowa 69.

However, it has been held that the auditor may correct the tax list even after the books have passed into the hands of the county treasurer.

Ridley vs. Doughty, 85 Iowa 418.

I can see no reason why errors such as those referred to in your letter should not be corrected at any time during the time when the tax might be enforced.

C. A. ROBBINS,
Assistant Attorney General.

BANKS PROHIBITED FROM REDUCING CAPITAL STOCK.

Banks organized under the state banking laws may not reduce their capital stock.

February 22, 1917.

Hon. Frank S. Shaw, Auditor of State.

Dear Sir: We have your favor of recent date requesting the opinion of this department on the followig subject:

> Has a bank organized under the state banking laws, whose capital has become impaired, or for other reasons desires to reduce its capital stock, the legal right to do so?

The question appears to be pretty well and generally settled that, unless the law under which the corporation is organized, or its articles of association expressly provide therefor, it has not the right to reduce its capital stock.

> A banking corporation cannot reduce its capital stock in the absence of charter or legislative authority.
>
> Michie on Banking, section 38, p. 80.

> In the absence of express authority from the state a corporation has no power whatsoever to increase or reduce the amount of its stock, and any attempt upon the part of the corporation, either by the corporate officers or by the stockholders, to do so, is wholly illegal and void. Accordingly, it is not competent for a corporation having a fixed capital and being without legislative authority to change it, to reduce that capital to the amount actually paid by it.
>
> Cook on Corporations, section 281.

We apprehend that the strict rules, as laid down by the authorities cited, are based largely, if not entirely, on decisions by the courts in cases where parties immediately interested as officers, stockholders or creditors have resisted, or sought to restrain, a contemplated or attempted reduction of the corporation's capital, in all of which cases there could be but little doubt that, in the absence of charter or statutory authority, a reduction of capital stock would not be permitted.

It is true that banks organized under the national banking law sometimes reduce their capital stock, and it is also true that such reduction has been made for the purpose of meeting an impairment of capital, instead of the usual method of assessment of stockholders, but such action is permitted by statute, under the supervision of the comptroller of the currency, but there being no provision in the state

law permitting banks organized thereunder to reduce their capital stock, we are of the opinion that it may not be done.

J. W. SANDUSKY,
Assistant Attorney General.

CERTAIN BANK DEPOSITS CLASSED AS BILLS PAYABLE.

When bank deposits are solicited, and the directors of banks given personal guaranty with certificates of deposit, such deposits should be classed as bills payable.

February 21, 1917.

Hon. Frank S. Shaw, Auditor of State.

Dear Sir: We have your letter of the 12th instant requesting the opinion of this department on the following facts:

> Is it permissible, under the Iowa laws, for a bank to prefer one class of depositors over another by issuing in connection with a time certificate of deposit a bond or guaranty signed by several of their directors as individuals, the bond or guaranty in question not given merely at the request of a depositor, but is primarily offered as an inducement? Said deposits are taken for a term of from one to five years and possibly longer, in some cases.
>
> Where funds are so solicited and guaranteed by the officers and directors of a bank as individuals, can such a deposit be classed as an item of bills payable?

The right of banks organized under the laws of Iowa to receive deposits of money is unquestioned, as is also their right to issue interest-bearing time certificates therefor. Deposits in a bank may usually be divided into two classes, "special" and "general." Under the later class is money deposited upon open account, and subject to check, and on demand certificates of deposit, and on time certificates of deposit, on each of which interest may, or may not, be allowed, depending upon the arrangement made by the depositor with the bank at the time the deposit is made. The class or kind of deposits to which your inquiry pertains is what is usually termed interest-bearing time certificates of deposit, and, in most instances, are issued for, and payable in, six or twelve months' time, with interest, at a rate agreed upon and fixed, upon presentation and surrender, though they may be issued for a longer or shorter period of time, and usually provide that they shall not draw interest after maturity.

There are certain general principles which are usually observed. In most instances the law, under which the bank is chartered or organized, expressly provides or authorizes the bank to receive depos-

its, and, in some instances, prescribes the conditions, though in general terms only, under which the deposits may be received, but it is left to the managers of the institution to determine upon what terms it will receive deposits, whether or not it will pay interest thereon, the rate of interest it will pay and the length of time for which such certificates will be issued.

The methods that may be employed to secure deposits, as well as other kinds of business, are as numerous and varied as are the characteristics of the various individuals having the institutions in charge. Methods to secure business, in this instance deposits, which might be considered questionable or not legitimate by the officers of one institution might be resorted to or practiced by the officers of another institution without hesitation or scruple, and, yet, there might be no infraction of the law or violation of the rules or regulations of the banking department.

We will now consider the question of the methods adopted or practiced in the case before us. That they are questionable can admit of but little doubt, but they are unlawful or in violation of any rule the banking department is authorized to make? There is no law or rule of the banking department that requires a bank, which issues interest-bearing time certificates of deposit, to pay a uniform rate of interest to its depositors, nor is there any rule of law or of the department that forbids or prohibits the officers of a bank from soliciting business, in this instance deposits, neither is there any law or rule of the department which forbids or prohibits a bank from offering to give, or giving, to its depositors, or some of them, some other security besides the obligation of the bank for the money they may deposit with it. The fact that the personal obligation of one or more of the directors is offered or given to some of the customers or persons who deposit money in the bank is, at most, but security or additional security, and, while it might have, or to some extent did, influence the depositor, it is not a violation of law, and, at most, is but a questionable method of securing business or conducting a bank.

In communities where competition is sharp and active many things are done by banking institutions, and the same may be said of institutions engaged in other lines of business, which high-class, conscientious gentlemen would not consider legitimate, but they violate no law and their correction can only come from and through the disapproval of such methods by the people of the community.

We will now consider the question whether the soliciting of deposits and the giving or offering to give the personal guaranty of the

directors of the bank on the certificate of deposit it issues make such certificates of deposit "bills payable" of, or loans to, such bank? In other words, should money so deposited be considered as deposited in the bank, or loaned to the bank?

In former years the rule quite generally adopted by courts was that money deposited in a bank, except what was termed "special" deposits, was loaned to the bank. Later on, that rule was modified and it was as generally held that money deposited in a bank, and on which the bank paid the depositor interest, was loaned to the bank. These rules became so at variance with methods and requirement of the vast business interests of the country, in this connection with the banking institutions, that their further modification became necessary and a further and complete modification or alteration thereof followed the enactment of statutes, similar to our own, in many of the states which gives to the depositors in banks, which later on became insolvent, a preference over general creditors in the assets of the insolvent bank, and, in construing such statutes, it became necessary for the courts to distinguish between a depositor in the insolvent bank and a creditor who had loaned money to the bank and who, under the law, would be classed as a general creditor.

The line of demarkation between what constitutes a deposit in a bank and a loan of money to the bank is neither distinct nor certain, and, while the courts have struggled with the question and sought to ascertain and define a rule by which the one class may be distinguished from the other, yet such efforts have not met with very complete success and the question is one to be determined by the facts and circumstances surrounding the particular transaction and from the intention and understanding of the parties at the time it occurred. We are assuming that the term, "bills payable," in connection with the business of banking, is synonymous with "money borrowed" by or "loans to" the bank, so that a determination as to whether the facts stated show a deposit in or a loan to the bank will be a sufficient answer to the question propounded. In the case of the State vs. Corning State Savings Bank, 136 Iowa 79, the court was required to distinguish between a deposit and a loan and the facts involved, as stated by Deemer, judge, speaking for the court, was, omitting parts we deem immaterial, as follows:

> "The Corning State Savings Bank was a corporation, organized under the savings bank law of this state. Upon proper proceedings instituted by the auditor of state, C. F. Andrews was appointed receiver of said bank and is now acting as such. March 24, 1904, the Des Moines National Bank filed with the

court and receiver its claim upon what purports to be two certificates of deposit in the sum of $5,000 each, issued by the Corning State Bank. The case was tried upon the two certificates of deposit. The receiver pleaded that the intervenor was not a depositor. That the savings bank never received any money from the intervenor. That whatever money it did receive was in fact a loan. * * * The trial court having dismissed the claim, intervenor appeals and presents the following questions for review: (1) Was it a depositor in the saving bank? If not a depositor, is it entitled to have its claim established as a loan? * * * One of the incidental questions is this: May the receiver show that, although certificates of deposit were issued by the savings bank, the transaction was, in fact, a loan? * * * The issuance of a certificate of deposit does not of and in itself indicate the true nature of the transaction. Such an instrument may be given, although a loan was intended, and parol evidence is admissable to show the true nature of the transaction. * * * A certificate of deposit is for many purposes treated as a promissory note, and parol evidence to show that it was given as evidence of a loan is admissible. * * * Our holding is that the nature of the transaction for which it was given—that is as to whether it was a loan or a deposit of money—may be shown by proper parol evidence. * * * The bank issuing such an instrument is in any event a debtor, but whether as to a depositor or a lender is subject to explanation by parol. None of the cases cited and relied upon by appellant are in point with this proposition. Appellee argues that one bank cannot be a depositor in another; but this is manifestly unsound. There is no provision of law and no reason growing out of public policy which forbids such a deposit. * * * We are now brought down to the pivotal question in the case, to-wit: Was intervenor a depositor in the savings bank as distinguished from a general creditor on account of a loan or loans made to that bank? Determination of this question is important, for two reasons: First, because, if it is a depositor, it is entitled to a preference over general creditors; and second, if a mere lender, there may be some doubt of the validity of its claim on account of a statute providing what kind of loans may be made by a savings bank. * * * A depositor is one who delivers to or leaves with a bank money subject to his order. These may be either time deposits or open ones subject to check. As said by the Connecticut court: "One whose money is intermingled with the general funds of a bank to an ascertained amount, who is acknowledged by the bank to be a creditor to that amount, and who is under no obligation to permit the money to remain there, is a depositor." * * * In Hunt v. Hopley, 120 Iowa 695, we said: "The transaction differs essentially from a loan. That is for the benefit of the depositor. The depository may obtain an incidental advantage, but that is seldom the original object contemplated. In a loan the bor-

rower promises to return the money at a future time, in a deposit, whenever the money is demanded. True, the technical relation of creditor and debtor springs from the making of deposits, but few of the many people who daily leave money with banks for safe keeping, and exact the return of an equivalent amount, ever think of the transaction as a loan, or ever speak of it as such. * *"

"Having distinguished as best we may between a deposit and a loan, we now go to the evidence to see whether intervenor was a depositor as to either of the certificates in question. On the 19th day of October, 1899, while the savings bank was a going concern and when no business relations of any kind existed between it and intervenor, Beaumont Apple, an employe of intervenor, wrote the savings bank that he had made unexpected collections, and would be pleased to place with the savings bank the sum of $5,000 for six months at 6 per cent interest and asked if it would use the same. To this the savings bank responded, through its cashier, that with its present outlook for loans it would use the money on a straight time certificate for one year at 6 per cent. Thereupon Apple sent a draft payable to the savings bank for the sum of $5,000, with a request for the certificate. On October 21, 1899, the savings bank sent Apple an ordinary time certificate of deposit for $5,000. This was made payable to Beaumont Apple, on return of the certificate properly indorsed, with 6 per cent interest from date, and by Apple was indorsed to the intervenor. This certificate was renewed from time to time, and the last renewal is the certificate declared upon in the first count of the petition. The facts as to the issuance of the second certificate differs very materially from those out of which the first one arose. As to this, it appears that one Shepard visited the officers of the savings bank, and these officials requested him, Shepard, to call upon intervenor and see if it would not send the savings bank more money. Shepard, in compliance with this request, saw the officials of the intervenor bank. Pursuant to this, the intervenor bank wrote the Corning bank a letter offering to deposit more money, at the same time, as we understand it, refusing to make a loan. In response to this, intervenor bank received the following letter: "May 29, 1902. Arthur Reynolds, President, Des Moines, Iowa. Dear Sir: Herewith find our certificate of deposit $5,500 as per your letter of some time since, which please put to our credit on account. We do this in order to hold the real estate loans we have for sale until there is a better demand for them later in the summer. I have also personally endorsed the certificate as per your former letter. Yours respectfully, F. L. LaRue, President." The certificate therein referred to was issued to LaRue and by him endorsed to Apple, who, in turn, endorsed it to intervenor bank, and the Corning bank was given credit upon the books of the intervenor bank with the amount of the certificate. This certificate was

marked "paid" by the intervenor bank, but, in fact, it was taken up by a renewal and a new certificate issued to LaRue, and by him endorsed as the other certificate had been. This certificate or one of the renewals thereof, all of which, save the one now in suit, were issued in the name of LaRue, and by him endorsed, was signed by F. A. LaRue as president of the savings bank. Others were signed by the cashier or assistant cashier. The one in suit was issued directly to Apple, and is signed by the cashier of the savings bank. From this recital of the facts, it is apparent, we think, that the first transaction was in fact and form a deposit, and it is just as clear that the second transaction both in form and fact was a loan. LaRue had not deposited any money upon which this second certificate was issued, nor had Apple nor the bank. The national bank simply gave the Corning Savings Bank credit for the amount of the certificate issued to LaRue, and was in no sense a depositor. By no stretch of the imagination may this last transaction be said to be a deposit. As to the first the Corning Bank was not applying for a loan. It was not so far as shown in need of money, but it consented to receive money which Apple proposed to deposit as such, and to issue its certificate therefor. Either Apple or his endorsee could have withdrawn the money at any time, and the mere fact that the certificate of deposit may draw interest at a large rate is not controlling. The certificate does not show that it was a time one, and, if it did, this would not be controlling. As to the first transaction, the relation of borrower and lender, did not exist, but rather that of banker and depositor. As to the second, the relation was clearly that of borrower and lender. The facts and circumstances surrounding these transactions are the strongest arguments that can be presented in favor of the conclusions reached. That one bank may be a depositor in another is not seriously controverted. That it may be, see Elmira Bank v. Davis, 73 Hun. (N. Y.) 357, 26 N. Y. Supp. 200.

"The trial court was in error in disallowing the claim on the first certificate, and in failing to treat it as a preferential one under the rule announced in State v. Bank, 127 Iowa, 198, 103 N. W. 97."

We have set out at considerable length the facts in above case together with the reasons given by the court for the conclusions arrived at. It is the leading case on the subject and has been approved and followed in subsequent cases.

It will be noticed in the foregoing case that the certificate for $5,000, or rather one of the renewals thereof, which was sent by the savings bank to Beaumont Apple, in exchange for the draft for a like amount which he had sent to the bank, and which certificate had been endorsed by him to the Des Moines bank, and which had been

renewed from time to time, was held by the court to be a deposit, and it will also be observed that the certificate for $5,500 sent by the president of the savings bank to the Des Mines bank was held to be a loan. The court basing its conclusions largely on the fact that the first certificate was issued at the request of Apple and in exchange for a draft of equal amount which was deposited in the savings bank, while the second certificate was issued to LaRue, president of the savings bank, and by him endorsed to Apple who, in turn, endorsed it to the Des Moines bank which placed the amount thereof on its books to the credit of the savings bank. In the one case there was the actual deposit of the $5,000 draft in the bank issuing the certificate, while in the other case there was no attempt to make a deposit in the savings bank, but, instead, it was given credit on the books of the Des Moines bank for the amount of the certificate sent it by the savings bank.

In the same entitled case reported in 139 Iowa 338, three certificates, aggregating $16,000 and issued by the savings bank to the Iowa National Bank, and wherein no attempt had been made to deposit anything in the savings bank but, instead, credit had been given it for the amount of the certificates on the books of the Iowa National Bank, they were held, on the authority of the former case in 136 Iowa, to be loans.

In the case in 139 Iowa the court, citing a Michigan case, says:

> What was said by the majority in a Michigan case, State Savings Bank v. Foster, 118 Mich. 268, is particularly applicable: "Under the arrangement the petitioning (creditor) bank took these two certificates of deposit with the understanding that the Peoples Savings Bank might draw its drafts upon it to the amount represented by the certificates and it would honor the drafts, or it may have credited the Peoples Savings Bank in account upon its books. The certificates were simply the evidence of debt, and nothing more. It may as well have held the notes of the Peoples Savings Bank. The transaction would have been no different."

The Michigan case involved the construction of a statute almost identical with our own, giving to the depositors a preference over general creditors in the assets of an insolvent bank.

In the case of Brown v. Sheldon State Bank, 139 Iowa 83, the facts were substantially the same as those pertaining to the $5,500 certificate involved in the case reported in 136 Iowa 79, which case is cited and approved, and it is there held that,

> A certificate of deposit which is, in fact, simply evidence of

a loan and not of deposit, will not be established as a preferred claim against the insolvent bank issuing the same.

With what light these cases furnish us, which we are compelled to admit is not much, we will endeavor to determine the remaining question. As before intimated concerning the conclusions arrived at by the court holding that the $5,500 certificate was not a deposit, but a loan, importance is attached to the fact that the amount represented by the certificate was never deposited in the bank, but, instead, credit was given on the books of the bank which received the certificate to the bank that issued it. The same may also be said as to the fact that the president of the savings bank, LaRue, wrote the Des Moines National Bank saying his bank could use some funds, stating the exact amount it could use, the length of time they would want it and the rate of interest they were willing to pay therefor. But there were other very material facts which might have been considered in arriving at a correct conclusion in that case. The Corning Savings Bank was in need of funds; the Des Moines bank was its regular correspondent and it kept an account with it, and, on account of such relationship, it was natural for the former to apply to the latter for accommodation. It could do so in various ways: It could execute and send on its promissory note, with or without collateral, or it could ask to have some of its customers' notes rediscounted, or it could send on its certificate of deposit, but, in either case, whatever sum it received would be money borrowed, and the character of the transaction could not be changed by the name or form of the instrument which evidenced it. It is true the savings bank solicited the accommodation but it was not soliciting a deposit—it was soliciting a loan from its correspondent, and a loan it got.

The question before us differs materially from any of those involved in the cases cited, and, as before stated, they aid us but little in a determination of this matter. So far as the soliciting of deposits is concerned, if entirely independent of the offering to give, or giving and accepting, additional security with the certificates of deposit issued, we would have no particular difficulty in reaching a conclusion, but taken together, a most serious doubt arises as to the real character of the transaction, and, when we consider the extent to which such practice may have reached and the effect that a conclusion that the instrument issued under such circumstances was not what it appears on its face to be, a certificate of deposit in a bank, but that in truth and in fact it was a loan of money to the bank, and should be listed in the reports of the bank as bills payable, as well as so classed

in all other respects affecting the bank, we realize the importance of the matter before us.

The relations of a bank and its regular depositors are peculiarly those of trust and confidence—far more so than that of borrower and lender. There is a distinct and marked difference and we are constrained to hold that there is a want of that trust and confidence shown when additional security is offered by the bank and accepted by the depositor before he will place his money in the bank and, therefore, we reach the conclusion that deposits received under the circumstances you describe should be classed as bills payable.

J. W. SANDUSKY,
Assistant Attorney General.

SALE OF BANK STOCK WITHOUT CONSENT OF DIRECTORS.

Bank stockholders may dispose of his stock without consent of directors. Any other rule adopted by executive committee of bank unreasonable and void.

February 13, 1917.

Hon. Frank S. Shaw, Auditor of State.

Dear Sir: We have your favor of the 8th inst. requesting the opinion of this department on the following facts:

> He states that about ten years ago he purchased ten shares of stock in a saving bank and that the certificate read as follows: "Shares subject to the articles of incorporation and by-laws of said bank."
>
> He further states that about two years later, the bank adopted a new set of by-laws, which provide as follows:
>
> "Shares of the capital stock of this corporation shall be assigned by surrendering the certificate and entering on the stock book to be kept by the corporation, such assignment and the consent of the executive committee to such transfer."
>
> That previous to the adoption of these by-laws, a stockholder could sell his stock, the purchaser would take the certificate to the bank and a new one would be issued. Now, it appears, the officials demand that the executive committee of the bank pass upon the new stockholder before they issue the new certificate. The question is this: If the purchaser can show that he is worth double the par value of the stock, can the officials legally refuse to issue a new certificate to him, and are such restrictions considered legal.

The rule that a stockholder may sell and dispose of his stock is everywhere recognized, and in support thereof we will quote the following:

> Every bank stockholder, unless prohibited by statute or the charter of the bank, or by-laws legally enacted, has the right to sell, assign and transfer his stock freely and without limitation, and charter provisions limiting this right are intended for the protection of the bank itself and of purchasers without notice, and do not affect the rights of the parties to a transfer in breach thereof as between themselves. When application is made for the transfer of stock in a bank in conformity with its by-laws by one prima facie entitled to have the same transferred, the bank has no control or discretion as to the transfer, or right to prevent it on their transfer book, where it has no claim on the stock at the time it is assigned unless it is insolvent or its capital impaired.
>
> Michie on Banking, Vol. I, pp. 102-103.

> So well established is this right that a by-law of a bank putting restrictions upon the transferability of stock in the hands of its members has been held void as being in restraining of trade.
>
> Morgan vs. Struthers, 131, U. S. 246.

> The stockholder has an entire and perfect ownership over his own stock and may sell and transfer it to whomsoever he pleases, and from which the bank has no power to restrain him.
>
> Brightwell vs. Mallory, 18 Tenn. 196.

and the rule that a banking association may adopt reasonable rules governing the sale and transfer of its stock is equally well recognized, and in support thereof we quote the following:

> To make by-laws for the management and regulation of the corporation, its property and affairs, prescribing the condition on which the deposits will be received and interest paid thereon, and the time and manner of dividing the profits, and for carrying on all business within its power.
>
> Subdivision 6 of Sec. 1844 of the code, relating to savings banks.

> Where the charter of a bank, or its legally enacted by-laws, provide for certain formalities to be observed in the transfer of stock, the legal title can not be otherwise acquired than by conformity thereto, but the equitable title may be otherwise transferred.

> Where the act of incorporation of a bank, authorizes the officers to establish rules conformable to which stock transfers are to be made, they may establish reasonable rules respecting the transfer of stock of the bank, but all unreasonable attempts to restrain the right to transfer such shares are void, as against public policy.
>
> Michie on Banking, Vol. I, p. 108.

Therefore, the question of the right of a stockholder to dispose of his stock and have the proper transfer thereof made on the books of the bank, must be determined upon the principles above stated.

In the case of McNulta vs. Corn Belt Bank, 164 Ill. 427, it is held, that:

> A by-law which makes the sale and transfer of shares of bank stock subject to the consent of the directors, or refuses to permit the same unless the directors are satisfied, is unreasonable and void.

This we regard as sound doctrine and we are of the opinion that if the executive committee of the bank in question was given the arbitrary power, through the by-laws of the association, to permit or refuse the sale and transfer of the stock of the bank, that such rule is unreasonable and void.

J. W. SANDUSKY,
Assistant Attorney General.

USE OF WORD "TRUST" PROHIBITED.

Corporations must eliminate the word "trust" from their name unless it complies with requirement of paid up capital not less than amount of capital of savings banks.

February 12, 1917.

Hon. Frank S. Shaw, Auditor of State.

Dear Sir: You are clearly right concerning the articles of incorporation of the proposed Pocahontas Loan & Trust Company.

The statute, section 1889 of 1913 supplement to the code, expressly provides that all corporations in whose name the word "trust" is incorporated and forms a part, shall have a fully paid-up capital of not less than the amount of capital of savings banks and shall be subject to examination, regulation and control of the auditor of state, and if the corporation does not want to come within the provisions of the section it must eliminate the word "trust" from its name.

I herewith return the articles of incorporation.

J. W. SANDUSKY,
Assistant Attorney General.

OPINIONS TO THE BOARD OF CONTROL

INJURED CONVICTS CANNOT RECOVER COMPENSATION.

A convict cannot recover compensation from state when injured while working at penitentiary.

January 23, 1917.

Board of Control of State Institutions,

Gentlemen: Replying to the oral request of your Mr. McConologue for an opinion on the following state of facts:

> One Adolph Weise, a convict in the Fort Madison penitentiary, was injured while working in the chair department, and the question presented is: "Is he entitled to come under the employer's liability and workmen's compensation act, and receive compensation for such injury from the state?"

will say that the sections of the statute governing the question are as follows:

> Section 2477-m. Employers—Employes—Exceptions. (a) Presumption—Employes Excepted. Except as by this act otherwise provided, it shall be conclusively presumed that every employer as defined by this act has elected to provide, secure and pay compensation according to the terms, conditions and provisions of this act for any and all personal injuries sustained by an employe arising out of and in the course of the employment; and in such cases the employer shall be relieved from other liability for recovery of damages or other compensation for such personal injury, unless by the terms of this act otherwise provided; but this act shall not apply to any household or domestic servant, farm or other laborer engaged in agricultural pursuits, nor persons whose employment is of a casual nature.
>
> (b) Compulsory. Where the state, county, municipal corporation, school district, cities under special charter or commission form of government is the employer, the terms, conditions and provisions of this act for the payment of compensation and amount thereof for such injury sustanied by an employe of such employer shall be exclusive, compulsory and obligatory upon both employer and employe.
>
> Section 2477-m16. Terms defined. In this act, unless the context otherwise requires:
>
> (a) "Employer" includes and applies to any person, firm, association or corporation, and includes, state, counties, municipal corporations, cities under special charter and under com-

mission form of government and shall include school districts and the legal representatives of a deceased employer. Whenever necessary to give effect to section seven of this act, it includes a principal or intermediate contractor.

(b) "Workman" is used synonymously with "employe" (,) and means any person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship for an employer, except a person whose employment is purely casual and not for the purpose of the employer's trade or business or those engaged in clerical work only, but clerical work shall include one who may be subjected to the hazards of the business or one holding an official position or standing in a representative capacity of the employer, or an official elected or appointed by the state, county, school district, municipal corporation, cities under special charter and commission form of government; provided that one who sustains the relation of contractor with any person, firm, association, corporation or the state, county, school district, municipal corporation, cities under special charter, or commission form of government, shall not be considered an employe thereof.

The foregoing subdivisions of section 2477-m of the employer's liability and workmen's compensation act, apparently places the state within its purview and operation. They also define the terms "employer" and "workman," as therein used. The term "employe" includes and applies to any person, firm, association or corporation, and includes the state, and the term "workmen" is used synonymously with "employe" and means any person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship for an employer, except a person whose employment is purely casual, and the question presented is whether a convict, sentenced to and confined at hard labor in the penitentiary at Fort Madison, and who, while so confined, and while engaged at work in the chair factory department of the prison, sustains a serious injury, may he avail himself of the provisions of said act and recover compensation for such injury from the state.

We have given the matter careful consideration and are of the opinion that such convict cannot recover compensation from the state for the injury he sustained.

In order that a person, so situated, may recover from the state, he must first, "have entered into the employment of" the state, or second, "works under contract of service, express or implied," with the state.

First. One who "enters into the employment of the state," must be

in a position to accept or refuse such employment. The entry must necessarily be voluntary. If it is compulsory, or the result of force, there is no entry. Or if it is in performance of a part of the penalty imposed for a violation of law, it is not an entry into the service of the state, as contemplated by the statute.

Second. The relation of master and servant did not exist. There had not been, and could not be, any interchange of reciprocal promises, which, taken in connection with the compulsory character of the employment, necessarily negatives the existence of such relation, and one who is sentenced to, and confined in, the penitentiary of the state at hard labor, and, as a result of such sentence is engaged in work for the state, such work or employment is not under or by virtue of any contract of service, express or implied, with the state but is in compliance with the mandate of the court imposing such sentence and is but a partial payment or performance of the penalties so imposed.

J. W. SANDUSKY,
Assistant Attorney General.

POWER TO PAROLE INSANE CONVICTS.

Board of control has power to parole insane patients taken by county hospital from state hospital—probably legislature intent to give such power to board.

February 1, 1917.

Board of Control of State Institutions,

Gentlemen: Replying to your letter of the 18th ult. wherein you request the opinion of this department on the following question:

> After an insane patient has been taken by the county from the state hospital under the board of control and is being cared for in the proper manner, with whom does the power and right to parole that patient from the county home lie? Does the board of control have jurisdiction over the patient while in the county home and thus have the right to parole him, or do the commissioners of insanity have the power or right to parole the patients who come to the county home from their county?

will say, section 2276 of the code provides, in part, as follows:

> On the application of the relations or immediate friends of any patient in the hospital who is not cured, and who cannot be safely allowed to go at liberty, the commissioners of the county where such patient belongs, on making provisions for the care of such patient within the county as in other cases, may authorize his discharge therefrom;

Section 2277 of the code provides:

> Whenever it shall be shown to the satisfaction of the commis-

sioners of insanity of any county that cause no longer exists for the care within the county of any person as an insane patient, they shall order his immediate discharge, and shall find if such person is sane or insane at the time of such discharge, which finding shall be entered of record by the clerk of the commission.

Section 2727-a64 of the 1913 supplement to the code provides:

Whenever it shall be found by said board of control that any patient cared for at public expenses is confined in a private asylum or county institution, who is violent and whose case is acute and said board shall be of the opinion, after taking competent medical testimony, that said patient can be better cared for in the state hospital with better hopes of recovery, it may remove said patient to the proper state hospital, at the expense of the proper county, said expense to be recovered as provided for in section six hereof. And whenever said board shall find any patient in a state hospital, who shall have become chronic, or likely to do as well in a county or private institution as in the state hospital, it may order the county to which the keeping of said patient is chargeable to remove him or her to some county or private institution in the state which shall have complied with the rules of said board relative to the keeping of insane patients; but in no case shall a patient, the relative or guardian of whom pays the expense of their keep in a state hospital, be thus transferred except upon the written consent of such relative or guardian; but a patient, the expense of whom is borne by the county, may be transferred on the written request of the board of supervisors, or the commissioners of insanity of the county to which the patient is chargeable, and of the board of control; nor shall a patient in a state hospital, who is not cured, be discharged without the consent of the board of control.

Section 2727-a59 code supplement 1913 provides:

Visitation, when and by whom—reports. It shall be the duty of said board of control as soon as practicable after the passage of this act, and at least twice annually thereafter, by one or more of its members or by some competent and disinterested person, whom the board shall appoint, to visit every private and county institution wherein insane persons are kept. Said visitor shall carefully examine into the capacity of said institutions for the care of insane patients, the number kept therein, and their sex, the arrangement of buildings, and the method of their construction, their adaptation for the purposes intended, their condition as to sewerage, ventilation, light, heat, cleanliness, means of water supply, fire escapes and fire protection, the care of patients, their food, clothing, medical attendance and treatment, their employment, if any, the number, kind and sex of employes, their duties and salaries, including nurses, attendants and night watches, the cost to the state or county main-

taining patients, which shall in all cases be kept separate and distinct from the cost of keeping paupers, and such other information which the said board shall deem proper. Said visitors shall make a written report including all of said matters to said board.

Sec. 2727-a62. Board to make rules and regulations. As soon as all private and county institutions in which insane persons may be kept shall have been visited and reports thereon received, the board of control shall adopt reasonable rules and regulations touching the care and treatment of, and make orders in relation to, such insane patients as may be kept in said institutions, which rules and regulations shall not interfere with the medical treatment given to private patients by competent physicians. Copies of such rules and regulations, when adopted, shall be mailed to the chief executive officer of each private institution, and to the clerk of the district court, the chairman of the board of supervisors, and the officer in charge of the institution in all counties having county institutions caring for insane persons. The board shall allow in this case a reasonable time for the management of these institutions to comply with such rules and regulations.

Sec. 2727-a58. County and private insane institutions—governed by board of control. All county and private institutions wherein insane persons are kept are hereby placed under the supervision of the board of control of state institutions.

Sec. 2727-a57. Existing laws—acts in conflict repealed. Existing laws relating to the institutions referred to in this act, which are not inconsistent with the provisions of this act, shall remain in force, and all acts or parts of acts in conflict with, or inconsistent with this act, are hereby repealed.

In certain cases the superintendent of state institutions may discharge patients confined in such institutions, and so may county commissioners of insanity discharge patients confined in the local institutions and also patients confined in state institutions from their respective counties, but there does not appear to be any specific statutory provision for the parole of insane patients from either state, county or private institutions, yet such paroles have been granted, usually upon request of relatives or friends, by the commission of the county from which the patient was sent if confined in a state institution, and, of course, if confined in a county or private institution by the commission of that county.

Section 2727-a62 authorizes the board of control to make rules and regulations as follows:

As soon as all private and county institutions in which insane persons may be kept shall have been visited and reports thereon

> received, the board of control shall adopt reasonable rules, and regulations touching the care and treatment of, and make orders in relation to, such patients as may be kept in said institutions,"

and, by the provisions of section 2727-a58 all such institutions are placed under the supervision of the board of control.

As before stated, no specific statutory provision is made for paroling patients from any of the institutions, and while it is true that the board of control is authorized to adopt reasonable rules and regulations touching the care and treatment of, and make orders in relation to, patients kept in private and county institutions, and that all such institutions are placed under the supervision of the board, yet the question is left in doubt whether the authority thereby conferred upon the board is broad enough and sufficiently comprehensive to permit it to adopt rules or make orders that would prohibit the commissioners of insanity from a county from exercising the power to parole patients they may have committed to the institution. The power to commit patients to the state, county or private institution does not necessarily include the power to parole them, but, such power having heretofore been exercised by them and they being, doubtless, in a position to know better than the board of control about the provisions that have been made for the care of the patient seeking parole, including the responsibility of the person to whom he is to be paroled, or in whose care he is to be placed, it would seem as though such commission might exercise the power to the extent of authorizing a parole, subject to the approval of the board of control and in conformity with the rules and regulations which the board may have adopted. This would secure uniformity in the management of the institutions so far as the matter of paroling patients is concerned

J. W. SANDUSKY,
Assistant Attorney General.

REDUCTION OF TERM OF SENTENCE OF "HONOR" CONVICTS.

Reduction of term of sentence of inmates of penal institutions applies to "trustees" or "honor" inmates the same as those employed in service outside the walls of the institutions.

August 20, 1917.

Board of Control of State Institutions,

Gentlemen: Your request for the opinion of this department on the following question has been referred to me for attention:

> Will you kindly furnish this board with a written opinion as to the law relating to inmates of the penitentiary and reforma-

> tory whereby they are placed on the honor list and when placed on said list are allowed ten days' good time for every thirty days actually served, etc. The point on which we desire your opinion is this: What class of these inmates are subject to be placed on this list? We are desirous of having your opinion on this matter as soon as possible.

Section 5718-a11 of the 1915 supplement provides as follows:

> Any inmate of the penitentiary, and any inmate of the reformatory, who may hereafter be engaged or employed in any service or labor, outside the walls of the institution to which he or she is sentenced, or who may be listed as a "trusty" or "honor" inmate of such institution, may, at the discretion of the said board of control, or at the discretion of the warden of such institution, acting under authority of said board of control, be given and allowed a special reduction in term of sentence at the rate of ten days for each and every month so employed or listed, and every month of such employment shall be counted one month and ten days in point of service on the sentence to be served, in addition to the "good time" allowed by law for good behavior, and the said board of control is hereby authorized and empowered to grant and allow such extra good time or special commutation of sentence, and to make all rules and regulations in relation thereto.

The obvious purpose of this section is to provide a system of reward or compensation, in the form of reduction of sentence, in addition to the provisions made by section 5703 of the code, for inmates of the several penal institutions of the state, and applies to those who may be engaged or employed in any service or labor outside the walls of the institutions, or who may be listed as a "trusty" or "honor" inmate of such institution, at the discretion of the board of control, or at the discretion of the warden, acting under the authority of the board, and it authorizes and empowers the board to grant or allow such extra good time or special commutation of sentence and to make all rules and regulations in relation thereto.

Some doubts or uncertainty may arise as to the class of inmates of the several institutions herein contemplated, from the following provisions of the section:

> And every month of such employment shall be counted one month and ten days in point of service on the sentence to be served.

but in my opinion this should not be construed to limit or modify the plain prior language of the section, which makes it equally applicable to any who may be listed as a trusty or honor inmates of the institution, as well as any who may hereafter be engaged or employed in

any service or labor outside the walls of the institution. In other words, the class includes those employed outside the walls of the institutions and those listed as trusties or honor inmates of the institution, although they may or may not be employed outside the walls thereof.

J. W. SANDUSKY,
Assistant Attorney General.

INSANE PRISONER.

If the prisoner is really insane at the time of his escape from the penitentiaries his good time already earned should not be forfeited.

October 11, 1917.

Board of Control of State Institutions,

Gentlemen: Your letter of October 8th addressed to the attorney general, has been given to me for answer.

You ask:

> Can "good time" be taken from an insane prisoner who, while insane, escapes from the insane ward of the Anamosa reformatory?

It is the opinion of this department that if the prisoner were really insane at the time of his escape his good time already earned should not be forfeited.

Section 5703 of the code provides:

> Each prisoner who shall have no infraction of the rules and regulations of the penitentiaries or laws of the state recorded against him, and who performs in a faithful manner the duties assigned to him, shall be entitled to the diminution of time from his sentence provided by law.

Section 5704 of the code provides for the forfeiture of good time earned under the preceding section. One of the causes for such forfeiture is an escape or an attempt to escape from the institution.

It is the undoubted policy of the law to hold out before the prisoner the opportunity to lessen the time of his confinement in prison. In other words, the reward offered is an appeal to the manhood and reason of the prisoner in order that he may exercise his will in favor of right, be a model prisoner, and acquire the habit of acting in uprightness and in obedience to laws and rules of regulation. While on the other hand, the forfeiture provided is for the purpose of reminding the prisoner that punishment will be meted out if he wilfully disobeys or breaks the law.

It cannot be doubted that it is the judgment of the prisoner which is appealed to in an attempt to induce him to exercise his will in the right direction.

If, then, his mind is impaired to such an extent that he cannot will, it cannot be said that he has violated any rule of the institution or statute of the state, if he acts without mental guidance. We believe, however, that the prisoner might be in the insane ward, and yet be capable of controlling his actions and be responsible for the infraction of rules and regulations.

If the prisoner in escaping from the institution did so because of mental disease or unsoundness which dethroned his reason and judgment with respect to that act which destroyed his power to rationally comprehend the nature and consequences of that act and which overpowering his will irresistibly forced him to its commission, then he is not amenable to legal punishment, but if, on the other hand, the prisoner was in possession of a rational intellect or sound mind and allowed his passions to escape control, then though passions may for the time being have driven reason from her seat and usurped it, and have urged the prisoner with a force at the moment irresistible to make the escape, he cannot claim for such acts the protection of insanity.

J. W. KINDIG,
Assistant Attorney General.

INSANE PATIENTS CHARGED WITH CRIME.

An inmate of the hospital for the insane who has been indicted by the grand jury and for whom a bench warrant has been issued should not be surrendered by the superintendent on demand of officer executing warrant.

October 13, 1917.

Board of Control of State Institutions,

Gentlemen: Your letter of the 11th inst. addressed to the attorney general has been referred to me for attention.

You state:

> The board of control received an opinion by phone from your office last week regarding the taking, on a bench warrant, of one E. E. Hosmer from the state hospital at Cherokee to Sioux City by the sheriff of Woodbury county on an indictment for embezzlement. The grand jury returned said indictment some weeks after Hosmer had been pronounced insane and was committed to the Cherokee hospital. Superintendent George Donohoe of the hospital was of the firm opinion that he should not

allow the sheriff to take Hosmer on a bench warrant. The opinion received from your office by phone from Mr. Sandusky sustained the position taken by Superintendent Donohoe that he should refuse to recognize the bench warrant and the opinion was so imparted to the superintendent.

The board of control is desirous of having that opinion in writing for our files for future reference in similar cases. Kindly supply us with the same at your early convenience.

The opinion referred to and which was given over the phone to your department was based upon the assumption that the patient Hosmer had been duly committed to the state hospital at Cherokee, by the commissioners of insanity of Woodbury county, prior to the return of the indictment and issuance of the bench warrant in question and had been admitted to such institution and was then in the custody of the superintendent thereof by virtue of an order of committal by such commissioners. This being true, it was proper and lawful for the superintendent to refuse to surrender such patient to the sheriff holding a bench warrant for his arrest.

J. W. SANDUSKY,
Assistant Attorney General.

USE OF MAINTENANCE FUNDS FOR STATE INSTITUTIONS.

The board of control has authority to use the maintenance fund or any part thereof at the penitentiary and reformatory for the support of the inmates of these institutions, when the amount allowed by the legislature for their support is insufficient.

December 5, 1917.

Board of Control of State Institutions,

Gentlemen: Your request of the 24th ult. for the opinion of this department on the following facts, has been assigned to me for attention.

You state:

> At both the state penitentiary and reformatory for the men who are employed on the industries, such as butter tubs and chairs, we are now charging these industries 50 cents per day per prisoner employed, for maintenance, both industries being on a sound paying basis and can well afford to pay this legitimate charge.
>
> At both of the above-mentioned institutions, the support fund on account of the great increase in the cost of food products, etc., is in a very serious condition. At other state institutions, for instance, insane hospitals, all have large tracts of land and produce large quantities of produce. At Mt. Pleasant, the

products produced during the past season were valued at over $70,000, all of which went into the support fund.

The per capita allowance at the institutions is as follows:

Cherokee, $17 per month.

Clarinda, $16 per month.

Independence, $17 per month.

Mt. Pleasant, $16 per month.

while at the penitentiary it is $13 per month and at the reformatory $13.50, which is not allowance enough to anywhere near meet the necessary expenses, after the practice of the most rigid economy.

We are giving you the facts fully, so that you may readily understand the situation, and while we think that it is perfectly legal to pay this maintenance for these men into the support fund of either institution as it is earned, yet no such charge having been made or earned before this time, we, for this reason, desire to have your opinion relating to this procedure.

The "maintenance fund" which the board has seen fit to charge up to the industries at the state penitentiary and reformatory for and on account of the men employed in these institutions, is a part of the production of the institutions, the same as is the grain, vegetables, milk, live stock and other products of the lands connected with the state institutions at Cherokee, Clarinda, Independence and Mt. Pleasand, and should be available for the support of the inmates of the penitentiary and reformatory, if needed, the same as the products of the lands connected with the other institutions are available for and used by the inmates of such institutions for their support and it is, therefore, proper and lawful for the board to use such portion of said maintenance fund as may be necessary for the support of the inmates of the two penal institutions.

J. W. SANDUSKY,
Assistant Attorney General.

DISPOSITION OF ESTATES OF DECEASED INMATES OF STATE INSTITUTIONS.

The chief executive officer of a state institution should take possession of the personal effects of any inmate who dies at such institution and deliver same to the legal representative of such person, and if administration is not granted within one year, under certain circumstances he may remit money in his hands to treasurer of state. He should not pay any claims against such deceased person.

December 12, 1917.

Board of Control of State Institutions,

Gentlemen: I have your favor of the 11th instant, enclosing the letter of the commandant at Marshalltown, Mr. B. C. Whitehill,

wherein he asks some advice as to the disposition of funds in his hands which belong to one Peter Wehl, who was killed on November 5th, by being struck by an automobile at the corner of Main and Center streets in the city of Marshalltown.

Section 2727-a72 of the 1913 supplement to the code provides:

> That when an inmate of any institution under the board of control of state institutions dies intestate, leaving money, certificate of deposit, promissory note, or other evidence of indebtedness in writing on deposit with the chief executive or other officer, or shall leave in the possession of such institution or of any officer or employe thereof any personal property, it shall be the duty of the chief executive officer of said institution to take into his possession, if he does not already have it, such money, certificate of deposit, promissory note or other evidence of indebtedness in writing, and to receive any money which may have been due, or property which may have been owned by the decedent, and to dispose of the same as follows:
>
> To deliver such money or other property to the legal representatives of the decedent as soon as he shall have qualified and become authorized to receive it.

It is further provided that

> If administration be not granted within one year from the date of the death of the decedent, and the value of the estate of decedent is so small as to make the granting of administration under the general law inadvisable, then delivery of the money and other property left by the decedent may be made to the surviving spouse and heirs, if known, of the decedent.

It is further provided that in case administration is not granted within one year from the date of the death of the decedent and no surviving spouse or heir is known to the institution that the money in the hands of such chief executive officer shall be transmitted to the treasurer of state.

Under the foregoing provisions of law, the commandant at the home should retain the custody of the money or property in his hands until administration is granted and upon the granting of administration he should turn such property over to the administrator of the estate. If, however, such administration is not taken out within the time specified the money may be remitted to the treasurer of state as provided by law. The commandant has no right to pay any bills or to turn over funds in his hands to anyone, except as provided above.

J. W. SANDUSKY,
Assistant Attorney General.

INDICTMENT AND PROSECUTION OF ESCAPED CONVICTS.

Convicts who have been or are confined in the penitentiary or reformatory and escape therefrom, whether such escape was effected from the institution or any other county in the state in which the convict may have been at the time, may be indicted and tried in the county in which the penal institution to which he was sentenced or committed is located.

December 21, 1917.

Board of Control of State Institutions.

Gentlemen: Your request for the opinion of this department on the following questions has been referred to me for attention.

You state:

> The enclosed letter from Warden McClaughry explains itself. We desire your opinion as to the legality of the prosecution of escapes, who are honor prisoners and paroled prisoners who escape in some other part of the state than from the penitentiary at Ft. Madison or the reformatory at Anamosa.
>
> Also, can such escaped prisoners be prosecuted in the county where the institution is located, from which they have been paroled or placed on the honor list, though the escape was, in reality, made in some other part of the state away from either institiution?

The conclusions of Mr. B. E. Rhinehart, county attorney of Jones county, as contained in the warden's letter to you of December 15th are, in my opinion, correct, and are as follows:

> 1. The recent laws, giving the warden of the reformatory, which is situated in Jones county, custody and jurisdiction over prisoners on parole and prisoners sent out on honor camp work anywhere within the state, makes an escape from his custody anywhere in the state an escape from the reformatory, and punishable by imprisonment for five additional years on successful prosecution.
>
> 2. The reformatory is located in Jones county. The law as cited in the above paragraph indicates that an escape from a road camp, wherever located, is an escape from the reformatory in Jones county; therefore:
>
> 3. The prosecution of an escape from the custody and authority of the warden of the reformatory, and consequently from the reformatory, is indictable and punishable in Jones county where the reformatory is located, even though the actual running away may have occurred in any part of the state in which the honor camp was located, or the prisoner was on parole.

The law referred to by Mr. Rhinehart is chapter 301, acts of the 35th General Assembly, and is incorporated in the 1913 supple-

ment to the code as section 4897-a. It provides that if any person committed to the penitentiary or reformatory shall escape from or leave without due authority any building, camp, farm, garden, city, town, road, street, or any place whatsoever in which he is placed, or to which he is directed to go, or in which he is allowed to be by the warden or any officer or employe of the prison, whether inside or outside the prison walls, he shall be deemed guilty of an escape from said penitentiary or reformatory. In order to constitute an escape under the provisions of the act it is not necessary that the prisoner be within any walls or enclosure, nor that there shall be any actual breaking, nor that he be in the actual custody of any officer or other person. And it further provides that if any person having been paroled from the state penitentiary or reformatory, as provided by law, shall thereafter depart without the written consent of the board of parole from the territory within which, by the terms of said parole he is restricted, or if he shall violate any condition of his parole, or any rule or regulation of said board of parole, he shall be deemed to have escaped from the custody within the meaning of section one of this act and be punished as therein provided.

The opinion rendered by Mr. Rhinehart has reference to the reformatory at Anamosa in Jones county only, but the statute applies to the penitentiary at Ft. Madison in Lee county just the same and escapes therefrom are governed thereby and prosecution may be brought in all cases in the county in which the penal institution to which the escaped prisoner had been sentenced or committed is located, regardless of the question as to the county where the escape was actually effected.

J. W. SANDUSKY,
Assistant Attorney General.

MONTHLY ALLOWANCES OF SUPPORT FUNDS MAY BE DRAWN IN ADVANCE.

Monthly allowances of support funds may be drawn monthly in advance for all state institutions under the control of the board where the statute provides the estimate to be made on the average number of inmates kept in the particular institution during the preceding month.

February 7, 1918.

The Board of Control of State Institutions,

Gentlemen: Your request for the opinion of this department on the following question has been referred to me for attention.

You state:

> Can the monthly per capita allowance be drawn by the institutions under the board of control of state institutions, as needed, monthly, in advance, the count to be estimated by the average number present during the preceding month? We are herewith enclosing references to the sections cover-same.

Chapter 266, acts of the 37th General Assembly, fixes the amount per capita to be allowed as support funds for the institutions named therein, but does not determine the manner in which, the time when or the particular amount of the monthly allowance for each of such institutions which may be drawn for and credited thereto, and reference is or must be made to other provisions of the law pertaining to such institutions. As an illustration, I set out part of section 2700 of the 1913 supplement to the code, which provides as follows:

> Upon the presentation to the state auditor of a sworn statement of the average number of inmates supported in the institution by the state for the preceding month, he shall draw his warrant upon the state treasurer for the amount.

This provision clearly contemplates that upon presentation to the auditor of state of a sworn statement of the average number of inmates supported in the particular institution for the preceding month, there may be drawn and credited to such institution for the succeeding month, a sum estimated or based upon the average for the preceding month, the amount thereof being the result of multiplying the average number of inmates for the preceding month by the per capita monthly allowance fixed by statute for the inmates of the particular institution, and like procedure may be followed as to all institutions where similar statutory provision is made, subject, however, to the limitation and regulations contained in section 108 of the code of 1908.

J. W. SANDUSKY.
Assistant Attorney General.

APPROPRIATIONS FOR PAVING.

The board of control are not authorized under the provisions of Chapter 287, Acts 37th General Assembly to use any part of the funds appropriated by said act in improving that part of the street along and upon which private property abuts, but such part of the street improvement should be borne by the owners of such property.

April 8, 1918.

The Board of Control of State Institutions,

Gentlemen: Your request for the opinion of this department on the following question has been referred to me for attention.

You state:

> Chapter 287, acts of the 37th General Assembly, directs our board to expend not to exceed $11,000 for paving of the highway running east and west along the south side of the grounds occupied by the principal buildings of the state hospital for Inebriates at Knoxville, Iowa.
>
> The highway which is proposed to be paved is about 1500 feet in length. The state owns all of the abutting land on the north side of this highway, but on the south side of same about 500 feet or more, of the abutting land, is owned by private parties, the balance of which is owned by the state.
>
> The question on which we desire your opinion is this: Is our board authorized, under above chapter to expend a part of the money appropriated for state paving to pay for the paving in front of the property of these private property owners?

The act of the 37th General Assembly, to which you refer, authorizes the board of control to grade, curb and pave the highway running east and west along the south side of the grounds occupied by the principal buildings of the state inebriate hospital at Knoxville, Iowa, and places the construction of said improvement under the supervision and control of the board. It provides that the material used for the paving shall be approved by the state engineer and be equal in all respects to the pavement of the streets of Knoxville with which the street connects. If further provides that the said improvement shall not be begun until the city of Knoxville shall have completed the paving of said street or highway, from the east end of the part herein provided for and connecting the same with the paved streets of the city. The act appropriates eleven thousand ($11,000) dollars, or so much thereof as may be necessary for the purpose.

If the street in question is within the corporate limits of the city of Knoxville, the city authorities should take the necessary steps to compel the owners of land abutting upon the portion of the street to be improved to pay their respective portions of the improvement, as by law provided, but if the part of the

street sought to be improved is outside of the city limits, then, in order to compel abutting property owners to contribute their proportion of the cost thereof, it may become necessary for the board of supervisors of the county to establish a permanent road district, embracing the highway in question, as provided by chapter 95, acts of the 33rd General Assembly. Such action, however, would hardly seem to be necessary in view of the fact that only a very small portion of the land abutting upon the part of the highway to be improved is owned by private individuals, who are doubtless, ready and willing to bear their part of such expense.

Improvements of this kind are a direct benefit to abutting property and enhance the value thereof and the expense incident therto is and always should be borne by the property benefited and, therefore, no part of the state funds should be used in paving the street in front of the property owned by private individuals.

J. W. SANDUSKY,
Assistant Attorney General.

ADMISSION OF WIVES TO SOLDIERS' HOME.

Wives of honorably discharged Union soldiers, sailors, and marines are entitled to admission to the soldiers' home notwithstanding they are living apart from their husbands and such admission may be granted at the request of any interested person.

April 24, 1918.

The Board of Control of State Institutions,

Gentlemen: Your request for the opinion of this department on the following questions has been referred to me for attention.

You state:

> I wish to inquire if an Iowa soldier whose wife has been estranged and separated from her husband for about fifteen months and has refused for that length of time to return to and live with her husband, altho a railroad ticket was sent her for her return in June, 1917, which she refused to use, is she eligible to admission to the Iowa soldiers' home, she being sick and in destitute circumstances, unless her husband is now or becomes a member of the soldiers' home?
>
> Second: Could the wife of such Iowa soldier be admitted to the Iowa soldiers' home if the husband of such wife is not a member or would not become a member for hospital treatment at her own request without the husband?
>
> Third: Could she be admitted at the request of her husband, he not becoming a member of the home?

Section 2606, of the 1915 supplement to the code, pertains to the rules which may be adopted by the board of control governing the admission of persons to the soldiers' home and designates the different classes of persons who may be admitted thereto.

Paragraph 3 of that section provides as follows:

> Army nurses, and the wives, fathers and mothers of honorably discharged union soldiers, sailors and marines.

It, therefore, follows that each of the three questions propounded may be answered in the affirmative. The mere fact that the wife of the soldier in this instance is living apart from her husband does not affect her right to admission to the home, neither does it make any difference who makes the application. She, as the wife of an honorably discharged union soldier, is entitled to admission to the institution.

J. W. SANDUSKY,
Assistant Attorney General.

PRIVILEGED COMMUNICATIONS.

Privileged communications rules apply to superintendent state sanitorium for treatment of tuberculosis.

October 22, 1918.

Board of Control of State Institutions.

Gentlemen: We are just in receipt of your letter of the 8th inst., enclosing a letter from Dr. H. N. Scarborough, superintendent of the state sanitorium for the treatment of tuberculosis, in which he requests an opinion from this department covering the following points:

First: When subpoenaed in a suit at law between an insurance company and a former patient in the state sanitorium for the treatment of tuberculosis how much information concerning the former patient can the superintendent give without violating the law concerning communications by a patient to his physician?

Second: To what extent should such institution open its records in making of affidavits for certificates of death to insurance companies?

Third: To what extent would such institution be authorized in giving to outside parties information concerning the physical condition, length of disease, prospects, etc., of patients now in said institution, or who have been there, when this information

is desired in connection with the employment of the patient, and other things?

Referring to the first question above asked, it will be pertinent to consider various principles of evidence established by the legislature and followed by our courts. The legislature has declared that any person having a matter pending in court shall be entitled to subpoena any one to attend and testify on his behalf at the trial. Section 4659 of the code. And for failure to obey a valid subpoena without sufficient cause or excuse the delinquent is guilty of contempt of court, and subject to not only punishment, but also to having his person attached and forcibly brought into court. Section 4664 of the code. For a distance of not to exceed seventy miles from his residence a person may be compelled to attend a civil trial in the district or superior courts. Section 4660 of the code. Thus, it will be seen, when a litigant desires the testimony of a certain person he has the right to subpoena him, and the person subpoenaed is required to respond, or subject himself to punishment for contempt of court. It is not for the witness to predetermine his competency to testify, but the court will determine that question when the witness takes the stand and the objection is properly raised. Robb v. McDonald, 29 Iowa 330; State v. Seaton, 61 Iowa 563. This rule applies to persons holding a public office the same as to those in civil life.

Now, the question arises as to how far a witness can be compelled to divulge certain facts within his knowledge or produce certain records under his control, particularly with reference to the superintendent of the state sanitorium for the treatment of tuberculosis as to information acquired in the treatment of a patient in said institution. As bearing on this question the Iowa statutes declare that no physician shall be allowed, in giving testimony, to disclose any confidential communication properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office, according to the usual course of practice or discipline. Section 4608, supplement to the code, 1913. The above section is not confined in its effect to verbal communications, but extends to all facts and information learned by the physician in the discharge of his duties. Brader v. National Masonic Accident Association, 95 Iowa 149. But it is not for the physician to raise the objection that the information acquired by him is privileged —it is only the patient who can invoke the rule of secrecy. The

statute does not disqualify the physician. State v. Bennett, 137 Iowa 427; Woods v. Town of Lisbon, 150 Iowa 433. And the objection may be waived by the patient. Section 4608, supra. The above rules apply to physicians holding an official position, such as the superintendent of the state sanitorium for the treatment of tuberculosis. Mehegan v. Faber, 158 Wis. 645; Casson v. Schoenfeld, 166 Wis. 409.

Therefore, in answer to the first question above asked, we are of the opinion that, whenever regularly subpoenaed, it is the duty of the superintendent of the state sanitorium for the treatment of tuberculosis to obey the summons and answer such questions as may be asked concerning a present or former patient in said institution, and if the patient desires to claim the privilege of secrecy, he may do so when the superintendent offers himself as a witness.

Now, as to the legal right of a physician to state in an affidavit of death, given to an insurance company, information concerning the cause of death of his patient, our supreme court has held that an affidavit containing such information should be excluded. Nelson v. Nederland Life Ins. Co., 110 Iowa 600. In the Nelson case the court say at page 605:

> This affidavit was objected to on the ground that death had been admitted, and it was a disclosure of confidential communication by deceased to his physician. The policy required no more than satisfactory proofs of death, and the company might, under this provision, demand that the fact of death be shown with reasonable definiteness and certainty. But, under the guise of ascertaining that fact, it had no right to insist upon information concerning the cause thereof, as that would have no direct bearing on such an inquiry.

Therefore, in answer to the second inquiry above, we hold that the superintendent should go no further than necessary to establish the fact of death, without disclosing the cause thereof. He may properly give what information he has concerning the age, residence, and family relationship of the patient, but should refuse to disclose any information pertaining to the ailment of the patient and the treatment thereof.

As to the right of the superintendent of the state sanitorium for the treatment of tuberculosis to furnish the general public information concerning the physical condition, length of disease,

prospects and the like of patients who now are or have been in the institution, the prohibition, based upon privileged communications by a patient to his physician, applies only to the giving of testimony in a judicial proceeding. The statute does not prohibit the physician from disclosing otherwise the secrets of his patients, although such a course would be reprehensible and in disregard of professional propriety. Nelson v. Nederland Life Insurance Co., 110 Iowa 600.

In the Nelson case it is said at page 606:

> The physician, in disclosing the secrets of his patients, in conversation or writing, violates no law of which we have knowledge, although such a course may be reprehensible and in disregard of professional propriety. It is "In giving testimony" in a judicial proceeding that such disclosures are prohibited by statute.

In answer to the third inquiry above, we are of the opinion that the superintendent is acting within his legal rights in furnishing outside parties information concerning the condition of individual patients; but for him to be discussing the condition of patients with the public generally, or to be furnishing outside parties indiscriminately with information concerning individual patients would not only be a rank breach of professional ethics, but would also disclose a woeful lack of good judgment. There are occasions, of course, when it would be proper to furnish information as to the condition of individual patients, such as upon request by public officials, and relatives of the patient, but such information should never be furnished to those seeking information only, and who evidently desire the information to advance some personal interest. As to whom such information should be given is a matter calling for the exercise of the superintendent's own good judgment; and the fact that he is required to keep a record of each patient does not necessarily require him to furnish a certified copy thereof to any person who might request it.

Trusting we have covered the points fully, we are,

W. R. C. KENDRICK,
Assistant Attorney General.

DUTY OF COUNTY ATTORNEY TO DEFEND HABEAS CORPUS PROCEEDINGS.

County attorney must defend state officials in habeas corpus proceedings in his county.

October 26. 1918.

Board of Control of State Institutions,

Gentlemen: Your letter of the 22nd inst., addressed to Attorney General Havner, has been referred to me for attention. You enclose a letter from Lew McDonald, county attorney of Cherokee county, together with a letter from Carl O. Gunderson, county attorney of Worth county, addressed to Mr. McDonald in relation to a habeas corpus proceeding against the superintendent of the state hospital for the insane at Cherokee, in which an opinion from this department is desired, as to whether or not it is the duty of the county attorney of Cherokee county to defend the proceedings on behalf of the superintendent of the state hospital, and if so, whether or not the county from which the insane party was committed to the hospital is under any obligations to pay an attorney fee to the county attorney defending the proceedings.

Beg to advise that it is one of the duties of county attorneys to appear for the state in all cases and proceedings in the courts of his county to which the state is a party. Par. 2, section 301, supplemental supplement.

Section 4427 of the code also provides that in habeas corpus proceedings the court or officer allowing the writ must cause the county attorney of the proper county to be informed thereof and of the time and place when and where it is made returnable.

Inasmuch as the hospital at Cherokee is a state institution, any proceeding in which that institution is interested would necessarily be a proceeding against the state, and pursuant to the statutory provisions above cited, it is evident that it is the duty of the county attorney to appear and defend actions of this character, and, being one of his statutory duties, it is further evident that he cannot expect any additional attorney fee from the county from which the patient has been committed.

Therefore, we are of the opinion that the county attorney of Cherokee county should appear and defend the action as one of his regular duties.

W. R. C. KENDRICK,
Assistant Attorney General.

STEP-CHILDREN ADMITTED TO IOWA SOLDIERS' ORPHANS' HOME.

Step-children of Soldiers treated as soldiers' children when admitted to Iowa soldiers' orphans' home.

November 6, 1918.

Board of Control of State Institutions,

Gentlemen: Your letter with a letter from F. L. Mahannah, superintendent of the Iowa soldiers' orphans' home, addressed to this department, received, and the same has been referred to me for reply.

You ask a ruling from this department on the following question, quoting from Mr. Mahannah's letter:

> Can step-children of a soldier be admitted to this institution as a soldier's children? The case in question at present involves a family of four children, whose mother has married a soldier, but during the absence of her husband, it will be impossible for the mother to support the children.

In determining this question it will depend entirely upon the attitude the step-father assumes toward his step-children. If the step-children were considered and treated by the step-father as members of his family, and he did maintain and support them before becoming a soldier, and still stands in "loco parentis" to such step-children, he could be held responsible for their maintenance and education.

It seems that if the step-father is held responsible for their maintenance and education, when he stands in "loco parentis" to such children, it would be reasonable to hold that such step-children would be entitled to any benefits conferred upon such children by the statute.

It is, therefore, the conclusion of this department, that if the step-father stood "loco parentis" to the step-children who are seeking admission to the Iowa Soldiers' Orphans' Home, they should be considered soldiers' children and should be treated as such.

If, upon investigation, it is found that the step-father considered and treated such step-children as members of his family, then the second question propounded in your letter would be answered, that is, that the state would pay the total expense of the childrens' keep at the home.

C. G. WATKINS,
Assistant Attorney General.

OPINIONS TO SUPERINTENDENT OF BANKING

GRANTING OF BANK CERTIFICATE OR CHARTER.

No discretion is given superintendent of banking to refuse certificate if law has been fully complied with.

July 10, 1917.

Hon. G. H. Messenger,

Superintendent of Banking,

Dear Sir: I have your favor of today, enclosing all the papers pertaining to the organization of the Farmers' Savings Bank of Swea City, Iowa.

I have examined the papers carefully and they appear to be in due form in every particular, and it appears that the law has been fully complied with.

As to whether the law vests any discretion with you in regard to issuing the certificate to a corporation which has fully complied with the statutory requirements governing the organization of state banking institutions, I will say that section 1843 of the code provides as follows:

> The paid up capital of any savings bank shall not be less than ten thousand dollars in cities, towns or villages, having a population of ten thousand or less, nor less than fifty thousand dollars in cities having a greater population. The corporation may commence business when its first directors or officers named in its recorded articles of incorporation shall have furnished the auditor of state proof, under oath, that the required capital has been paid in and is held in good faith by said bank, and he has satisfied himself of such fact, for which purpose he may make a personal examination, or cause it to be made, at the expense of such bank, and he is also satisfied that the preceding sections of this chapter have been complied with, and has issued a certificate to that effect, naming therein its first board of directors, notice of which certificate shall be given by the publication thereof for four consecutive weeks in some newspaper printed in the county where its articles are recorded, at the expense of such bank, and proof of such publication by the oath of the publisher or his foreman filed with such auditor.

It would appear from the foregoing that upon the furnishing the superintendent of banking the proof under oath therein re-

ferred to, and he being satisfied that all requirements of the law relating to the organization of a savings bank have been complied with, that it becomes his duty to issue the certificate; in other words, that the duty is enjoined upon him to issue the certificate, and that he may not exercise any further discretion in the matter.

I herewith return the papers for your files.

J. W. SANDUSKY,
Assistant Attorney General.

DIRECTORS OF BANKS.

State and savings banks may not have sliding scale of directors.
Stockholders can elect directors only at annual meeting.
Stockholders cannot delegate authority.
Board of directors may fill all vacancies arising.

August 23, 1917.

Hon. G. H. Messenger,
Superintendent of Banking,

Dear Sir: Your request for the opinion of this department on the following facts and questions has been referred to me for attention:

> The Des Moines Savings Bank has filed with me a certificate reading thus:
>
> "RESOLVED, That the Articles of Association be amended to read as follows:
>
> "The Board of Directors of this Association shall consist of not less than five, nor more than twenty shareholders."
>
> At the same meeting the following resolution was unanimously adopted:
>
> "RESOLVED, That the stockholders hereby authorize the directors of this bank to fill all vacancies on the directory created by the increase of the maximum number of this board to twenty, as fixed by the stockholders at this meeting."
>
> Has this bank the right to provide for a sliding number of directors?
>
> Did the stockholders have the power to delegate to the holden directors authority to select the new members provided for in the amendment?

Section 1842 of the code, pertaining to the organization of savings banks, is as follows:

> The articles of incorporation of a savings bank shall be signed and acknowledged by the incorporators before some

> officer authorized to take acknowledgments of deeds, and give the corporate name, the object for which it is formed, the amount of capital, the time of its existence, which shall not exceed fifty years, the number of its directors, the name and post office address of each person or officer who shall manage its affairs until the first election, and the name of the city, town or village, and the county, in which the principal place of business is to be located * *.

Section 1845 of the code, as amended by chapter 238, acts of the 37th General Assembly, and pertaining to the management of savings banks, provides in part as follows:

> The business and property of such banks shall be managed by a board of directors of not less than five, all of whom shall be shareholders, and at least three-fourths of the directors must be citizens of the state * *.

Section 1846 of the code, pertaining to directors and their election is as follows:

> All vacancies in the board of directors shall be filled at its next regular meeting after such vacancy shall arise from among the stockholders, and the person receiving a majority of the votes of the whole number of directors shall be duly elected to fill such vacancy. The directors to succeed those named in the auditor's certificate shall be elected at the first annual meeting thereafter, at such time and place, in such manner and upon such notice as shall be provided by the by-laws, and shall hold office until their successors are elected and qualified, which shall be annually thereafter. All such elections shall be by ballot, and the person receiving the greatest number of votes cast shall be directors. If an election of directors shall not be held on the day designated, it may be held on any other day, after giving the notice required by the by-laws * *.

It was doubtless regular and lawful for the stockholders of the Des Moines Savings bank to amend its articles of incorporation, so as to increase the number of its board of directors, at an annual meeting of the stockholders or at a special meeting called for that purpose, and, as the law now exists, there is no limit to the number of directors that the articles of incorporation may provide for or authorize, but a definite and certain number must be fixed by the articles of incorporation, and, as the amendment pertaining to this question leaves the number uncertain, it fails to comply with section 1842 of the code, above set out. Your first question is, therefore, answered in the negative.

By express provision of section 1846 of the code, boards of

directors of savings banks are given authority to fill any vacancy arising in the board at the next regular meeting thereof, from the stockholders of the association, but the question presented in this case is not that of the usual "vacancy" arising from resignation, removal or death, but if a vacancy exists, at all, in the board of directors, it is by virtue of the particular amendment to the articles of association above referred to, increasing the number thereof. The statute requires that the directors who succeed those named in the auditor's certificate shall be elected at the first annual meeting thereafter, code section 1846, and the annual meeting therein referred to means the annual meeting of the stockholders of the association, and, the section further provides, that the directors thus elected shall hold office until their successors are elected and qualified, which shall be annually thereafter, and it, therefore, follows that the only time at which the stockholders may elect members of the board of directors is at the annual meeting held for that purpose, and, as the meeting referred to was a special meeting of the stockholders, they had not the power to then elect the additional number provided for by the amendment to the articles of associations, nor could they delegate the power to the board, as then constituted, and your second question is, therefore, answered in the negative.

I deem it proper, at this time, and in this connection, to also pass upon the question as to whether the board of directors, as constituted at the time the articles of association were amended, had the authority, by virtue of section 1846, to fill the vacancies existing as a result of such amendment. I was at first inclined to the opinion that the words, "after such vacancy shall arise," as used in the statute, should be construed to mean vacancies arising from the usual causes, like death, removal or resignation, but upon more reflection, although the question is not entirely free from doubt, I am constrained to believe that when the articles of association of a corporation are amended increasing the number of its directors that vacancies, within the meaning of the law, then arise and that the board of directors, as then constituted, have the authority to fill such vacancies.

J. W. SANDUSKY,
Assistant Attorney General.

BANK AND TRUST COMPANIES MAY INVEST IN BANK BUILDING.

Banks and trust companies may invest a reasonable amount of their capital in bank building and furniture and fixtures.

October 1, 1917,

Hon. G. H. Messenger,

Superintendent of Banking,

Dear Sir: This department has been requested to grant a rehearing on some of the questions involved in the opinion rendered you on August 30th, relative to the investment of the capital of state banks, savings and loan and trust companies in real estate, and particularly as to the construction placed upon section 1848 of the code, and also, what is claimed to be, the uncertainty of the right of state banks to own the real estate and buildings in which their business is carried on.

The questions you propounded and upon which you asked our opinion are as follows:

1. What moneys can a savings bank invest in real property used for banking purposes?
2. What moneys can a state bank invest in real property used for banking purposes?
3. What moneys can a savings bank invest in furniture and fixtures used for banking purposes?
4. What moneys can a state bank invest in furniture and fixtures used for banking purposes?

The right to own or lease a suitable building with suitable equipment in the way of vaults, safes, furniture and fixtures, is indispensably necessary to transact the business of banking and, therefore, banking institutions in the absence of charter or statutory inhibition, have the authority to use a reasonable part of their undivided profits, surplus or capital to purchase and equip or construct and equip a bank building suitable for conducting and carrying on their business, the amount so invested to be regulated or determined by the capitalization of the particular institution and the volume of the business it was transacting.

Section 1846 of the code has been amended from time to time and the powers of savings banks have been greatly enlarged and extended by divers amendments to the original act of 1874, authorizing their creation. This particular section was section 7 of the original act and was, in part, as follows:

> All savings banks organized under this act may receive, on deposit, all such sums of money as shall from time to time be offered by tradesmen, merchants, laborers, servants, minors and others. All such banks with a paid up capital of ten thousand dollars may receive deposits to the amount

> of one hundred thousand dollars, those with a paid up capital of twenty-five thousand dollars may receive deposits to the amount of two hundred and fifty thousand dollars, those with a paid up capital of fifty thousand dollars, deposits to the amount of five hundred thousand dollars, those with a paid up capital of one hundred thousand dollars, deposits to the amount of one million dollars, and no greater amount of deposits shall be received without a like proportionate increase of cash capital, and which capital shall be regarded a guaranty fund for the better security of depositors, and so invested in some safe and available securities.

As amended the corresponding part of the section now reads as follows:

> Any savings bank organized under this chapter may receive on deposit money equal to twenty times the aggregate amount of its paid up capital and surplus, and no greater amount of deposits shall be received without a corresponding increase of the aggregate paid up capital and surplus which capital and surplus shall be a guarantee fund for the better security of depositors and invested in safe and available securities.

The question naturally arises whether the language, as it now appears, excludes the use of capital and surplus, or any part thereof, for the purchase or construction of a bank building and also the purchase of suitable equipment therefor for banking purposes. It will be observed that there is a marked and substantial difference in the language used in the section, as originally enacted, from that comprising it in its present form, though the investing of the capital and surplus is still sought to be safeguarded in the interest of the depositors. The phrase, "safe and available securities," like that of "safe and available assets," has a peculiar and reasonably well defined meaning. The word "available," when used in connection with either the words "securities" or "assets" has a qualifying or limiting purpose and effect and is intended to include certain securities or assets and exclude others, and, in the connection used in this section we are considering, should be construed to refer to such securities as are usable and can readily be converted into money; representatives of value that can in a reasonable time be converted into cash; like notes, bills, drafts, acceptances and obligations of solvent individuals, firms and corporations, and similar evidences of indebtedness, all of which may very properly and are sometimes designated as "liquid

assets," as distinguished from bonds having long periods to run, real estate, buildings and divers other kinds of investments.

I am aware that by placing such a construction upon this particular section of the banking law, unless authority is elsewhere given savings banks to acquire buildings as well as suitable furniture and fixtures for conducting their business, that they would, in most instances, be required to rent, for it rarely occurs that arrangements are made to provide for such expense by a special fund outside of the authorized capital, but, nevertheless, I am constrained to believe that the section, as originally enacted, would not admit of any other construction, and even, as now worded, if standing alone, it would still be susceptible of such constructing or meaning. This section is not, however, made applicable to state banks, but by reference contained in section 1889-m, of the 1913 supplement to the code, it is made applicable to loan and trust companies, though the reasons for thus restricting the manner of investing the capital and surplus of such institutions, considering the present tendency and the powers conferred upon them is not, I must say, quite so apparent as it was when applied to savings banks at the time the law was first enacted authorizing their organization.

By express provisions of section 1851 of the code savings banks are authorized to purchase, hold and convey real estate only as follows: "The lot and buildings in which its business is carried on." No such provision is made as to state banks or loan and trust companies, nor have I been able to find any express authority for any of these institutions to invest any part of their capital or surplus in furniture and fixtures.

It was stated by the supreme court in the case of Carroll v. Corning Savings Bank, 139 Iowa, 340, that institutions now transacting business as savings banks differ radically from such institutions as originally organized, and that all of the philanthropy involved in their conception originally has disappeared under the touch of modern methods and legislation and that they now partake of and perform the functions of regular banking institution doing a general banking business, rather than savings depositories.

It should also be observed that the law regulating the taxing of national banks, state and savings banks and loan and trust companies provides that in arriving at the value to be placed upon

the shares of capital stock of such institutions that the amount of their capital actually invested in real estate owned by them shall be deducted from the real value of such shares, and while it is true that this does not authorize any of these institutions to invest any part of their capital in real estate, yet it must be conceded that the legislature recognized that a part of their capital might be so invested.

A review of the situation, as stated, discloses that modern customs and methods, together with legislation, have materially changed the scope and function of savings banks. That by the provisions of section 1851, they are permitted to own the lot and building in which their business is carried on. That by the provisions of section 1848 they are required to invest their capital and surplus, in safe and available securities. That the latter section does not apply to state banks, but by reference is made applicable to loan and trust companies. That all of the institutions referred to are permitted, by statute, to deduct from actual value of their shares of capital stock, for the purposes of taxation, the amount of their capital actually invested in real estate, and it should be further observed that express authority is nowhere conferred by the statute upon state banks or bank and trust companies to purchase or own real estate, or for any of the institutions named to invest any part of their capital or surplus in furniture and fixtures.

It might not be out of place, in this connection, to say that in many of the states banks are prohibited from investing in the building in which their business is carried on, including the equipments thereof, more than a stated per cent of their capital, ranging from about twenty per cent to fifty per cent thereof, and while bills have been introduced in our legislature with a view to the passage of a law of this kind none of them ever reached final passage.

From the foregoing summary of the law bearing upon the questions propounded, together with the brief review of the legistlation pertaining to savings banks, it will be seen that some difficulty exists in harmonizing the several provisions of the statute relating to the matter before us and, therefore, without seeking to give full effect to the various measures, I am of the opinion that each of the institutions named have the authority to invest a reasonable amount of their capital or surplus in purchasing or constructiong bank buildings and in furnishing and equipping the same suitable for transacting their business, the amount thereof to be in accordance with and

regulated by the capitalization of the particular institution and the volume of business it transacts. From which, however, as the law now stands, it may not be inferred that an unlimited discretion is possessed by the board of directors of these institutions to invest such part of their capital or surplus as in their judgment may seem necessary or proper, for by express provision of section 7 of chapter 40, acts of the 37th General Assembly, creating the department of banking, the superintendent of banking is made the head of the banking department of the state and is given general control, supervision and direction of all banks and trust companies incorporated under the laws of the state, and in the exercise of the powers thereby conferred upon him it becomes his duty, not only for the protection of depositors, but for the welfare and success of the banks themselves, that he should see that none of the institutions under his supervision have a disproportionate amount of their capital and surplus or either invested in bank buildings and equipment.

J. W. SANDUSKY,
Assistant Attorney General.

BANK AND TRUST COMPANIES CANNOT ACT AS SURETY.

Banks and trust companies have no authority to become surety or guarantor on the bond of another.

September 24, 1917.

Hon. G. H. Messenger,
Superintendent of Banking.

Dear Sir: I have your request for the opinion of this department on the following question:

> Has a savings bank, a state bank, or a trust company the authority to become surety or guarantor on the bond of another?

Section 1844 of the code, pertaining to savings banks, is as follows:

> The corporators and their successors shall be a body corporate with the right of succession for the period limited, and shall have power:
>
> 1. To sue and be sued;
>
> 2. To have a corporate seal and alter it at pleasure;
>
> 3. To purchase, hold, sell, convey and release from trust or mortgage such real and personal estate as provided for in this chapter;
>
> 4. To appoint such officers, agents, employees and servants as the business of the corporation shall require; to define their powers, prescribe their duties, fix their compensation, and

require of them such security as may be proper for the performance of their duties;

5. To loan and invest the funds of the corporation; to receive deposits of money, to loan and invest the same as provided in this chapter, and to repay such deposits without interest, or with such interest as the by-laws or articles may provide;

6. To make by-laws for the management and regulation of the corporation, its property and affairs, prescribing the conditions on which the deposits will be received and paid thereon, and the time and manner of dividing the profits, and for carrying on all business within its power.

Section 1861 of the code, pertaining to state banks, is as follows:

Associations organized under the general incorporation laws of this state for transacting a banking business, buying or selling exchange, receiving deposits, discounting notes and bills, other than savings banks, shall be designated state banks, and shall have the word "state" incorporated in and made a part of said corporation; and no such corporation shall be authorized to transact business unless the provisions of this code have been complied with.

Section 1889-d of the 1913 Supplement to the code and pertaining to trust companies, state banks and savings banks, is as follows:

To act in fiduciary capacity—notes, bonds and mortgages—safe deposits. Trust companies, state and savings banks now existing or which shall be hereafter incorporated under the provisions of title nine of the code, in addition to the powers already granted to such corporations, shall have power, when so authorized by their articles of incorporation:

1. To be appointed assignee or trustee by deed and guardian, executor, or trustee by will and such appointment upon qualification as herein required shall be of like force as in case of appointment of a natural person.

2. To be appointed receiver, assignee, guardian, administrator, or other trustee by any court of record in this state, and it shall be lawful for such court to appoint such corporation as such receiver, assignee, guardian, administrator or other trustee, in the manner provided by law, for the appointment of any natural person to such trust. Provided any such appointment as guardian shall apply to the estate and not the person.

3. To act as fiscal or transfer agent or registrar for estates, municipalities, companies and corporations.

4. To take, accept and execute any and all such trusts and powers of whatsoever character and description, not in conflict with the laws of the United States or of the State of Iowa, as may be conferred upon or entrusted or committed to them by

any person or persons or any body politic, corporation or other authority, by grant, assignment, transfer, devise, bequest or otherwise, in which may be entrusted or committed or transferred to them or vested in them by order of any court of record, and to receive and take and hold any property or estate, real or personal, which may be the subject of any such trust, and to manage and dispose of such property or estate, in accordance with the terms of such trust or power. * * * * *

7. To issue drafts upon depositories, and to purchase, invest in and sell promissory notes, bills of exchange, bonds and mortgages, and other securities.

8. To exercise the powers conferred on, and to carry on the business of a safe deposit company.

The foregoing provisions of the law in general terms enumerates the powers possessed and that may be exercised by savings banks, state banks and trust companies, beyond which they are not at liberty to go. The statute does not attempt to specify or define the numerous details incident to the carrying into effect of such powers, and, therefore, it should be held that the several institutions possess all the authority incident to and necessary for the full and free exercise of the powers enumerated.

The usual and ordinary business of a banking institution is to receive money on deposit, pay out the same on the checks and drafts of its customers, buy and sell exchange, loan money and discount or purchase notes, bills, bonds and other kinds of securities and by the provisions of section 1889-d trust companies and state and savings banks may be appointed assignee or trustee by deed and guardian, trustee or executor by will, and they may be appointed receiver, assignee, guardian, administrator or other trustee by any court of record of this state, also to act as fiscal or transfer agents or registrar for estates, municipalities, companies or corporations and perform other offices and functions specified in the section, and by this section and other provisions of the law, trust companies are authorized to transact the ordinary business of banking institutions.

It will be observed that no direct or specific authority is conferred by the statute upon either of the institutions named to become surety or guarantor on bonds or other instruments of like character or to transact any of the usual and ordinary business of surety or bonding companies, and if this is correct, then it only remains to ascertain and determine whether it may become necessary, in the full and free exercise of the powers conferred upon them, that

they should, or that it may become necessary for them to assume the obligations and liabilities of sureties or guarantors on bonds or similar undertakings of others.

As I view the matter, it is inconceivable that such authority should be considered essential or necessary in transacting the ordinary business of banking. 'Tis true that officers of banking institutions, for divers reasons, furnish bonds and sureties for friends, depositors and customers, but the undertaking or obligation usually given is not that of the bank, as such, but of the officers or directors, acting in their individual capacity, which they have a perfect right to do. It sometimes occurs, that the board of directors of banks, where their officers or directors have furnished bonds under circumstances like above, to pass resolutions indemnifying them from liability or loss on account of the responsibility thus assumed, the legality of which, to say the least, is seriously doubted.

As bearing upon the question of the authority of corporations to assume obligations or transact business not embraced within their corporate powers, I will call your attention to the case of Lucas, cashier, etc., vs The White Line Transfer Company, 70 Iowa 541, and the case of J. S. Willet vs Farmers Savings Bank of Victor, Iowa, 107 Iowa 69.

The powers conferred upon trust companies and state savings banks by section 1889-d are largely additional to the ordinary powers exercised by banking institutions, and, as the exercise of the greater part thereof would necessitate the execution of proper and sufficient bonds, I deem it wise to refer thereto, although the giving of such bonds as may be required in case of the appointment to any of the trusts therein enumerated does not involve the question of authority to become a surety or guarantor on the bond of another, for the bond thereby required will be the bond or obligations of the corporation receiving the appointment.

It may not be amiss, in this connection, to call attention to the fact, that in the conclusions herein arrived at, and which we are about to announce, that the authority to guarantee the collection or payment of any part of the actual bills receivable or assets of any of the institutions enumerated, where such bills receivable or assets have been assigned or transferred to another for the use and benefit of the institution transferring or assigning them, is not disputed or questioned.

I have given the question you propound careful and deliberate consideration, and am constrained to the opinion that neither trust companies nor state or savings banks have authority to become surety or guarantor on the bond of another.

J. W. SANDUSKY,
Assistant Attorney General.

CAPITALIZATION OF TRUST COMPANIES.

Trust companies are required to have the same amount of paid up capital as savings banks, under like circumstances.

October 25, 1917.

Hon. G. H. Messenger,

Superintendent of Banking.

Dear Sir: Your request for the opinion of this department on the following question has been referred to me for attention:

> Do the capital requirements of section 1843, applicable to savings banks, apply to trust companies? This question has been brought to my attention by Mr. Charles L. Powell, counsel for the federal reserve board of Chicago, whose letter I enclose.

Section 1843, to which you refer, as amended by chapter 357, acts of the 37th General Assembly, is as follows:

> The paid up capital of any savings bank shall not be less than ten thousand dollars ($10,000) in towns or villages having a population of one thousand (1,000) or less, nor less than fifteen thousand dollars ($15,000) in towns having a population of more than one thousand (1,000) and less than two thousand (2,000), nor less than twenty-five thousand dollars ($25,000) in cities of more than two thousand (2,000), and less than ten thousand (10,000) population, nor less than fifty thousand dollars ($50,000) in cities havings a greater population. The corporation may commence business when its first directors or officers named in its recorded articles of incorporation shall have furnished the auditor of state proof, under oath, that the required capital has been paid in and is held in good faith by said bank, and he has satisfied himself of such fact, for which purpose he may make a personal examination, or cause it to be made, at the expense of such bank, and he is also satisfied that the preceding sections of this chapter have been complied with, and has issued a certificate to that effect, naming therein its first board of directors, notice of which certificate shall be given by the publication thereof for four consecutive weeks in some newspaper printed in the county where its articles are recorded at the expense of such bank, and proof of such publication by the oath of the publisher or his foreman filed with such auditor.

Section 1889, pertaining to savings banks, state banks and loan and trust companies, as it now appears in the 1913 supplement to the code, is as follows:

> 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 numbers 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 depositories. All such companies and all corporations now existing or hereafter organized under the provisions of chapter 1, title IX of the code, whose articles of incorporation authorize the acceptance and execution of trusts, and all corporations in whose name and word "trust" is incorporated and forms a part, shall have a full paid capital of not less than the amount of capital of savings banks as provided in section 1843 of chapter 10 and shall be subject to examination, regulation and control of 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 fine and imprisonment, at the discretion of the court, provided that loan and trust companies organized under the general incorporation laws of this 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.

This section deals with subjects other than capitalization of banks and trust companies, but the amendment embraced in chapter 65, acts of the 30th General Assembly, deals with that question

only, and after striking out of the section the following words "But such companies," enacts the following in lieu thereof:

> All such companies and all corporations now existing or hereafter organized under the provisions of chapter 1, title IX of the code whose articles of incorporation authorize the acceptance and execution of trusts, and all corporations in whose name the word "trust" is incorporated and forms a part, shall have full paid up capital of not less than the amount of capital of savings banks as provided in section 1843 of chapter 10.

This amendment, as it appears to me, removes all doubts regarding the matter. It makes direct reference to section 1843 and requires all companies and corporations now existing or hereafter organized under the provisions of chapter one, title IX of the code, pertaining to corporations for pecuniary profit, whose articles of incorporation authorize the acceptance and execution of trusts, as well as all corporations in whose name the word "trust" is incorporated and forms a part, to have a full paid up capital of not less than the amount required of savings banks, under like circumstances. Your question is, therefore, answered in the affirmative.

J. W. SANDUSKY,
Assistant Attorney General.

EXCESS LOANS OF BANKS.

Under section 1877 of the code and sec. 7, Chap. 40, Acts of the 37th General Assembly, the state superintendent of banking has power to order practice of making excess loans stopped; otherwise, take possession of bank and with assent of attorney general, have receiver appointed.

January 1, 1918.

Hon. George H. Messenger,
Superintendent of Banking.

Dear Sir: I have your letter of January 1st setting forth a condition which you say exists in connection with one of the banks under the supervision of your department, wherein you say the bank has made what is termed "excess loans" in violation of section 1870 of the code, and you ask what your authority is with reference to such bank when you find such condition exists.

Section 1877 of the code provides as follows:

> When it shall appear to the auditor of state that any savings or state bank has refused to pay its deposits in accordance with the terms on which such deposits were received, or has become insolvent, or that its capital has become impaired, or has violated the law, or is conducting the business in an unsafe

manner, he shall, by an order addressed to such bank, direct a discontinuance of such illegal or unsafe practices and require conformity with the law. The auditor of state may appoint an examiner to investigate the affairs of any savings or state bank, who shall have power to administer oaths to any person whose testimony may be required on such examination and to compel his attendance for the purpose thereof, by subpoena or attachment, in the manner now authorized in respect to witnesses in the courts of the state, and all books and papers which it may be found necessary to inspect on the examinations so ordered shall be produced, and their production may be compelled in like manner; all expense thereof shall be paid by the banks examined, in such amount as the auditor of state shall certify to be just and reasonable but costs taxed as such shall not exceed those allowed for like services in the district court. If any such bank shall fail or refuse to comply with the demands made by the auditor of state, or if the auditor of state shall become satisfied that any such bank is in an insolvent or unsafe condition, or that the interests of creditors require the closing of any such bank, he may authorize a bank examiner appointed by him to take possession of any such bank, whereupon the right of levy of execution, or attachment against such bank or its assets shall be suspended and the auditor of state may forthwith, with the assent of the attorney general, apply to the district court or judge thereof for the appointment of a receiver for such bank, and its affairs shall be wound up under the direction of the court and the assets thereof ratably distributed among the creditors therof, giving preference in payment to depositors. The auditor of state, with the assent of the attorney general, shall have authority to apply for the appointment of receivers of savings and state banks, who shall be residents of the county where the bank is located; and no general assignment for the benefit of creditors shall be of any validity.

Section 7 of chapter 40, acts of the 37th General Assembly, provides:

> The superintendent of banking shall be the head of the Banking Department of Iowa, and shall have general control, supervision and direction of all banks and trust companies incorporated under the laws of Iowa, and shall be charged with the execution of the laws of this state relating to banking; and all powers now vested in and all duties imposed upon the auditor of state relating in any way to banking matters, shall, from and after the taking effect of this act, be vested in and made incumbent upon the superintendent of banking herein provided for.

You will notice that section 1877 of the code provides that when it appears to the superintendent of banking that any savings or state bank has refused to pay its deposits in accordance with the terms

on which such deposits were received, or has become insolvent, or its capital has become impaired, or it has violated the law, or is conducting its business in an unsafe manner, the superintendent of banking shall order and direct such bank to discontinue such illegal or unsafe practices and require conformity with the law.

Whenever you have complied with this provision of the statute and the bank fails to remedy the condition complained of, you have the power, under section 1877 of the code, to authorize one of your bank examiners to take possession of any such bank, and upon the assent of the attorney general, to apply to the district court or judge thereof for the appointment of a receiver for such bank; and it is my opinion that unless you would take such action, you would be derelict in your duty, and whenever such condition as above described exists with any bank, the assent of the attorney general to the appointment of a receiver will always be forthcoming.

You will also notice that under section 7 of chapter 40, acts of the 37th General Assembly, there is given to yourself, as the superintendent of banking, the general control, supervision and direction of all banks incorporated under the laws of Iowa.

This language is broad and comprehensive, and, in the judgment of this department, enables you to make any reasonable regulation with reference to the management or conduct of the business of any of the banks under the control, supervision or direction of your department, and it is the duty of such bank to comply with such requirement, and a failure so to do would make such bank amenable under the provisions of section 1877 of the code, as above set forth.

H. M. HAVNER,
Attorney General.

A CORPORATION CANNOT RECEIVE DEPOSITS WITHOUT COMPLIANCE WITH BANKING LAWS.

No corporation has the right to receive moneys which have the effect of deposits, without compliance with the banking laws of the state.

May 2, 1918.

Hon. G. H. Messenger,
Superintendent of Banking.

Dear Sir: Your request for the opinion of this department on the following question has been referred to me for attention.

You state:

> Has a Company organized under the general corporation laws, but not complying with the banking laws, the right to receive monies which in reality are deposits, evidencing such receipts by issuing forms or obligations of indebtedness, which are so worded as to be merely subterfuges intended to eliminate the transactions from the supervision of this department?

Section 1861 of the code requires associations organized under the general corporation laws of the state for transacting a banking business, buying or selling exchange, receiving deposits, etc., other than savings banks, to incorporate the word "state" and make it a part of the name of such corporation, and it further provides that no such corporation shall be authorized to transact business unless the provisions of the code have been complied with.

Section 1889 of the 1913 supplement to the code, pertaining to this subject, provides in part as follows:

> 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 depositories. All such companies and all corporations now existing or hereafter organized under the provisions of chapter 1, title IX of the code, whose articles of incorporation authorize the acceptance and execution of trusts, and all corporations in whose name and word "trust" is incorporated and forms a part, shall have a full paid capital of not less than the amount of capital of savings banks as provided in section 1843 of chapter 10 and shall be subject to examination, regulation and control of 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.

The manifest intent and purpose of these statutory provisions was to prevent corporations from transacting any of the essential functions of banking institutions unless they comply with the law pertaining to and regulating such institutions. Receiving deposits is one of the essential and most important functions of banking business, and is so recognized not only by the institutions themselves, but by the laws which seek to regulate and control them

and the mere fact that the corporation receiving deposits does not buy or sell, exchange or transact certain other kinds of business which banks do, or may do, does not dispense with the necessity of examination, regulation and control. It is the receiving and handling of the funds of the public by corporations, by whatever name or designation they may be known, that the law seeks to safeguard and protect and no corporations may receive deposits of money or its equivalent without complying with the banking laws of the state.

J. W. SANDUSKY,
Assistant Attorney General.

ISSUANCE OF BONDS BY TRUST COMPANY.

A trust company has no authority to issue bonds secured by pledge of personal securities.

July 16, 1918.

Hon. G. H. Messenger,
Superintendent of Banking.

Dear Sir: Two letters from you, addressed to Mr. Sandusky, have been referred to me for attention.

As I understand it, both of these letters refer to the Cedar Falls Trust Company, and a copy of their articles of incorporation, also their so-called "Investment Bond" and letter of Wm. H. Merner, attorney at law at Cedar Falls, dated April 6th, addressed to the Cedar Falls Trust Company, appear to have been kept in connection with these inquiries.

Your question is:

> Has a company, organized under the general corporation laws, but not complying with the banking laws, the right to receive monies which in reality are deposits, evidencing such receipts by issuing forms or obligations of indebtedness which are so worded as to be merely subterfuges intended to eliminate the transaction from the supervision of this department?

This question should be answered in the negative. Section 1889 of the Code provides in substance that:

> No corporation shall engage in the banking business generally done by banks, receive deposits and transact the business generally done by banks unless it is subject to and organized under the provisions of this title, except that loan and trust companies may issue time deposits subject to the same limitations as are now or hereafter may be prescribed for receiving deposits by state banks, etc.

This section proceeds:

> All such companies and all corporations now existing or hereafter organized under provisions of chapter 1, title 9 of the code, whose articles of incorporation authorizes the acceptance and execution of trusts, and the corporation in whose name the word "trust" is incorporated and forms a part, shall have a full paid capital of not less than the amount of capital of savings banks as provided in section 1843 of chapter 10, and shall be subject to examination, regulation and control of the auditor of state, like savings and other banks.

I find, however, that this company has no right to receive deposits because it is not authorized to do so by its articles, and if Mr. Merner is right in his statement, the company has not been receiving deposits.

This brings me to your second question:

> Has a trust company organized under our laws, the right to issue debentures or bonds secured by the pledge of other than real estate securities?

I am inclined to think that this question should also be answered in the negative. Section 1889-j, supplement to the code, 1913, after providing the purpose for which trust companies and banks may contract indebtedness, says:

> But nothing hereafter contained shall limit the issuance by trust companies of debentures or bonds, the actual payment of which shall be secured by an actual transfer of real estate securities.

Since a trust company is not entitled, under the provision of this section, to contract an indebtedness, except for the purpose of paying expenses, for deposits and to pay deposits, etc., it follows that it cannot issue debentures or bonds except under the last clause of this section, namely those "which shall be secured by an actual transfer of real estate securities."

I might add that section 7, chapter 40 of the laws of the 37th General Assembly, provides:

> The superintendent of banking shall be the head of the banking department of Iowa, and shall have general control, supervision, and direction of all banks and trust companies incorporated under the laws of Iowa, and shall be charged with the execution of the laws of this state relating to banking; and all powers now vested in and all duties imposed upon the auditor of state relating in any way to banking matters, shall, from and

after the taking effect of this act, be vested in and made incumbent upon the superintendent of banking herein provided for.

It would further appear to me that this section, taken in connection with that portion of section 1889 already quoted, gives you authority over any company which uses the word "trust" in its name. It would seem that you have a right to insist that the debentures or bonds of this company be secured as provided in section 1889-j.

We herewith return you the articles of incorporation of the Cedar Falls Trust Company, and the form of investment bond issued by it.

F. C. DAVIDSON,
Assistant Attorney General.

BANKS CANNOT PREFER DEPOSITORS.

Banks may not issue "Trust Certificates" of deposit, giving the depositor a right to preference in a particular fund.

August 7, 1918.

Hon. G. H. Messenger,
Superintendent of Banking.

Dear Sir: You have orally requested the opinion of this department regarding the right of the Mapleton Trust & Savings Bank to issue a so-called trust certificate of deposit, the language of which is as follows:

No..... $.....

Mapleton Trust & Savings Bank
Trust Certificate of Deposit

This certifies that.....whose postoffice address is.....has deposited in this bank .....dollars, payable to his order on the....., 19.....with interest thereon at the rate of.....per centum per annum, payable semi-annually on the.....day of .....and.....in each year, on the presentation and surrender of the interest coupons hereto attached, payable both interest and principal, at its banking office at Mapleton, Iowa. This deposit is made in trust with the said Mapleton Trust & Savings Bank for investment in first mortgage real estate loans, maturing on the date of the maturity of this certificate, but said Mapleton Trust & Savings Bank reserves the right to pay this certificate at the maturity of any coupon, on or after the.....day of....., 19.....on the conditions named on the back hereof.

> It is also expressly agreed by this bank that the legal holder hereof may at any time, on giving sixty days' written notice to this bank, and by paying the expense of making the transfer, present this certificate of deposit for exchange for a first mortgage bond, bearing interest at the same rate as this certificate which shall be secured by real estate, the reasonable value of which shall be at least twice the amount loaned.
>
> In testimony whereof, the Mapleton Trust & Savings Bank has caused these presents to be executed by its president and cashier this.....day of....., 19..... with the seal of said bank affixed.
>
> ....
> Cashier President.

The effect of the issuance of this certificate of deposit is either to give the depositor a special right amounting to a trust or a lien in certain real estate securities supposed to be held by the bank, or else the effect of it is to creat a direct obligation on the part of the bank more in the nature of a debenture or a bond. I do not see that it makes very much difference which horn of the dilemma we would take. The law certainly does not contemplate that a state or savings bank may give to a depositor the right of having his deposit paid from a particular fund, or to have special security for its payment. In case of insolvency all depositors must be in the same class, and it will not do to say that certain depositors would be be entitled to a preference because they could claim that their certificates entitled them to payment out of certain obligations due to the bank.

No one could contend that a bank might issue a certificate to its depositor providing that he should have a special lien upon the building or the furniture belonging to the institution for the payment of his certificate of deposit.

Taking up the other phase of the matter, I would call your attention to section 1889-j Supplement to the Code of 1913, the closing sentence of which is as follows:

> But nothing herein contained shall limit the issuance, by trust companies, of debentures or bonds, the actual payment of which shall be secured by an actual transfer of real estate securities.

The first part of the section relates to indebtedness that may be created by trust companies, state or savings banks, and the

final clause just quoted makes it clear that only trust companies may issue debentures or bonds secured by the actual transfer of real estate securities. It is clear that no such power was intended to be conferred upon the banks, otherwise this last clause of the section would have been made applicable also to them.

We return you herewith the so-called trust certificate of deposit of the Mapleton Trust & Savings Bank.

F. C. DAVIDSON,
Assistant Attorney General.

TRAVELING EXPENSES OF BANKING DEPARTMENT.

The salaries and expenses of conducting the banking department cannot exceed the amount of fees collected from banks and trust companies.

October 10, 1918.

Hon. George H. Messenger,
Superintendent of Banking.

Dear Sir: I am in receipt of your inquiry of this date, which is as follows:

> At the close of business December 31, 1917, there remained to the credit of this department from the year's receipts $3222.73 which sum was transferred to the general revenue account under instructions of your assistant John W. Sandusky.
>
> Owing to increased traveling expenses for my examiners, my department will be out of funds about December first; in other words, to finance to completion the year's work we will need something like two thousand dollars more money than we will have available.
>
> What am I to do?

Section 5 of chapter 40 of the acts of the 37th General Assembly provides:

> * * * The superintendent of banking and examiners shall be entitled to actual and necessary expenses incurred in the examination of banks and trust companies, and all such other expense as shall be approved by the superintendent and by the state board of audit, as provided in section one hundred seventy-s (170-s) supplemental supplement to the code 1915, and such expense shall be paid by the treasurer of state upon warrants drawn by the auditor of state, but the total amount of such expenses and salaries shall not in any one year exceed the amount of fees collected from banks and trust companies.

This section absolutely forbids the use of any more money, either for expenses or salaries, than the amount of fees collected from banks and trust companies in any one year.

Unless we can find some other provision of statute which will nullify the provisions of section 5, chapter 40, acts of the 37th General Assembly, then you cannot have from any other source any revenue for expenses or salaries other than that derived from the fees collected from banks and trust companies.

The joint resolution passed by the 37th General Assembly, known as chapter 294 of the acts of the 37th General Assembly, does not cover the situation. That resolution might be made to apply to your department had it not been for the provision in section 5, chapter 40, acts of the 37th General Assembly,

> but the total amount of such expenses and salaries shall not in any one year exceed the amount of fees collected from banks and trust companies.

I appreciate the fact that this will work a hardship upon your department, and that it will make it impossible for you to carry out the spirit of the legislation creating your department, but the express provisions of the statutes cannot be ignored, and it is the opinion of this department that unless the amount of the fees collected from banks and trust companies is sufficient to finance your department, there can be no other state funds given to your department.

H. M. HAVNER,
Attorney General.

MORTGAGES.

A mortgage will cover future loans when such was within contemplation of parties at time of executing mortgage.

December 4, 1918.

Hon. Geo. H. Messenger,
Superintendent of Banking.

Dear Sir: You refer to this department a letter from Mr. V. W. Miller, State Bank Examiner, and verbally request an opinion concerning the matter set forth in said letter. The questions raised are the following:

> Where a mortgage contains a clause covering any future loans which the mortgagee may make to the mortgagor, in addition to the definite amount stated in the mortgage, will this

hold as against a subsequent mortgage? If not kindly cite me authority, if you have it at your disposal.

In case a mortgage contains a clause covering any property which the mortgagor may acquire in the future, (chattel mortgage) will this hold against subsequent lien-holder?

As to the first question, our supreme court has held that a chattel mortgage given to secure future advancements should not be construed to secure advancements not in contemplation of the parties at the time of the execution of the mortgage.

Wright vs. Voorhees, 131 Iowa, 408.

In the Voorhees case, supra, it is said at page 409:

> The theory of the trial court was that when the notes specified in the mortgage, one of which it is conceded was to cover advances to be made, were fully paid and discharged the mortgage was cancelled and could not be relied upon by the defendants as security for subsequent advances made. We think it is clear that a mortgage may be made to secure future advances which are in contemplation of the parties at the time of the making of the mortgage, and that when the indebtedness to be secured, including the advances contemplated, has been fully satisfied and discharged then the mortgage is cancelled and extinguished by operation of law.

Again, at page 410, it is said:

> The cases authorizing the inclusion of after-acquired property and future advances will all be found to come far short of a general inclusion of everything the mortgagor may subsequently own and every indebtedness to the mortgagee which he may subsequently incur. * * * * Certainly, under the authorities already cited, a mortgage to secure future indebtedness should not be construed to cover indebtedness not in the contemplation of the parties at the time the instrument was executed and having no reference to the subject-matter referred to in the instrument.

Pursuant to the foregoing authority it would follow that a subsequent mortgage would acquire a superior lien after the indebtedness to be secured in the prior mortgage, together with the contemplated advancements, has been paid.

As to your second question, our supreme court has repeatedly held that a chattel mortgage will not cover after acquired property unless the intention so to do is clearly expressed therein.

Hopkins Fine Stock Co. vs. Reid, 106 Iowa, 78;

In re Thompson, 145 N.W. 76.

Our supreme court has also held that a clause in a chattel mortgage covering any property which the mortgagor might acquire in the future is too sweeping and indefinite and does not impart constructive notice to a subsequent mortgagee.

Bank vs. Stockdale, 121 Iowa, 748.

In the Stockdale case, supra, it was said at page 751:

> The law contemplates that there shall be a description of the property conveyed or incumbered. Certainly, neither designation nor a description of any property is afforded by a sweeping statement to the effect that the instrument in question is intended as a conveyance of all the property the mortgagor has, and all that he ever expects to have. The record of such an instrument could not impart notice, because it fails absolutely to furnish any information, such as that by the recording act it was intended should be given.

In the Voorhees case, supra, it was said that cases authorizing the inclusion of after-acquired property do not authorize a general inclusion of everything the mortgagor may subsequently own.

Therefore, as a general rule the mere inclusion in a chattel mortgage of a clause "covering any property which the mortgagor may acquire in the future," is too sweeping and indefinite to impart constructive notice to a subsequent lien holder. However, this holding is intended to apply only as a general doctrine, and is not intended to govern every specific case, for the reason that the facts in each individual case might differ to such an extent as to make a general rule inapplicable. So that if you have a specific mortgage upon which you desire a specific opinion from this department, we would respectfully suggest that you submit to us a copy of the specific mortgage.

W. R. C. KENDRICK,
Assistant Attorney General.

CIVIL TOWNSHIPS.

Workmen's compensation acts does not apply to civil townships.

April 21, 1917.

Hon. A. B. Funk, Industrial Commissioner.

Dear Sir: Replying to the inquiry of Richardson Brothers, of Denison, Iowa, asking for an opinion from your department, whether in substance townships or municipal corporations, when carrying on road work or doing work by day labor, they would come under the workmen's compensation act.

The workmen's compensation act provides:

> Sec. 2477-m. (b) Where the state, county municipal corporation, school district, cities under special charter or commission form of government is the employer, the terms, conditions and provisions of this act for the payment of compensation and amount thereof for such injury sustained by an employe of such employer shall be exclusive, compulsory and obligatory upon both employer and employe.

It is clear that unless a civil township comes within one of the classifications referred to in the fore-going section, the so-called compensation act does not apply. It is also evident that the only classification in said section which could possibly apply, is that in relation to municipal corporations. Now, is a civil township a municipal corporation within the contemplation of the Iowa law?

Our courts have repeatedly held that a civil township is not a corporation nor a legal entity, and cannot sue or be sued. It is no more than a legal subdivision of the county for governmental purposes. These provisions clearly indicate that civil townships have no corporate powers as such.

Austin Company v. Township of Weaver, 136 Iowa, 709.

Theulen v. Reed, 139 Iowa, 68.

It is therefore our opinion that civil townships are not munici-

pal corporations, and that the workmen's compensation law does not apply thereto.

W. R. C. KENDRICK,
Assistant Attorney General.

LIMITATION ON LIABILITY OF COUNTY.

A county is not liable for compensation for injuries to workmen hired by township officials.

July 11, 1917.

Hon. A. B. Funk, Industrial Commissioner.

Dear Sir: Replying to your inquiry asking whether or not a county might be held liable for injuries sustained by workmen hired by township officials, beg to advise that in reaching a conclusion in this matter, I am assuming that the term "workman" was used advisedly and synonymously with the word employe.

The workmen's compensation law of this state relating to the liability of counties reads as follows:

> Where the state, county, municipal corporation, school district, cities under special charter or commission form of government is the employer, the terms, conditions and provisions of this act for the payment of compensation and amount thereof for such injury sustained by an employe of such employer shall be exclusive, compulsory and obligatory upon both employer and employe.
>
> Code Sec. 2477-m (b). Supplement of 1913.

Section 2477-m-16 (b) provides that:

> "Workman" * * * means any person who has entered into the employment of, or works under contract of service, express or implied; * * * provided that one who sustains the relation of contractor with any person, firm, association, corporation or the state, county, school district, municipal corporation, cities under special charter or commission form of government, shall not be considered an employe thereof.

It is therefor evident that, from the foregoing provisions of the workmen's compensation law, unless the relation of employer and employe exists within the meaning of said law, there can be no liability on the part of the county. That is to say, a county could not be liable under the compensation law unless there was a contract of hire, express or implied, between the county and the person doing the work, excluding, of course, independent contractors. So that the county can not be held liable for compen-

sation for injuries sustained by workmen hired by township officials.

W. R. C. KENDRICK,
Assistant Attorney General.

CLERICAL HELP OF STATE OF IOWA.

Clerical help in one of the state departments is not entitled to the benefits of the workmen's compensation act.

July 19, 1917.

Hon. A. B. Funk, Industrial Commissioner.

Dear Sir: Replying to your esteemed favor of the 3rd inst, together with your favor of November 8, 1916, addressed to Hon. Henry E. Sampson, assistant attorney general, relative to the claim of Mr. Welker Given for compensation against the state of Iowa for injuries alleged to have been sustained by Mr. Given while an employe of the state, beg leave to submit the following opinion:

It is claimed by Mr. Given that on June 14, 1916, he was employed by the state of Iowa to assist in the preparation of the biennial report of the Iowa industrial commissioner, at a monthly salary of $150, under the direction, control and discretion of the industrial commissioner. That Mr. Given entered upon his duties June 30, 1916, and while so engaged on August 12, 1916, sustained a personal injury by accident under the following circumstances:

About 4:45 p. m. on said day he left the office of the industrial commissioner and went to the state library for a citation and reference needed for immediate use in said biennial report, and on his way back to the office, through a rain storm, on East Twelfth street north of Capitol avenue and within the capitol extension he fell on a slippery place on the sidewalk, striking his shoulder on the curbing and sustaining a fracture resulting in a permanent partial disability of his right arm. At the place of accident the street had been vacated by the city council of the city of Des Moines, although said street was still open to the general public. Wet clay had accumulated on the sidewalk where the accident occurred and the accident in question is claimed to be the natural result of passing along the street vacated for a year, with buildings taken away, the street removed from full use and care, and with accumulations of wet clay thereon.

The opinion of this department is particularly desired upon the following questions:

1. Was Mr. Given at the time of the accident an employe of the state within the meaning of the workmen's compensation act?

2. Was Mr. Given engaged in clerical work within the meaning of Sec. 17 (b) of the compensation act and therefore excluded from the right to compensation, or was he "subjected to the hazards of the business" of collecting and compiling information, and entitled to compensation under that section?

3. Does the provision of Sec. 17 (c) 7-e, regarding services and accidents on the premises of the employer apply to this case?

4. Did the injury described arise out of and in the course of Mr. Given's employment?

5. Does Sec. 1 (b) of the Compensation Act making compensation "exclusive, compulsory and obligatory" on the state and its subdivisions prevent the exclusion of clerical employes of such employers, this section presenting, together with Sec. 17, an instance where "the context otherwise required?"

At the threshold of this opinion it will probably serve a good purpose to recall a few general and well established rules concerning compensation.

As to when responsibility begins and ends, it is the general rule that the responsiblity of the employer begins when his employe enters his premises to perform the services required of him, and terminates when the employ leaves such premises, provided he does not loiter needlessly, or arrive at an unreasonable hour in advance of the beginning of his duties. Gordon vs. Ely, 4 N. C. C. A., 858-n.

Also, to have all the requisites for compensation present, it is necessary that the employe be in fact at the time of the injury discharging some of the duties which he is employed to perform. It is equally true that before compensation can be collected for an accidental injury, the injury must have arisen out of the employment. That is to say, the accident must have occurred by reason of some risk or hazard peculiar to that particular employment. Section 2477-m, Supplement 1913; Hoeing vs. Industrial Commission (Wis.) 150 N. W. 996; Worden vs. Commonwealth

Power Company, Michigan Workmen's Compensation cases, July, 1916, page 14; Hopkins vs. Michigan Sugar Co., 21 D. L. M., 1260; McNichols case, 215 Mass. 497; Newman vs. Newman, 155 N. Y. S. 665; Hennold on Workman's Compensation, I. Vol. 408.

It is well established further, that in going to and from his work, his risks are those of the commonalty, and not those of the industry in which he was engaged. However, where it is the duty of an employe to go to places away from the employer's office and then return to the office and make report, the employe is at such times acting in the course of his employment and is entitled to compensation, if injured by accident at such times, provided, however, such injury occurs from a risk peculiar to that business and not a risk to which the general public is exposed. Oldham vs. Insurance Company, 7 N. C. C. A., 410-n; Turgeon vs. Fox Company, 7 N. C. C. A., 429-n; De Fazios Estate vs. Goldschmidt, D. E. T. Co., 4 N. C. C. A., 716.

Further, clerical assistance has been held not to mean official assistance, but such as aid in the execution of official authority by the official himself; such as writing letters, making entries of records and like services. Beam vs. Jennings, 96 N. C. 82; Words and Phrases. II Vol. 1224.

With the foregoing general doctrines in mind, I beg to call attention to the Iowa statutory provisions in regard to workmen's compensation:

Section 2477-m, Supplement 1913, provides that compensation shall be paid only when the injury sustained by the employe arose out of and in the course of employment.

Also, in construing the term "employe," Section 2477-m-16, supplement 1913 provides: "Workmen is used synonymously with employe; means any person who has entered into the employment of, or works under contract of service, expressed or implied, * * * for an employer, except * * * to engage in clerical work only, but clerical work shall not include one who may be subject to the hazards of the business."

And Section 2477-m (b), Supplement, 1913, provides:

> "Where the state * * * is the employer, the terms, conditions and provisions of this act for the payment of compensation and the amount thereof for such injury sustained

> by an employe, shall be exclusive, compulsory and obligatory upon both the employer and employe."

It is evident therefore that claimant cannot recover compensation if his employment was purely clerical and the injury sustained was one not peculiar to the particular occupation in which he was engaged.

That claimant's occupation was purely clerical there can be no doubt. Bouvier's Law Dictionary describes a clerk to be:

> "A person employed in an office, public or private, for keeping records."

Webster defines the term to be "of or relating to a clerk or copyist, or to writing." Clerical service means a service that involves writing. (Post vs. U. S. 27 Ct. Cl. 244.) Clerical error is held to be an error made by a clerk, or a transcriber; a mistake in copying or writing. In re Stewart 48, N. Y. S. 957. And clerical assistance has been held to be such as aids in the execution of official business by the official himself, such as making entries or records and like service. Beam vs. Jennings, 96 N. C. 82; Words and Phrases, II. Vol. 1224.

According to the facts in the Given case, the claimant's duties were limited to the collection and assortment of records in the Department of the Iowa Industrial Commissioner, particularly for the purpose of aiding said commissioner in the preparation of his biennial report. Pursuant to the authority cited above, such service was undoubtedly clerical.

But there was another feature of Mr. Given's employment that might raise a question of doubt, and that is, whether said employment was such that slipping and falling on the sidewalk was peculiarly incident thereto. In order to recover in this case, the nature and conditions of the employment must be such that the alleged injury was one unlikely to happen to one engaged in that employment, that is the nature of the employment must specifically expose the employe to that particular risk. It is absolutely imperative that there exist a causal connection between the employment and the injury. Sheldon vs. Needham, 7 B. W. C. C., 471; Newman vs. Newman, 155 N. Y. S. 665; Worden vs. Commonwealth Power Company, Michigan Workmen's Compensation cases, July 1916, page 14; Hopkins vs. Michigan Sugar Company, 21 D. L. H. 1260; McNichols case 215, Mass. 497; Hon-

nold on Workmen's Compensation, I. Vol. 408; Hoeing vs. Industrial Commission, 150 N. W. 996.

In the Worden case, supra, it is said:

> "The more serious question in the case is did the accident arise out of applicant's employment? Under the language of the statute two conditions must be present to entitle the injured man to compensation, viz., the injury must have happened in the course of his employment and it must also arise out of his employment. The fact that it occurred in the course of his employment merely, if it be a fact, is not enough to entitle him to compensation. It must also appear that the injury arose out of the employment and from a risk reasonable incident to such employment, as distinguished it from risks to which the general public is exposed * * * it may be fairly said that one of the most common risks to which the general public is exposed is that of slipping and falling upon the ice."

From all the foregoing, it would seem that, first, claimant was engaged in purely clerical work; and, second, that slipping and falling on the sidewalk was not a risk peculiar to his work, but was a hazard to which the general public was exposed.

We would therefore answer each of your five questions in the negative.

W. R. C. KENDRICK,
Assistant Attorney General.

LUMP SUM SETTLEMENT WITH ALIENS.

It is legal to make lump sum settlements with subject of Austrian government with which the U. S. has severed diplomatic relations, although not at war.

July 30, 1917.

Hon. A. B. Funk, Industrial Commissioner.

Dear Sir: Replying to your inquiry relative to the legality of making a lump sum settlement with a subject of the Austrian government, beg leave to advise that such action would be legal.

We are not at war with Austria-Hungary, and so far as respects the rights of alien dependents to receive compensation under the Iowa Workmen's Compensation Act, the same right exists now as heretofore, taking into consideration, of course, recent amendments to the Iowa Workmen's Compensation Act.

Under Chapter 336, Acts 37th General Assembly, you are authorized to deal with the consular officer of the foreign country affected, or his duly appointed representative, after administration on the estate of a deceased has been taken out by said consular officer or his agent.

However, I might suggest that you require the administrator acting in this matter to show his authority, as well as the authority of the principal, the consular officer, to represent the Austrian government or its subjects in this country, as provided for in Chapter 336 aforesaid.

I would also suggest that ample proof be furnished that the claimant is in fact the lawful widow of the deceased.

As to the propriety of a lump sum settlement at this time you ask for no opinion and I therefore withhold giving any.

W. R. C. KENDRICK,
Assistant Attorney General.

FEES OF CLERK OF DISTRICT COURT.

Provisions of section 2477-m 33, relating to fees of clerk and workmen's compensation act discussed.

September 14, 1917.

Hon. A. B. Funk, Industrial Commissioner.

Dear Sir: Complying with your oral request for an opinion on the fees to be charged by the clerk of the district court under the last paragraph of section 17, chapter 270, Acts of the 37th General Assembly, beg to say that said paragraph reads as follows:

> "No fee shall be charged by the clerk of any district court for the performance of any official service required by this act, except for the docketing of judgments and for certified copies or transcripts thereof. In proceedings on appeal from an order or decree, costs as between the parties shall be allowed or not, in the discretion of the court."

The 37th General Assembly repealed section 2477-m33, as found in the supplement of 1913 and enacted in lieu thereof section 17, chapter 270, Acts of the 37th General Assembly. By reading section 2477-m33, supplement of 1913, you will find no provision limiting the fees to be charged by clerks of district courts, while section 17, chapter 270, aforesaid, expressly limits the fees to be charged for the performance of any service required

by said act to such fee as may be legally charged for docketing judgments and for certified copy and transcript thereof; except in proceedings on appeal from an order or decree, and then, "costs by the parties may be allowed or not in the discretion of the court."

By referring to section 296, subdivision 9, supplement of 1913, we find that provision is made for taxing a fee of seventy-five cents by the clerk for entering a decree or judgment, and subdivision 21 of said section entitles the clerk to charge a fee of ten cents for each hundred words, for all copies of records or transcripts; and, subdivision 13 allows a charge of fifty cents for the clerk's certificate and seal.

So that it was evidently the intention of the legislature when repealing section 2477-m33, supplement of 1913, and in enacting in lieu thereof section 17, chapter 270, Acts of the 37th General Assembly, to limit the fees which the clerk may charge in the performance of any official duty in connection with matters arising under the Workmen's Compensation Act.

We, therefore, hold that under section 17, Chapter 270, Acts of the 37th General Assembly, that the clerk is limited in his charge to a fee of seventy-five cents, and that for entering a decree or judgment, except when a certified copy is desired, or an appeal is taken and the court has allowed costs of appeal to be taxed.

W. R. C. KENDRICK,
Assistant Attorney General.

ALIEN ENEMY ENTITLED TO COMPENSATION.

Alien enemies residing in Iowa are entitled to receive compensation when injured in the course of their employment, if both employer and employe are operating under the workmen's compensation act.

December 14, 1917.

Hon. A. B. Funk, Industrial Commissioner.

Dear Sir: You have requested an opinion from this department upon the two following questions:

1. Are the alien enemies, residing in Iowa, entitled to apply for and receive compensation when injured in the due course of their employment?

2. What effect, if any, has H. R. 4960, Acts of the 65th Congress, commonly known as the "trading with the enemy act," upon the legal right of alien enemies, residing in Iowa, to receive compensation when injured in the due course of their employment?

For the purpose of this opinion, we are assuming that the alien enemies were employed by an employer operating under the Iowa Workmen's Compensation Law, and that neither the employer nor the employe has ever elected to reject the act.

It is a well recognized priciple of international law that no commercial intercourse can be lawfully carried on between the subjects and citizens of two belligerent powers. This principle has been so far advanced in this country that even the courts are closed to alien enemies. Masterson vs. Howard, 85 U. S. 99; McVeigh vs. United States, 78 U. S. 259; Jecker vs. Montgomery, 59 U. S. 110. But the foregoing principle applies only when the intercourse is between alien enemies actually residing in the belligerent territories and the subject of said intercourse is intended to pass back and forth across the belligerent lines. It was never intended to apply to intercourse between the alien enemies residing in the country where the intercourse is carried on, and an alien enemy residing in Iowa may contract and sue like an ordinary citizen of this state. Kershaw vs. Kelsey, 100 Mass. 573; Russell vs. Skipwith, 6 Binney (Pa.) 241; Clark vs. Morey, 10 Johns (N. Y.) 69; Buchanan vs. Curry, 19 Johns (N. Y.) 136; Conn vs. Penn, 1 Pet. C. C. (U. S.) 496; Denniston vs. Imbrie, 3 Pet. C. C. (U. S.) 396; Ward vs. Smith. 74 U. S. 447; 2 Kents Com. sec. 63.

In Ward vs. Smith, supra, it is said at page 453:

> "The rule," says Mr. Justice Washington, in Conn. vs. Penn, "can never apply in cases where the creditor, although a subject of the enemy, remains in the country of the debtor, or has a known agent there authorized to receive the debt, because the payment to such creditor or his agent could in no respect be construed into a violation of the duties imposed by a state of war upon the debtor. The payment in such cases is not made to an enemy, and it is no objection that the agent may possibly remit the money to his principal. If he should do so, the offense is imputable to him, and not to the person paying him the money. Nor can

the rule apply when one of several joint debtors resides within the same country with the creditor, or with the known agent of the creditor."

It will, therefore, be observed that so long as alien enemies, residing in this state obey the law and conduct themselvs as decent citizens they are accorded the same rights and privileges as our own citizens with reference to engaging in commercial enterprises, including working for wages. In the event of personal injury they would undoubtedly be entitled to apply for and receive compensation upon the same basis as our own citizens.

As to whether or not the "Trading With The Enemy Act" could, in any manner, affect the right of an alien enemy residing in Iowa to recover compensation under the Iowa Workmen's Compesation Law, I am clearly of the opinion that it cannot. That act provided among other things that the term "trade" shall be deemed to mean a payment or satisfaction of any debt or obligation; that an Alien Property Custodian shall be appointed, to whom every person owing nonresident alien enemy any debt or obligation shall report, and to whom such obligation or debt shall be paid or assigned; that all money received by said Alien Property Custodian shall be deposited in the Treasury of the United States to be retained by the Treasury until the end of the war; that alien enemies residing in this country shall not be included in the "Trading With the Enemy Act" until the President by proclamation so includes them. It occurs to us therefore that the only effect said act could have on claims for compensation arising under the Iowa Workmen's Compensation Law would be in event a nonresident alien enemy was entitled to compensation as a beneficiary, in which event the Alien Property Custodian should be notified and the amount due to said beneficiary turned over to said Custodian. To this extent, it is probable that "Trading With the Eenemy Act" would apply.

W. R. C. KENDRICK,
Assistant Attorney General.

ADMINISTRATOR CANNOT APPLY FOR COMPENSATION.

Administrator of deceased workman not the proper party to make application for compensation.

February 15, 1918.

Hon. A. B. Funk, Industrial Commissioner.

Dear Sir: In reply to your verbal inquiry for an opinion as to whether or not the administrator of deceased employe has the right to appear as plaintiff for the dependents in an application for compensation under the Iowa Workmen's Compensation Act beg to call your attention to the following provisions of the act relating thereto.

Section 2477-m-9 (c) supplement of 1913, provides as follows:

> Where the injury causes death the compensation under this act shall be as follows:
>
> The employer shall in addition to any other compensation pay the reasonable expense of the employe's last sickness and burial not to exceed one hundred dollars. If the employe leaves no dependents this shall be the only compensation.

Section 2477-m-9 (d), supplement of 1913, provides as follows:

> If death results from the injury, the employer shall pay the dependents of the employe, etc.

Then, sub-division (e) of the same section provides that:

> When weekly payments have been made to an injured employe before his death, the compensation to dependents shall begin from the date of the last of such payments, etc.

The foregoing sections regulate the payment of compensation generally under the Iowa Workmen's Compensation Act. This law is special in its application, and whatever remedy an injured employe, or his dependents in case of death, has against his employer is limited to the express provision of the act. The legislature substituted the Workmen's Compensation Act for the old common and statutory law relating to the recovery of damages sustained by an employe through the negligence of his employer in failing to provide a safe place to work, or otherwise, and in so providing the legislature attempted to get away from the technical uncertainty and delay incident to court procedure, and provided a direct, simple and absolute remedy for obtaining compensation by a workman injured in the course of his employment. The result is that the courts have been

entirely eliminated from the early stages of procedure to obtain compensation, and an administrative body, entirely separate and distinct from the courts has been clothed with exclusive jurisdiction to hear and determine, in the first instance, all applications for compensation.

Now, then, referring again to the sections of the Workmen's Compensation Act, above quoted, it will be observed that absolutely no reference is made therein to administrators or administration upon any estate of the deceased workmen, but that in every instance express provision is made for payment of compensation direct to the injured employe, or, in the event of his death, to his dependents. In fact, whatever sum of money the injured employe, or his dependents, receives is considered compensation and not damages, and the thought of the compensation received being considered an estate is entirely foreign to the purpose of all workmen's compensation laws. This is conclusively demonstrated by the fact that the law itself provides that in the event the employe is accidentally killed and leaves no dependents, then the liability of the employer is limited to the burial expenses, not to exceed $100.00. If it had been intended by the legislature that the money received by an injured workman was to be considered as damages, so as to create an estate to his heirs in the event of the injury resulting in death, the legislature would have said so.

However, the legislature did provide for the appointment of an administrator to whom funds should be paid in cases arising out of injuries resulting in death, to an employe whose dependents reside outside of the United States.

Section 2477-m-13, supplement to the code of 1913, as amended by Chapter 336, acts of the 37th General Assembly, after providing for representatives by the consul general, vice consul, or consul agent of the nation of which the said dependent or dependents are citizens, reads as follows:

> And provided further that before said consular agent or his representative shall have the right to receive funds due the estate of said decedent he shall regularly take out administration in the county where said decedent last resided, and give bond as administrator for the protection of such funds as provided by law.

It will be observed that the section just quoted has reference only to dependents residing outside of the United States, so that with this one exception no provision is made in the Workmen's Compensation Act for the payment of any claim to an administrator, but on the contrary, express provision is made for payments direct to the dependents.

From all the foregoing it is clear to me that it was never contemplated by the legislature that application for compensation under the Workmen's Compensation Act, should be made by the administrator of the deceased employe, and that application by such officer would be improper. In my opinion, the dependent alone should make the application, except when the dependents are aliens residing outside of the United States.

W. R. C. KENDRICK,
Assistant Attorney General.

MEANING OF WORD "BEYOND."

The word "beyond" as used in Section 2477-m-9 (g), Supplement 1913, of the workmen's compensation act defined.

February 18, 1918.

Hon. A. B. Funk, Industrial Commissioner.

Dear Sir: You asked for an opinion as to the construction of section 2477-m-9 (g), Supplement of 1913, as amended by the Acts of the 37th General Assembly, particularly as to the meaning of the word "beyond" used therein, with reference to additional compensation, when "the period of incapacity extends beyond the thirty-fifth day following the date of the injury." The statutory provision referred to reads as follows:

> No compensation shall be paid for an injury which does not incapacitate the employe for a period of at least two weeks from earning full wages; provided, however, that this provision shall not apply to those injuries resulting in disability partial in character and permanent in quality and compensated according to the schedule found in section twenty-four hundred seventy-seven-m-9 (J) (2477-m-9-j) Supplement to the Code, 1913. Should such incapacity extend beyond a period of two weeks, compensation shall begin on the fifteenth day after the injury; provided, however, that if the period of incapacity extends beyond the thirty-fifth day following the date of the injury, then the compensation for the fifth week of incapacity, shall

> be increased by adding thereto an amount, equal to two-thirds (2-3) of the weekly compensation; if the period of incapacity extends beyond the forty-second (42) day following the date of injury, then the compensation for the sixth week of incapacity shall be increased by adding thereto an amount equal to two-thirds (2-3) of the weekly compensation; if the period of incapacity extends beyond the forty-ninth (49) day following the date of the injury, then the compensation for the seventh week of incapacity shall be increased by adding thereto an amount equal to two-thirds (2-3) the weekly compensation; if the period of incapacity extends beyond the forty-ninth day following the date of the injury then the compensation thereafter shall be only the weekly compensation provided for in this law.

Webster defines the word "beyond" to mean "on the further side of;" the Century Dictionary defines it as "further on than;" and defines the term "to go beyond" to mean "to exceed."

The courts have declared the word "beyond" to mean "that which follows after the termination of something going before." Construing the meaning of the word used in the following connection, to wit. "No proceeding shall work a forfeiture beyond the life of the offender" the Supreme Court of the United States in Wallach vs. Van Riswick, 92 U. S. at 209 says:

> The obvious meaning is that the proceeding for condemnation and sale shall not affect the ownership of property after the termination of the offender's natural life.

Then again it has been held that where the state prohibited the filling in of the water front "beyond" a definite point, it permitted the filling in "up to" that point.

In Williams vs. Mayor of New York, 105 New York, at 431 it is said:

> And so, when it says that no filling shall be done beyond, it strongly implies that it may be done up to.

Now let us turn to the section in question.

It will be observed that no compensation shall be paid for an injury which does not incapacitate the employe for a period of at least two weeks, but if such incapacity extends beyond two weeks, then compensation shall begin on the fifteenth (15) day after the injury. That language is plain and easily understood. No one would question that compensation commences only upon the ter-

mination of the fourteenth (14) and after the commencement of the fifteenth (15) day. Now then the same section provides:

> If the period of incapacity extends beyond the thirty-fifth (35) day following the date of the injury then compensation for the fifth (5) week of incapacity shall be increased by adding thereto an amount equal to two-thirds (2-3) of the weekly compensation.

It seems to me that if the word "beyond" when used in the early part of the section, means the termination of the fourteenth (14) day, that the same interpretation should be placed upon the word "beyond" when used later on in the same section, and construe it to mean after the termination of the thirty-fifth (35) day. So that it seems to me the section in question should be construed to mean that additional compensation shall be paid for the fifth (5th) week only when incapacity extends past the thirty-fifth (35) day and into the thirty-sixth (36) day, and so on, as further provided in said section.

W. R. C. KENDRICK,
Assistant Attorney General.

WHEN INDUSTRIAL COMMISSIONER TAKES JURISDICTION.

When an employer who has rejected the act files a waiver the Industrial Commissioner takes jurisdiction on the date the notice of such waiver is filed with the Industrial Commissioner.

March 29, 1918.

Hon. A. B. Funk, Industrial Commissioner.

Dear Sir: I have your esteemed favor of the 19th inst. stating that on the 31st day of December, 1917, the Consolidation Coal Company filed with your department a waiver of its notice to reject the provisions of the Iowa Compensation statutes; that on the 7th day of January, 1918, said company filed with your department the affidavit of its superintendent; that on the 7th day of January, 1918, he posted notices of Employer's Waiver of Notice to Reject; and asking for a written opinion as to the date when said company became subject to the jurisdiction of your department.

Paragraph (b) of Section 2477-m3 Supplement 1913, provides:

> When an employer or employe rejects the terms, conditions or provisions of this act, such party may at any

time thereafter elect to waive the same by giving notice in writing in the same manner required of the party in electing to reject the provisions of the act and which shall become effective when filed with the Iowa industrial commissioner.

Paragraph 4 Section 2477-m, Supplement 1913, provides as follows:

> Every such employer shall be conclusively presumed to have elected to provide, secure and pay compensation to employes for injuries sustained arising out of and in the course of the employment according to the provisions of this act, unless and until notice in writing of an election to the contrary shall have been given to the employes by posting the same in some conspicuous place at the place where the business is carried on, and also by filing notice with the Iowa industrial commissioner with return thereon by affidavit showing the date that notice was posted as by this act provided.

It will therefor be observed that pursuant to the foregoing statutory provisions, the Consolidation Coal Company became subject to the jurisdiction of your department upon the 7th day of January, 1918.

W. R. C. KENDRICK,
Assistant Attorney General.

FAILURE TO CARRY INSURANCE.

Construction of Section 2477-m41 Supplement 1913, relating to liability of employer for failing to carry insurance.

October 24, 1918.

Hon. A. B. Funk, Industrial Commissioner.

Dear Sir: I have your favor enclosing letter from Messrs. Stapleton & Stapleton, a firm of attorneys located at Marengo, Iowa, in connection with the application for arbitration in re Thomas William Walsh vs. John Ryan.

You ask for a construction of Section 2477-m41, Supplement to the Code, 1913, as amended by Section 20, Chapter 270, Acts of the 37th General Assembly, particularly whether or not an employer who neglected to insure his risk would still be governed by Chapter 8-a, Supplement to the Code, 1913, in the event said employer failed to comply with the provisions

of Section 20, Chapter 270, Acts of the 37th General Assembly with reference to giving notice.

Section 2477-m41 of the Supplement to the Code, 1913, provides:

> Every employer subject to the provisions of this act, shall insure his liability thereunder in some corporation, association or organization approved by the state department of insurance. Every such employer shall within thirty days after this act goes into effect exhibit on demand of the state insurance department evidence of his compliance with this section; and if such employer refuses, or neglects to comply with this section, he shall be liable in case of injury to any workman in his employ under part one of this act.

Then the 37th General Assembly amended Section 2477-m41 by striking out the last five words of said section, to-wit: "part one of this act," and inserting in lieu thereof the following: "the common law, etc."

Prior to the amendment by the 37th General Assembly, it was always uncertain just what was meant by the words "part one of this act." Some very able lawyers interpreted those words to mean that in the event an employer failed to insure his risk and an employe was injured, then the injured employe could go directly into court and sue for damages, while equally capable lawyers denied that such a construction should be placed thereon. Not only did members of the legal profession entertain these conflicting views, but also the courts in the various states operating under compensation laws. It was on this account that the 37th General Assembly attempted to definitely settle the question, and to that end struck out the words "part one of this act" and substitute the words heretofore set out.

So that under the section as it now stands there can be no question as to its real meaning. Section 2477-m41 now declares that:

> If such employer refuses or neglects to comply with this section, he shall be held liable in case of injury to any workman in his employ under the common law as modified by statute, and in the same manner and to the same extent as though such employer had legally exercised his right to reject the compensation provisions of Chapter 8 (8)a, title XII, Supplement to the Code, 1913.

Liability under the common law means the liability to respond in damages for injury to others through your own negligence, and unless response is voluntary on the part of the negligent party, then application to the courts is the only recourse. The section as it now stands strips such defaulting employer of every vestige of protection afforded by the compensation laws.

It will be noticed, however, that Section 20, Chapter 270, Acts of the 37th General Assembly, also provides for the posting of a notice by an employer who fails to insure his risk, and for failure so to do is guilty of a misdemeanor. That provision has no connection whatever with the employer's liability to his employe, but imposes an independent criminal penalty for his "sins of omission."

I am, therefore of the opinion that in the event an employer neglects to insure his risk liability is under the common law in an action for damages, regardless of whatever he did or did not post the notice to employes required by law. The giving of notice would not change the liability; therefore, I cannot see how the failure to give notice would affect the rule.

W. R. C. KENDRICK,
Assistant Attorney General.

STREET COMMISSIONER.

Whether a street commissioner is an official of the city and exempt from provisions of act depends upon facts in each case.

October 25, 1918.

Hon. A. B. Funk, Industrial Commissioner.

Dear Sir: I have your favor of the 18th inst., enclosing letter from the Fidelity and Casualty Company of New York, in re the claim of A. J. Breeden vs. City of Grinnell, and asking an opinion from this department as to whether or not the street commissioner of the city of Grinnell comes within the exception found in Subdivision B, Section 2477-m 16, Supplement to the Code, 1913.

Sub-division B, Section 2477-m16 excludes from the provisions of the Workmen's Compensation Act:

> * * * an official elected or appointed by the state, county, school district, municipal corporation, cities under special charter and commission forms of government.

If A. J. Breeden is an official of the city of Grinnell, then he will come within the exclusion of the Workmen's Compensation Act; otherwise not.

In determining whether or not a person is acting in an official capacity, Chief Justice Marshall, in the case of the United States vs. Maurice, 2 Brock, 96, announced the following rule:

> Although an office is an employment, it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act, or perform a service, without becoming an officer. But if the duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, which individual is appointed by government to perform, who enters upon the duties appertaining to his station, without any contract defining them, if those duties continue though the person be changed, it seems difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer.

The rule announced by Chief Justice Marshall in determining whether a person is acting in the capacity of an official, or merely as an employe, is followed by a majority of the authorities. It will therefore be seen that to take the arbitrary position that the street commissioner in every city or town is an official of that city or town is not tenable, but the proper determination of that question will depend upon the facts in each case. So that in reaching a correct conclusion as to whether the person performing the duties of street commissioner in the city of Grinnell is acting in an official capacity, it is necessary to first ascertain whether his duties are fixed by contract between Mr. Breeden and the city, or whether those duties are fixed and determined by ordinance or resolution and continue to be the same regardless of whether Mr. Breeden is performing them or someone else. If the facts disclose the latter situation, then, under the rule announced by Chief Justice Marshall, Mr. Breeden would be acting in an official capacity and excluded from the provisions of the Workmen's Compensation Act.

W. R. C. KENDRICK,
Assistant Attorney General.

OPINIONS RELATING TO WORKMEN'S COMPENSATION.

THRESHING AS AGRICULTURAL PURSUIT.

Labor connected with a threshing outfit in the threshing of grain falls within the term "agricultural pursuits" and does not come within the provisions of the Workmen's Compensation Act.

September 4, 1917.

R. E. Hatter, Attorney, Marengo, Iowa.

Dear Sir; Your favor of the 25th ult., addressed to the Attorney General, has been referred to me for attention.

You ask for an opinion from this department on the following facts:

> A owns a threshing outfit which he operates during the proper season. During the rest of the year he engages in different lines of work such as blacksmithing and the like. Having completed all his threshing contracts for this season he is employed by the owner of another outfit at a daily wage to operate the latter's machine while he finishes his remaining threshing work. Is A's employment of such a casual nature as will bring his employer within the exception provided in the Workmen's Compensation Act?

Section 2477-m, supplement of 1913, as amended by Chapter 418, Acts of the Thirty-seventh General Assembly, provides:

> Except as by this act otherwise provided, it shall be conclusively presumed that every employer as defined by this act has elected to provide, secure and pay compensation according to the terms, conditions, and provisions of this act for any and all personal injuries sustained by an employe arising out of and in the course of the employment; and in such cases the employer shall be relieved from other liability for recovery of damages or other compensation for such personal injury, unless by the terms of this act otherwise provided; but this act shall not apply to any household or domestic servant, farm or other laborer engaged in agricultural pursuits, nor persons whose employment is of a casual nature. The provisions of this act shall not apply as between a municipal corporation, city or town and any person or persons receiving any benefits under, or

who may be entitled to, benefits from any "firemen's pension fund" or "policemen's pension fund" of any municipal corporation, city or town.

You will observe from the section just quoted that the Workmen's Compensation law does not apply to "farm or other laborer engaged in agricultural pursuits." Construing the term "agricultural pursuits," the Supreme Court of Iowa, in the recent case of Slycord vs. Horn, reported in the advance sheet of the Northwestern Reporter No. 2 (May 4, 1917), page 249, wherein a laborer engaged in operating a corn shredder was injured, it is said; at page 252:

> This brings us to the other question relied upon, and really the only question in the case, and that is, whether plaintiff was a "farm or other laborer engaged in agricultural pursuits." If so, he is within the exception contained in section 2477-m, Code Supplement, 1913, and not within the Compensation Act. It seems to us it is hardly a debatable question. No authorities are cited by either party on this point. The petition alleges that at the time of his injury he was engaged as an engineer and laborer in defendant's employ, operating a piece of farm machinery, a corn shredder. In 2 Corpus Juris, 982, and Century Dictionary we find this definition of agricultural: "Pertaining to, connected with, or engaged in agriculture." We also find at page 988, 2 Corpus Juris, that the term "agriculture" has been defined to be the art or science of cultivating the ground, especially in fields or large quantities, including the preparation of the soil, the planting of seeds, the raising and harvesting of crops, and the rearing, feeding and management of live stock; tillage, husbandry, and farming. In the last citation the note cites Dillard vs. Webb, 55 Ala. 468, 474, where it is held as to the comprehensiveness of the term "agriculture."
>
> "The variety of products of the earth, of agricultural implements, and of domestic animals, invited and put on exhibition at agricultural fairs, attests the comprehensiveness of the term, 'agriculture.' It refers to the field, or farm, with all its wants, appointments, and products, as horticulture refers to the garden, with its less important, though varied products."
>
> The note also cites Simons vs. Lovell, 7 Heish. (Tenn.) 510, 516, holding:
>
> "It is equivalent to husbandry, and husbandry Webster defines to be the business of a farmer comprehending agriculture, or tillage of the ground, the raising, managing, and

fattening of cattle and other domestic animals, the management of the diary and whatever the land produces." * * *

There can be no doubt but that shredding of corn is a part of carrying on a farm. Swaney could have employed defendant to plow a 40-acre field, and defendant could have employed plaintiff to assist him. The fact that defendant may have agreed to plow the entire field by contract would not change the character of the work, and both he and his assistant would still be engaged in farming operations.

It is our conclusion that, under the allegations of the petition as it now stands, plaintiff has not brought himself within the Compensation Act, but that he is a farm or other laborer engaged in agricultural pursuits and within the exception of section 2477-m. This being so, it is not material to his rights that defendant failed to insure his liability or deposit security, and the trial court properly sustained defendant's motion to strike that part of the petition.

If labor connected with the operation of a corn shredder comes within the meaning of "agricultural pursuits" it is reasonable assumption that our Supreme Court would also hold that work in connection with a threshing machine would fall within the meaning of "agricultural pursuits."

Regardless of whether or not the employment of the labor in your case was of a casual nature, nevertheless it is the opinion of this department that said employment comes within the term "agricultural pursuits," and for that reason the Workmen's Compensation law does not apply.

W. R. C. KENDRICK,
Assistant Attorney General.

TOWNSHIP TRUSTEES NOT UNDER WORKMEN'S COMPENSATION ACT.

Township trustees do not come under the workmen's compensation act. Full discussion of the subject.

October 20, 1917.

Geo. R. Buckles, County Attorney, Keosauqua, Iowa.

Dear Sir: Your favor of the 16th inst., addressed to the Attorney General has been referred to me for reply.

You ask in substance four questions, to wit:

1. Do township trustees come under the Workmen's Compensation Act?

2. Are township trustees required to carry insurance on the person with whom they have contracted to do the road work in the township?

3. In the event the township trustees fail to carry insurance on the person with whom they contract to do the road work, are said trustees liable, in case of accidental injury to said contractor?

4. Would township trustees be liable to the men employed by the contractor in any event, whether said trustees do or do not carry insurance?

In reply to the foregoing questions we beg to advise that unless a civil township comes within the classification of municipal corporations, the Workmen's Compensation Act does not apply to the trustees who are the official representatives of the township.

The provisions of the Workmen's Compensation Act relative to municipal corporations are found in Section 2477-m-b, Supplement 1913, which reads as follows:

> Where the state, county, municipal corporation, school district, cities under special charter or commission form of government is the employer, the terms, conditions and provisions of this act for the payment of compensation and amount thereof for such injury sustained by an employe of such employer shall be exclusive, compulsory and obligatory upon both employer and employe.

Our Supreme Court has repeatedly held that a civil township is not a municipal corporation, nor a legal entity, and cannot ordinarily sue and be sued, and that it is no more than a legal subdivision of the county for governmental purposes.

In Austin Company vs. Township of Weaver, 136 Ia. 709, it is said:

> It has been repeatedly held that a civil township is not a corporation and cannot be sued.

In Theulen vs. Township of Viola, 139 Ia. 61, it is said:

> The petition alleged that plaintiff's daughter in riding along the highway in the defendent township, without fault on her part, was thrown from the buggy in which she was riding because of a deep hole or gully in the road.

> She was seriously injured, and, having assigned her claim for damages to plaintiff, he prayed for recovery thereof from the township and Bowman, Perrine, and Gilbert, its trustees. A demurrer to this petition by the township was rightly sustained, as it is without capacity to sue or be sued. Township of West Bend vs. Munch, 52 Iowa, 132; Austin Western Co. vs. Weaver Township, 136 Iowa, 709.

In township of West Bend vs. Munch, 52 Iowa, 132, at 133 it is said:

> A township under our system of government, is not a corporation authorized to sue and be sued. It is no more than a legal subdivision of the county for governmental purposes. Its officers are paid for their services by the county, except in special cases where payment is required to be made by private persons. Code, sections 3808-9-10. Any person elected to a township office, and refusing to qualify, shall forfeit five dollars, which may be recovered by action in the name of the county for the use of the school fund of the county. Section 394. These, and other provisions of the Code, indicate clearly that civil townships have no corporate powers, as such.

Pursuant to the above decisions, it is clear that a civil township has no corporate powers as such, and does not come within the scope of Section 2477-m-b of the Workmen's Compensation Act.

Now as to the question of insurance: Section 2477-m-41, Supplement 1913 provides:

> Every employer, subject to the provisions of this act, shall insure his liability thereunder in some corporation, association or organization approved by the state department of insurance. Every such employer shall within thirty days after this act goes into effect exhibit on demand of the state insurance department evidence of his compliance with this section; and if such employer refuses, or neglects to comply with this section, he shall be liable in case of injury to any workman in his employ under part one of this act.

It will be observed that only such employers as are subject to the provisions of the Workmen's Compensation Act are compelled to take out insurance for the benefit of their employees; and it will be further noticed that civil townships do not come within the provisions of the Workmen's Compensation Act.

We are therefore of the opinion that each of the questions above set out should be answered in the negative.

W. R. C. KENDRICK,
Assistant Attorney General.

INJURY MUST ARISE IN CONNECTION WITH EMPLOYMENT.

Section 2477-m16 (e) supplement of 1913, does not modify the rule that the injury must arise out of and in the course of such employment.

February 15, 1918.

Otis Gilbrecht, Attorney, Davenport, Iowa.

Dear Sir: This is to acknowledge receipt of your favor of the 30th ult., in which you call attention to section 2477-m-16 (e), supplement of 1913, and take the position that the said section authorizes the payment of compensation regardless of whether the employe was performing the work for which he was directly employed, so long as the injury occurred anywhere on the premises of the employer, the section referred to reads

> The words "personal injury arising out of and in the course of such employment" shall include injuries to employes whose services are being performed on, in or about the premises which are occupied, used or controlled by the employer, where in places where their employer's business requires their presence and subjects them to dangers incident to the business.

I believe that the section just quoted does not have the effect for which you contend. In Griffith vs. Cole Brothers, recently decided by our Supreme Court and not yet reported, the following rule is laid down as to when compensation may be recovered by employes:

> But it does not suffice that he was injured in the course of his employment. It must further appear that his injury arose out of such employment. The defendants were bridge builders who had charge of construction of county bridges in Story county. Deceased was employed by them. Decedent and others in such employment were by defendants lodged and boarded on the ground where the work was done. On the night of the accident the day's work had been finished, but the employes were in the boarding tent. They had gotten through washing the dishes and were sitting there until it was time to go to bed. While thus engaged the decedent came to his death from a stroke of lightning. Conceding that he was in the

> course of his employment, while thus in the tent awaiting his bedtime, or supervising other employes in getting ready for bed, still there must be proof that the injury arose out of such employment.

In Hunter vs. Coal Company, 175 Iowa, 245, and cited with approval in the Griffith vs. Cole Brothers supra, it is provided that in order to authorize action by the statutory tribunal, to wit, a board of arbitration or the Industrial Commissioner, the following judicial facts must appear:

> 1. The provision of the act must have been accepted by both employer and employe.
>
> 2. The claimant must be an employe.
>
> 3. Employe must have sustained personal injuries.
>
> 4. They must have arisen out of and in the course of employment.
>
> 5. And the compensation shall be at the rates fixed by statute.

Now, then, as to the effect of that language used in section 2477-m-16 (e) which reads as follows:

> Shall include injuries to employes whose services are being performed on, in or about the premises which are occupied, used or controlled by the employer.

It is clear that the language quoted does not enlarge the statute so as to include personal injuries other than those arising out of and in the course of his employment. It seems to me that the authorities above cited are positive in that respect. It occurs to me further the most that can be claimed of the language used in section 2477, supra, is that an injured employe may recover compensation when injured anywhere on the employer's premises, provided at the time of the injury the employe is carrying out some duty connected with the work which he was employed to do. For illustration: Suppose the employe in the instant case, whose duties were confined to keeping the fires going in the furnace had broken the shaker to the grate and while he was returning from another department of the factory where he had gone to have the shaker repaired he fell into a hole on the employer's premises and was injured, he could recover compensation, although falling in a hole would not ordinarily be in any way connected with firing a furnace.

In any event, until the Supreme Court announces this rule, we must be content with the present holdings and follow them.

W. R. C. KENDRICK,
Assistant Attorney General.

LUMP SUM SETTLEMENT.

Compensation—paid in a lump sum to the injured employe and application having been made to the court and it having assumed jurisdiction, the industrial commissioner had no further authority. Final settlement was perfected when the lump sum payment was made.

January 19, 1917.

Reno R. Reeve, Attorney, Waterloo, Iowa.

Dear Sir: We have your favor of the 6th instant submitting statement of facts in re Mellon vs. William Galloway Co., relative to an injury received by the plaintiff while in the employ of defendant company, in settlement of said injury by the acceptance of a lump sum, and requesting the opinion of this department on the two following propositions, to wit:

First. Did the settlement for a lump sum, as set out in your statement of facts, close the case so far as the Industrial Commissioner is concerned?

Second. Would the district court probably reopen the case upon the alleged facts?

Taking up the propositions in the order named, it is the opinion of this department that when application was made to the district court for an order commuting future payments to a lump sum and the court assumed jurisdiction over the parties and subject matter, then and in that event the jurisdiction of the Industrial Commissioner ceased and the matter was closed so far as said commissioner was concerned.

Now, as to the second proposition. It occurs to us that after the district court acquired jurisdiction and proceeded with a hearing, at which it was shown to the satisfaction of the court that a lump sum settlement, in lieu of weekly payments, was for the best interests of all parties concerned, and a lump sum was ordered, accepted and paid, then a final settlement was perfected with reference to any claim arising out of that particular injury.

Bearing on the second proposition aforesaid, section 2477-a14 of the supplement to the code, 1913, provides as follows:

> Upon the payment of such amount the employer shall be discharged from all further liability on account of such injury or death for which said compensation was being paid, and be entitled to a duly executed release, upon filing which the liability of such employer under any agreement, award, finding or judgment shall be discharged of record.

So that, in view of the mandatory provisions of the foregoing section, together with the assumed statement of facts submitted with your inquiry, it is very doubtful, in our opinion, that the court would re-open the case.

W. R. C. KENDRICK,
Assistant Attorney General.

OPINION RELATING TO TAXATION.

LODGE PROPERTY.

Exemption does not apply to lodge property if any portion is rented or used for other purposes.

April 17, 1917.

Frank E. Lewis, County Attorney, Mount Ayr, Iowa.

Dear Sir: Your request for the opinion of this department on the following question has been assigned to me for attention:

> There are two Odd Fellow lodges in our county that are claiming exemption under section 1304-2, supplemental supplement, 1915.

The provisions of section 1304 pertaining to the question involved are as follows:

The following classes of property are not to be taxed:

> All grounds and buildings used for public libraries, including libraries owned and kept up by private individuals, associations or corporations for public use and not for private profit, for cemetery associations and societies, and for literary, scientific, charitable, benevolent, agricultural and

religious institutions and societies devoted solely to the appropriate use of these institutions.

This department has held, under a former administration, that property owned by fraternal societies was exempt from taxation under the section quoted, and the tax department of the auditor of state's office has so advised county auditors who have applied to that department for instructions on the subject. Such exemption, however, has been limited strictly to the property used solely for lodge purposes. If any portion of the property is rented or used by the institution for other purposes, it is subject to taxation, and the fact that rents so obtained may be devoted to, or used for, the appropriate objects of such institution does not change the rule.

J. W. SANDUSKY,
Assistant Attorney General.

ANNUAL FEES FOR CORPORATION REPORTS.

The annual fees due the state for corporation reports together with penalties for failure to make report, are taxes and entitled to preference in bankruptcy proceedings.

October 12, 1917.

Mr. Herbert F. McCabe, Trustee, 520-1 Bank & Insurance Building, Dubuque, Iowa.

Dear Sir: Replying to your esteemed favor of the 4th inst. in which you take the position that the annual corporation fee exacted by the state from all corporations doing business in Iowa (except those expressly exempted by law) is not a tax within the meaning of Section 64-a of the Federal Bankruptcy Act of 1898, beg to advise that this department must decline to follow your views in regard thereto and we respectfully offer our reasons therefor.

The Supreme Court of the United States has passed squarely upon this identical question. The Supreme Court has expressly held that a yearly license fee imposed upon corporations by the state for the privilege of doing business in the state is a tax within the meaning of the bankruptcy law.

In New Jersey vs. Anderson, 203 U. S. 483, wherein this same question was raised it was held:

> The question is, is the claim a tax legally due and owing to the state of New Jersey? We have been cited to many

cases in the state of New Jersey, some of which it is alleged maintain the theory of the appellant that this is a tax, and some the contrary view.

Without undertaking to analyze these numerous cases or to harmonize the views expressed by different judges, we think the weight of judicial decision in that state favors the view that this is a tax imposed upon the right of the corporation to continue to be a corporation, with power to exercise its corporate franchises, based upon the amount of its capital stock issued and outstanding.

In Hancock, Comptroller, vs. Singer Manufacturing Co., 62 N. J. L. 289, 335, it was said:

The act of 1884 (Pamph. L., page 232) is entitled "An act to provide for the imposition of state taxes upon certain corporations and for the collection thereof."

In that act this imposition is called a yearly license fee or tax.

In a supplement passed to the act of 1884 (Pamph. L, 1891, p. 150) it is styled "a tax."

In a further supplement, passed in 1892 (Pamph. L. p. 136), it is called "an annual license fee or franchise tax."

It is wholly immaterial what name may be given to it. The fact that it is called a "license fee" or "franchise tax" cannot validate it * *."

We are of opinion that this claim was for a tax. The language of the act, as we have said, is very broad and includes all taxes. It is not necessary to enter upon a discussion of the different forms which taxes may take. Generally speaking, a tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the government. We think this exaction is of that character. It is required to be paid by the corporation after organization in invitum. The amount is fixed by the statute to be paid on the outstanding capital stock of the corporation each year, and capable of being enforced by action against the will of the taxpayers. As was said by Mr. Justice Field, speaking for the court in Meriwether vs. Garrett, 102 U. S. 472, 513:

Taxes are not debts. It was so held by this court in the case of Oregon vs. Lane county reported in 7 Wallace. Debts are obligations for the payment of money, founded upon contracts, expressed or implied. Taxes are imposts levied for the support of the government, or for some special purpose authorized by it. The consent of the taxpayer is

not necessary to their enforcement. They operate in invitum. Nor is their nature affected by the fact that in some states—and we believe in Tennessee—an action of debt may be instituted for their recovery. The form of procedure cannot change their character.

It is urged by the appellee, and upon this ground the case was decided in the circuit court of appeals, that this is in no just sense of a tax levied by the state, but is the result of a contract by which the corporation was brought into existence, the consideration being the payment of annual sums for the privileges given it by the state, for which no lien is given upon the property, but only a right of action for their recovery. But this imposition is in no just sense a contract. The amount to be paid, fixed by the state, is subject to control and change at the will of the state. It is imposed upon all corporations whether organized before or after the passage of the act. The corporation is not consulted in fixing the amount of the tax and under the laws of New Jersey the charter of such corporations as this may be amended or repealed. Hancock vs. Singer Manufacturing Company, 62 N. J. L. 289-328.

The form of the collection of taxes is left to the discretion of the taxing power; sometimes a lien is provided, sometimes a summary method of collection is awarded; in other cases, an action for debt is given, and, as in the present case, with the right of prohibition of the exercise of corporate franchises by injunction for failure to pay.

We think, then, that as denominated in the statute this is a tax imposed by the state upon the corporation for the privilege of existence and a continued right to exercise its franchise.

It has also been held that the failure of the trustee to pay taxes, when having in his hands sufficient funds, renders him liable to be surcharged to the extent of interest and penalties accruing in default of payment. See In Re Monsarrat, 25 Am. Bkrptcy Rep. 820.

Penalties are a constituent part of the tax and are collectible along with the tax. The federal courts invariably take the view that penalties imposed when taxes become delinquent are treated as interest and collectible as a part of the tax itself. See In Re Prince & Walter, 131 Fed. 546; In Re Scheidt Bros. 177 Fed. 599.

The courts uniformly take the position that the word "tax,"

as used in the bankruptcy law, is not to be used in any restricted or narrow sense, but in a most comprehensive view, including every phase of obligations imposed by the state for governmental purposes, and particularly within the police power.

In Re Otto F. Lange Company, 159 Fed. 586, it is said at page 588:

> It is obvious that the word "tax," as used in the bankruptcy act, is not used in any restricted or narrow sense, but is used broadly to include all obligations imposed by the state and general governments under their respective taxing or police powers for governmental or public purposes. That a tax so imposed may not be a general property tax does not deprive it of the character of a tax. Many taxes are imposed under the name of license fees, franchise taxes, or taxes for special purposes under some other name, and are therefore special taxes; but they are nevertheless taxes imposed for a public purpose, no matter what the name under which they are levied or imposed, and are clearly within the meaning of the term "tax" as used in the bankruptcy act.

Federal courts have even gone so far as to hold that taxes becoming due and owing while the bankrupt estate is in the hands of the trustee are payable as preferred claims. See In Re Prince & Walter, 131 Fed. 546, at 550.

Pursuant to the foregoing authorities, it must be apparent to you that the annual corporation fee exacted by the state is a tax within the meaning of Section 64-a of the Bankrupt Act of 1898 and inasmuch as it is a tax, all penalties imposed by reason of the failure to pay the tax become a part of the tax and are collectible as such.

We respectfully call your attention to the fact that the state has filed its claim up to the commencement of the bankruptcy proceedings only, but if there is to be a contest, we will file our claim for the full amount and ask the court to allow the claim up to the date of final hearing.

W. R. C. KENDRICK,
Assistant Attorney General.

FARM PRODUCE.

Farm produce received as rent is not exempt if in hands of landlord before January 1st.

March 21, 1917.

T. M. Adams, County Attorney, Mt. Pleasant, Iowa.

Dear Sir: Your favor of the 17th instant received. In your letter you propound the following inquiry:

> Is farm produce, received as rent from a tenant prior to January 1st in a given year, to be assessed and taxed?

In answer thereto we have to say that it is the opinion of this department that, if the farm produce received as rent was in the hands of the person on the first day of January, it would be liable to taxation.

You will notice that sub-division 3 of section 1304, supplemental supplement to the code, 1915, provides that the farm produce of the person, assessed, harvested by him, etc., shall be exempt.

Inasmuch as the farm produce received as rent could not be considered as having been harvested by the landlord, it is the opinion of this department that it would be liable to taxation if in his hands on January 1st.

H. H. CARTER,
Assistant Attorney General.

ABSTRACTOR'S BOOKS.

Abstractor's books are not within statutory exemption.

February 22, 1917.

Chas. E. Macomber, Assistant County Attorney, Ida Grove, Iowa.

Dear Sir: We beg to acknowledge receipt of your esteemed inquiry of recent date asking for an opinion from this department as to whether or not the exemption laws of this state, relating to taxation, apply to a set of abstract books in the hands of the owner, the head of a family, and with which books he earns his living.

In reply we would suggest that taxation is the rule and exemption from taxation the exception, so that he who would claim an exemption must be able to point to a statute or some rule of law which gives him the right.

One claiming an exemption must do so under section 1304,

supplemental supplement to the code, 1915. As abstractors are omitted from the list of vocations who are, to any degree, exempt from taxation, there is every reason to believe that the legislature intended to tax them.

It is, therefore, the opinion of this department that a set of abstract books belonging to an abstractor is not exempt from taxation.

W. R. C. KENDRICK,
Assistant Attorney General.

COLLECTION OF INTEREST ON DRAINAGE ASSESSMENTS.

Interest may be collected on interest which has accrued and is delinquent on drainage assessments.

March 29, 1917.

H. E. Narey, County Attorney, Spirit Lake, Iowa.

Dear Sir: We have your request for the opinion of this department on the following facts:

> A question has arisen in this county as to the legality of charging a taxpayer interest on interest under Section 1989-a26 of the Code, where the taxpayer under the section has signed a waiver and fails to pay his assessment until some time after March 1st as provided in the section. Will you please advise me whether or not, in your opinion, a county treasurer has a right to charge six per cent interest on interest where the assessment is not paid until after March 1st. Also will you please advise me whether or not, in your opinion, this assessment, where the taxpayer has signed the waiver under Section 1989-a26. is payable one-half in March and one-half in September.

Section 1989-a26, pertaining to special assessments, provides as follows:

> If the owner of any parcel of land, lot or premises against which any such levy shall have been made and certified, which is embraced in any certificate provided for in this section, shall within thirty days from the date of such assessment promise and agree in writing endorsed upon such certificate, or in a separate agreement, that in consideration of having the right to pay his assessment in installments, he will not make any objection of illegality or irregularity as to the assessment of benefits, or levy of such tax upon and against his property, but will pay said assessment with interest thereon at such rate not exceeding six per centum per annum as shall be prescribed by resolution of the

board, such tax so levied against the land, lot or premises of such owner shall be payable in ten equal installments, the first of which with interest on the whole assessment shall mature and be payable on the date of such assessment, and the others with interest on the whole amount unpaid annually thereafter at the same time and in the same manner as the March semi-annual payment of ordinary taxes; but where no such terms and agreement in writing shall be made by the owner of any land, lot or premises then the whole of said special assessment, so levied upon and against the property of such owner, shall mature at one time and be due and payable with interest from the date of such assessment, and shall be collected at the next succeeding March semi-annual payment of ordinary taxes. All of such tax with interest shall become delinquent on the first day of March next after its maturity and shall bear the same interest with the same penalties as ordinary taxes.

In this section appears the following language:

> All of such tax with interest shall become delinquent on the first day of March next after its maturity and shall bear the same interest with the same penalties as ordinary taxes.

It is our opinion that this provision of the statute, which appears to add to and include the interest with the principal, was intended by the legislature to mean that interest might be collected on the interest accrued and delinquent.

As to the second proposition, we are of the opinion that the installments are payable annually on the first of March.

J. W. SANDUSKY,
Assistant Attorney General.

PERSONAL PROPERTY.

Personal property and stocks of merchandise should be assessed to the party owning the same on 1st day of January.

March 16, 1917.

H. A. Norman, City Assessor, Denison, Iowa.

Dear Sir: Your letter of the 1st instant addressed to the State Board of Review has been referred to this office for answer.

You ask concerning personal property subject to taxation:

1st. Is any personal property, moneys and credits in-

cluded, bought or acquired after 1st of January to 1st of April, or during assessment time except others that have moved in my district and have been assessed?

2nd. Merchants that have opened up a new stock of merchandise for sale from 1st of January to 1st of April?

In reply will say that personal property must be assessed and taxed in the name of the person owning it on the first day of January of each year, and not in the name of the person owning it when assessed, if purchased after the first of January.

Wangler Bros. vs. Black Hawk County, 56 Iowa, 384;

In Re Kauffman's Est., 104 Ia., 639;

Code section 1350.

The rule above stated applies also to moneys and credits.

Stocks of merchandise are taxed in the name of the owner thereof on January 1st and not in the name of the owner when the stock is assessed, the rule being that assessments of personal property relate back to the first day of January each year. So that a brand new stock of merchandise purchased after January 1st is not taxable as such for that year in the name of the new purchaser.

Tackaberry vs. City of Keokuk, 32 Iowa, 155;

Larson vs. Hamilton County, 123 Iowa, 485.

W. R. C. KENDRICK,
Assistant Attorney General.

BANK STOCK SHOULD BE ASSESSED TO OWNER.

Bank stock should be assessed to owner thereof on January 1st. National banks liable for tax assessed to individual stockholders of such institutions.

April 19, 1917.

Maxwell A. O'Brien, County Attorney, Oskaloosa, Iowa.

Dear Sir: Your letter of the 18th inst. requesting the opinion of this department on the following proposition has been assigned to me for attention:

1.

A national bank in this county gave in its list of stock holders to the assessor when he came around for the assess-

ment, as those owning the stock in said bank upon the first day of January of this year. Under Section 1322, Supplement to the code, 1913, was this the proper way for the bank to turn in the assesssment? In other words, does it come under Section 1350, Code of 1897, or does Section 1322, Supplement to the Code, 1913, provide a different manner for the listing of bank stock as personal property? (To the owners of said stock when the assessment is made.)

2.

Under Section 1325, Code of 1897, is the national bank liable for the taxes upon its stock, or does this section only apply to state, savings, and private banks? In other words, does the tax upon the stock of a National bank for the amount thereof, under Section 1325, or does the assessment merely stand against the person of the owner on the first day of January, under Section 1350, Code of 1897, the same as other personal property? Also, does the case of Tackberry vs. Keokuk, 32 Iowa, page 155, apply to this proposition of National bank stock?

Section 1322 of the supplement to the Code, 1913, provides that stock of National, State and Savings Banks shall be assessed to the individual stockholders, and also requires these institutions to furnish these assessors with a list of all stockholders and the number of shares owned by each.

Section 1350 of the Code of 1897, provides that personal property shall be listed and assessed each year in the name of the owner thereof on the first day of January.

Section 1325 of the Code of 1897, pertaining to the institutions referred to in section 1322 of the Supplement to the Code, 1913, is as follows

> The corporation described in the preceding sections shall be liable for the payment of the taxes assessed to the stock holders of such corporation and such tax shall be payable by the corporation in the same manner and under the same penalty as in case of taxes due from an individual tax payer, and may be collected in the same manner as other taxes, or by action in the name of the county. * *

It is apparent from the foregoing that the bank stock should be assessed to the owner thereof on January 1, and it is also apparent that Section 1322 of the Supplement to the Code, 1913, was not intended to, and does not relieve National banks from the obligation imposed upon them by Section 1325 of the Code, and that

they are liable for the tax assessed to the individual stockholders of such institutions.

J. W. SANDUSKY,
Assistant Attorney General.

CORRECTION OF ERRORS BY COUNTY AUDITOR.

Funds placed in the hands of agents or trustees by action of the board of directors or stockholders of a banking institution to loan and invest in interest bearing certificates, is "moneyed capital," and should be assessed and taxed as such and where the same has been erroneously assessed and taxed by the assessor as "moneys and credits," the error can be corrected by the county auditor upon proper notice to the interested parties.

April 22, 1918.

P. E. Roadifer, County Attorney, Logan, Iowa.

Dear Sir: Your favor of the 16th instant, enclosing copy of opinion rendered by you to the county auditor of your county has been referred to me for attention.

As I understand from the statement of facts you set out, the real question presented is, whether the particular property or funds involved should have been assessed and taxed upon the taxable value of twenty per cent, the rate applicable to "moneyed capital" or as "moneys and credits," which are assessed and taxed at a uniform rate of five mills on the dollar. If it is correct, and I assume that it is, that the funds were a part of the assets of the bank, either surplus or undivided profits, that they were, by resolution or other action of the board of directors of the bank, withdrawn or attempted to be withdrawn therefrom and placed in the hands of officers, directors or stockholders of the bank, to be handled or invested by them, and that they now have possession thereof.

The evident intent and purpose of this action was, doubtless, to avoid taxation, and therefore, no refined or subtle distinction should be permitted to lend character to the action thus taken or to impress the funds involved with a status or character other than strict rules of law would necessarily imply. This action of the board of directors should not, and in fact, did not divest the back of the ownership of the funds in question, indeed, it may well be doubted whether the action thus taken did or could accomplish any result, but whether such action was illegal or otherwise, it, at most, merely vested the control and management of the funds

in the officers, directors or stockholders, as the case may be, who hold the same as agents or trustees of the bank, the real owner thereof, which is entitled to the interest thereon or the profits arising therefrom and such funds should and could continue to be "moneyed capital" within the clear meaning of the statute, and should be asesssed and taxed upon the taxable value of twenty per centum of the value thereof, and the result would have been the same although the object and purpose of the directors may have been legitimate instead of avoiding taxation. The funds would be loaned and invested by the persons in whose hands they were placed and the class or character of the loan made or securities taken could in no manner affect the question. These funds were thus placed in competition with banks, and, whether the persons handling them received deposits, bought or sold exchange, or performed any of the other functions of banks, except that of making loans of all kinds, would not alter the situation or relieve the funds from the rate of taxation imposed upon "moneyed capital" as distinguished from "moneys and credits."

As to the question of the auditor correcting and error in the assessment, or assessing omitted property there can be no doubt of his authority to do so, after proper notice is given, provided, the record before him discloses either condition to exist. There can be no claim, as I view it, that any part of the property was omitted, and, therefore, the only question presented is whether there was an error in the assessment, and, if so, may the auditor correct it?

Section 1322-1a of the 1913 supplement to the code provides as follows:

> For the purpose of placing the taxation of bank and loan and trust company stock and moneyed capital as nearly as possible upon a taxable value at which other property is now actually assessed * * * it is hereby provided that state, savings and national bank stock and loan and trust company stock and moneyed capital shall be assessed and taxed upon the taxable value of twenty per cent of the actual value thereof, determined as herein provided * * *.

This language is clear and explicit and when it is ascertained by the taxing officer that the property to be assessed comes within either of the classes above enumerated there is but one thing for him to do, and that is, to assess and tax it upon a taxable value

of twenty per cent of the actual value thereof. No discretion as to the per cent at which, or the manner in which, the property is to be assessed and taxed is vested in the assessor, or board of review. It must be assessed at the rate stated and in the manner provided and the rule of adjustment and equalization which may be and in fact are applicable to other classes of property have no application whatever to property of this class.

The erroneous action of the assessor, and the approval thereof by the board of review, placing the property in a class to which it does not belong, is not binding in any sense. The statute is imperative in this particular and cannot be contravened or modified by any taxing officer or board, and hence, the failure to prosecute an appeal from the board of review does not constitute a waiver, nor preclude the correction of the error under Section 1385-b of the supplement to the code which provides, in part, as follows:

> The auditor may correct any error in the assessment or tax list, and may assess and list for taxation any omitted property.

An additional safeguard and protection in relation to the assessment and taxation of property, is hereby lodged with the county auditor. It includes the authority to correct errors in the assessment or tax list and to assess omitted property. It is not claimed, as hereinbefore stated, that the property was omitted but it is insisted that an error was committed in assessing and taxing certain property and that the auditor, under the section last referred to, has authority to correct such error. The case of Polk County vs. Sherman, 99 Iowa, 60, does not rule or decide the question here presented as claimed. In that case the question arose on the authority of the auditor to change the value put upon the property and the following language was used by the court:

> But where an assessment has been made and returned to the board of equalization, and the amount is either too high or too low, but is not objected to by the property owner and is not changed by the board, it cannot be said to be erroneous within the meaning of the section quoted.

The case before us is entirely dissimilar. The error sought to be corrected in this case consisted in the assessor assessing and taxing moneyed capital at a rate of five mill on the dollar of the actual valuation thereof, when the law commanded and re-

quired him to assess and tax it upon a taxable value of twenty per cent of the actual value thereof. This was not an error or mistake in the value that should have been placed upon the property, nor a question of judgment upon which men might differ, but the assessing and taxing of property of the value of which there was no dispute, at a rate other than that clearly and distinctly fixed by statute, and while it may be conceded that the board of review should have discovered and corrected the error, the mere fact that they did not do so, does not deprive the auditor of the authority to make the correction when his attention is called thereto and proper notice has been given to the persons interested therein.

The remaining question is of little or no consequence. It may be conceded, technically speaking, that the state checkers have no authority to order the county auditor to correct a tax list or assessment roll, but they have authority to check the auditor's office, and if errors of the kind under consideration are discovered it is their duty to report them, and it is none the less the duty of the auditor to take the necessary steps to correct them when his attention is called to the fact that they exist.

J. W. SANDUSKY,
Assistant Attorney General

MAINTENANCE OF PUBLIC LIBRARY.

The city council is not bound to levy a tax at the rate certified by the library trustees.

July 20, 1918.

N. D. Shinn, County Attorney, Knoxville, Iowa.

Dear Sir: Your letter of the 9th inst. addressed to the Attorney General has been referred to me for reply.

You state, in substance, that the board of library trustees of the city of Knoxville determined and fixed three and one-half mills of the taxable valuation of said city as the rate necessary to be levied in order to raise the amount required the ensuing year, in their judgment, for the maintenance of the public library; that the rate so determined and fixed was certified by the board to the city council, but the council refused to levy more than three mills for said purpose.

You then ask for an official opinion from this department as to the duty of the city council in the matter; or, in other words, whether the city council has the power to reduce the rate fixed and certified by the said board.

We are also in receipt of a similar inquiry from Mr. J. S. Bellamy, president of your board, who requests that our opinion, if given, be furnished to you direct, and inasmuch as the rules of this department prohibit our giving official opinions to others than state officials, members of the general assembly and county attorneys in matters connected with their official duties, we would ask that you permit Mr. Bellamy to read this opinion.

The statutory provision relative to determining and fixing the rate of taxation and the levy thereof for the purpose of raising funds with which to maintain public libraries for the ensuing year will be found in Section 732, Supplement to the Code, 1913, which reads as follows:

> The board of trustees shall, before the first day of August in each year, determine and fix the amount or rate, not exceeding five mills on the dollar in all cities and incorporated towns, of the taxable valuation of such city or town, to be levied, collected and appropriated for the ensuing year for the maintenance of such library; and in cities and towns also the amount or rate, not exceeding three mills on the dollar of the taxable valuation of such city, to be levied, collected and appropriated for the purchase of real estate and the erection of a building or buildings thereon for a public library, or for the payment of interest on any indebtedness incurred for that purpose, and for the creation of a sinking fund for the extinguishment of such indebtedness; and shall cause the same to be certified to the city council, which shall levy such tax for each of said purposes so determined and fixed, and certify the per centum thereof to the county auditor, with the other taxes for said year.

A former statute on the same subject probably the same as the one first quoted, was before the Supreme Court for its construction, and in the case of State vs. Mayor of Des Moines, 103 Iowa, 76, it was held, that the provision of the statute delegating to the board of library trustees the power to fix and determine the rate of the tax necessary to be raised for library purposes was a delegation of the taxing power to a body unauthorized by the constitution of Iowa, and therefore void and

of no effect. It was therein also held, that the city council was not bound to levy the tax at the rate certified by the library trustees, but could lower or raise the rate at their discretion, subject only to the statutory limitations.

It is said at page 90:

> We have treated this statute as, in effect, authorizing the library board to levy the tax. In fact, it in terms directs them to fix and determine the amount of the tax, which upon being certified to the council, it must levy. The right to thus fix and determine is equivalent to the right to levy. Now, the uses to which this tax is to be put are local, and the benefits to be derived from such library must necessarily inure mostly to the people of the city of Des Moines. Such being the case, we think that the legislature had no power to vest the levying of this tax in a body not directly responsible to the people of the city.

Further, at page 94, it is said:

> We hold that no officer and no board not elected by and immediately responsible to the people can be made the repository of such power. * * The act in question is unconstitutional in so far as it undertakes to confer the arbitrary power upon the board of library trustees to fix and determine the amount of tax to be levied for the purposes therein mentioned, and the city council cannot be compelled to levy (regardless of any discretion) the amounts fixed by the library board, and certified to said council.

We are, therefore of the opinion that your city council is not required to levy the tax at the rate certified by the board of library trustees of the city of Knoxville, but may lower the rate, if in their judgment the amount necessary for maintaining the library for the ensuing year can be thereby raised. In other words, we hold that it is discretionary with your city council what tax shall be levied for library purposes, subject only to the statutory limitation, and the action of the board of library trustees in certifying the rate they believe to be necessary is advisory only.

W. R. C. KENDRICK,
Assistant Attorney General.

TAXATION OF REAL ESTATE.

When real estate is sold in even numbered years, after it had been listed and valued in odd numbered years, auditor must list it in name disclosed by his books, unless owners agree otherwise.

July 29, 1918.

M. L. Temple, County Attorney, Osceola, Iowa.

Dear Sir: I have your letter of the 20th inst. relating to the request of W. A. Crist, your county auditor, for an opinion as to the proper manner in arriving at the value of certain real estate for the purpose of taxes under the following conditions:

> "First: John Jones owned and was assessed in January, 1917, with Lot 1, Block 1, Osceola City, assessed value $1000.00. In May, 1918, he sold the north half of said lot for $1200.00. How shall I arrive at the value of each half for taxes of year 1918?
>
> Second: John Smith owned and was assessed with the NE¼ NE¼ Sec. 1, Township 71, Range 24, assessed value, $2000.00. In July, 1918, he sold the east half of said forty acres for $1.00 and other valuable considerations. How shall I value each twenty acres for taxes of year 1918?

This situation has arisen frequently over the state and has been the source of considerable confusion and annoyance to the auditors in the various counties. Prior to the 37th General Assembly no definite action was ever taken by that body toward providing a method by which the respective parcels of real estate could be equitably valued and listed in the name of the then owner. But the 37th General Assembly attempted to solve the problem and a bill was introduced in the Senate and passed in both Senate and House and approved by the governor, —but the speaker of the House failed to sign it. That attempted act is known as Senate File No. 25, and is carried in the session laws of the 37th General Assembly as Chapter 242. By the terms of said act if the owners of different items of real estate could not agree as to the amount of the tax which should be borne by said separate portions respectively, then either party could apply to the board of supervisors for an apportionment and the board would make an apportionment in accordance with the value of the respective portions.

As hereinbefore stated, Senate File No. 25 is not affective, owing to the failure of the Speaker of the House to sign the bill, hence the respective county auditors must be governed by the law as it existed prior to the 37th General Assembly.

Section 1350 of the Code provides that "real estate shall be listed and valued in each odd numbered year." Section 1400 of

the Supplement to the Code, 1913, provides that "taxes upon real estate shall be a lien thereon against all persons except the state. * * * As against a purchaser, such a lien shall attach to real estate on and after the 31st day of December in each year."

Pursuant to the above statutory provisions, it is clear that real estate shall be listed and valued only in each odd numbered year, and when a tract of real estate has been assessed and valued in the odd numbered year, then neither the auditor nor anyone else has any power or authority to change the valuation thus fixed. As is said in Snell vs. City of Fort Dodge, 45 Iowa, at page 567, "When the county auditor made out the tax books for that (1870) and all other evenly numbered years, it was his duty to make up the proper list from the books of the previous year, so far as all real property that had been assessed and taxed during that year was concerned, and calculated the taxes thereon, based on the values as fixed and determined by the books in his office." If, after the assessment and valuation, real estate or any part thereof is sold, the lien for taxes attaches as to the purchaser on and after the 31st day of December each year.

So that unless the owners of the respective portions of the real estate can amicably agree upon the amount each shall pay, the county auditor has but one course to follow and that is to list the real estate in the even numbered years in the name and at the valuation disclosed by the books in his office.

Your county auditor asks the further question:

> Is the county auditor required to list the real estate in even numbered years in the name of the party owning it at the time of making the tax lists, and what length of time before December 31st of such years should he make the tax lists?

The first part of that question has been answered. As to the latter part of this question, Section 1383, Supplement 1913, provides that the county auditor shall prepare the tax list before the first day of January in each year, no particular number of days prior thereto being required.

W. R. C. KENDRICK,
Assistant Attorney General.

SPECIAL ASSESSMENTS.

Special assessments, pursuant to Sec. 825, Sup. 1913, mature on date of assessments but do not become delinquent until March 1st following regardless of date of certifying over to county treasurer.

October 12, 1917.

Hon. J. F. Wall, Chief Examiner, County Accounting Department, State House.

Dear Sir: As I understand your oral inquiry, you desire an opinion of this department on the law as to the date when a special assessment, which the property owner has not agreed to pay in installments, and which was assessed by the city council before March 1, 1917, but was not certified to the county treasurer for collection until March 20, 1917, becomes delinquent.

This involves a construction of Section 825, Supplement to the Code, 1913, a copy of which is as follows:

> The special assessments made in said plat and schedule, as corrected and approved, shall be levied at one time, by ordinance or resolution, against the property abutting on such street improvement or sewer, and, in case of sewers, upon adjacent property, and, when levied and certified, shall be payable at the office of the county treasurer. If the owner of any lot or parcel of land or railway or street railway, the assessment against which is embraced in any bond or certificate provided for in chapter eight of this title, shall, within thirty days from the date of such assessment, promise and agree in writing, indorsed on such bond or certificate, or in a separate agreement, that, in consideration of having the right to pay his assessment in installments, he will not make any objection of illegality or irregularity as to the assessment or levy of such tax upon and against his property, and will pay said assessment with interest thereon at such rate, not exceeding six per cent, per annum, as shall by ordinance or resolution of the council be prescribed, such tax so levied against the lot or parcel of land or railway or street railway of such owner shall be payable in seven equal installments, the first of which, with interest on the whole assessment from date of acceptance of the work by the city council, shall mature and be payable on the date of such assessment, and, the others, with interest on the whole amount unpaid, annually thereafter, at the same time and in the same manner as the March semi-annual payment of ordinary taxes; but where no such promise or agreement in writing shall be made by the owner of any lot or parcel of land or railway or street railway within said time, then the whole of said

> special assessment so levied upon and against the property of such owner shall mature at one time, and be due and payable, with interest from the date of acceptance of the work of the city council, on the date of such assessment, and 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 next after their maturity, and shall bear the same interest, with the same penalties, as ordinary taxes.

A reading of this section shows that when the property owner enters into an agreement to waive errors and to pay his assessment in installments, that the first installment "with interest on the whole assessment from the date of the acceptance of the work by the city council, shall mature and be payable on the date of such assessment," etc.; but where no such agreement is entered into by the property owner "then the whole of said special assessment so levied upon and against the property of such owner shall mature at one time and be due and payable, with interest from the date of the acceptance of the work by the city council, on the date of such assessment, and 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 next after their maturity, and shall bear the same interest, with the same penalties, as ordinary taxes."

It is apparent that the date of the assessment by the city council is made the date of the maturity of the tax and as the property owner has notice of the proceedings resulting in the assessment, he is obligated to pay the same at that time, but the taxes are not delinquent until "the first day of March next after their maturity."

It follows that if the city council made the assessment of the special taxes to which you refer before March 1st of this year, that the taxes became delinquent on that date, altho not certified to the county treasurer for collection until the 20th day of March; it also follows that the usual remedy of advertising and selling the property for taxes may be employed by the county treasurer this year.

Just what would be the effect of the failure of the proper officers to certify these taxes so that they would not reach the

hands of the county treasurer until after April 1st, I do not care to express an opinion unless an actual instance of this kind arises making a determination of the matter imperative.

F. C. DAVIDSON,
Assistant Attorney General.

COLLECTION OF BACK TAXES.

Individuals cannot sue for back taxes in their own name.

June 29, 1917.

W. H. Wehrmacher, County Attorney, Waverly, Iowa.

Dear Sir: Your favor of the 23rd instant, addressed to the Attorney General, has been referred to me for attention. You ask:

> I have an inquiry from a resident of this county, wanting to know whether or not he could bring an action in his own name and prosecute it in his own name to require some parties to pay their back taxes which have been running four or five years and longer, and I would like to know how far back such an action could be maintained. I have some doubts about the situation, and I write you this so that I may be better able to answer the question.

Under Section 1374 of the Code, it is the duty of the county treasurer to assess and list for taxation all property that has been omitted, withheld, overlooked, or for any cause not listed or assessed; but the statute provides a five year period of limitation. Section 1374 also gives to the treasurer alone power to demand taxes within five years from the date at which the assessment should have been made, the amount the property should have been taxed in each year, and if it is not paid to assess and sue for the same. All that the private individual might do, as mentioned in your letter, would be entirely unwarranted.

Mead vs. Story County, 119 Iowa 69.
Jewett vs. Fott, 119 Iowa 359.
Sherer vs. Citizens Bank, 129 Iowa 564.
Thornberg vs. Cardell, 123 Iowa 313.
Woodbury County vs. Talley, 147 Iowa 498.
Talley vs. Brown, 146 Iowa 360.

W. R. C. KENDRICK,
Assistant Attorney General.

ASSESSMENT OF BANK STOCK.

No deduction may be made in the assessment of shares of stock of national, state and savings banks and loan and trust companies on account of liberty bonds or other non-taxable securities or assets held by such institutions.

February 20, 1918.

Harry Langland, County Attorney, Nevada, Iowa.

Dear Sir: I have your request for the opinion of this department on the following questions:

> Some of the banks of this county, in reporting their resources to the assessors, are deducting the amount which they have invested in liberty bonds. The county auditor has requested a ruling on this proposition.
>
> Kindly let me know whether or not the banks are justified in making deductions as above in taxation.

The stock of all incorporated banks in this state is, by virtue of Section 1322 of the 1913 supplement to the code, assessed to the individual stockholders of such institutions, and no deductions are permitted, except as therein provided.

The fact that a part of the assets of a banking institution is invested in non-taxable securities does not entitle it to have the same deducted from its capital stock. The tax is levied upon the capital stock, regardless of the character of the securities held by the institution. Hence, state obligations, United States Bonds, and other kinds of securities which might be exempt in the hands of an individual cannot be deducted from the capital stock of an incorporated bank.

J. W. SANDUSKY,
Assistant Attorney General.

LEVYING OF TAXES.

The law requires the board of supervisors to make the annual levy of taxes at the regular September session of the board, but in the event that a taxing district neglects to certify the necessary amount to the board prior to such meeting, the board may, on the theory that the statute is directory, make such levy at a subsequent meeting.

December 27, 1917.

Harry Langland, County Attorney, Nevada, Iowa.

Dear Sir: Your request for the opinion of this department on the following question has been referred to us for attention.

You state:

> I would like the opinion of your department on the following proposition:
>
> The town of Story City, Iowa, in November, 1917, voted to issue bonds for the erection of a new high school building. The school board would now like to arrange if possible for a levy to be made by the board of supervisors so that they will have money next year to pay the interest on these bonds. Do you know of any law that would permit the board of supervisors to make such a levy at this time?

Section 1303 of the code contemplates that the board of supervisors shall, at its September session, make the levy of taxes for the coming year and so far as I have been advised, there is no direct provision authorizing such levy at any other time.

In the case of Hubbell vs. Polk County, Iowa, 106 Iowa, 618, the question of whether or not the section referred to is merely directory is discussed and while it is true that the question there before the court pertained to the levying of a mulct tax, yet the principle involved is, as I view it, the same as in the case like you are confronted with.

In the Hubbell case, the assessment was made after the time fixed in the statute and the levy was sustained by the court. It is possible that if your school board failed to certify the amount of tax they desired to be levied at the proper time so that the board could make the levy at the September session that they might lawfully make the same now, if the proper certification were made, although the matter is not entirely free from doubt.

There will not be, I apprehend, another regular session of the board this year, and if not, that fact would present another difficulty, as the levy is supposed to be made at the regular September session. However, they may not be fatal either, and it is possible that a levy made now could not be enjoined by a taxpayer, although as before stated, the question of legality would be involved.

J. W. SANDUSKY,
Assistant Attorney General.

LIVE STOCK.

Live stock in this state on January 1st for feeding or pasturing are taxable in Iowa.

March 8, 1918.

Henry Dayton, Waukon, Iowa.

Dear Sir: In response to a letter from your auditor dated March 5th, we are writing you this opinion which, at your convenience, you may kindly deliver to the auditor.

It is stated:

> That a farmer owns eighty (80) acres of land in Minnesota and seven (7) acres across the line in Iowa on which is a barn; hog house and yards. The house and machine shed is across the line in Minnesota. About half a mile south of the Minnesota line, this farmer owns eighty (80) acres. After harvest time he drives his stock to the 80 acres in Iowa for pasturage and feed, and he keeps upon the said seven (7) acre tract, horses, hogs, and cattle. The question is: Should this stock kept in Iowa be taxed in Iowa.

It is our opinion that if the stock in question is in Iowa for more than a mere temporary purpose it should be taxed here; that stock in Iowa for the purpose of feeding or pasturage is kept for more than a temporary purpose, has been decided by the Supreme Court. Fennell vs. Pauley, 112 Ia. page 94. Under Section 1308 of the Code it will be seen that horses, cattle, mules and asses over two years of age, sheep and swine over six months of age are taxable in Iowa. Under Section 1354 of the Code as amended, it is the duty of the assessor to assess the said property which is taxable, if the same is found within his township, and under the provisions of Section 1350 of the Code this assessment is limited, as follows:

> Personal property shall be listed and assessed in each year in the name of the owner thereof on the first day of January.
>
> Linton vs. Crosby, 56 Ia. 384.

If then the said stock is kept by the said farmer in Iowa for the purpose of feeding and pasturing, and is there kept on the first day of January, the assessor of the township wherein the said property is found should assess the same.

The fact that this same property may be assessed in Minnesota does not relieve the owner thereof from taxation and assessment in Iowa.

> Heinz vs. Board, 121 Ia. 445.

In that case the Supreme Court of Iowa stated:

It is the undoubted province of the general assembly to determine what property actually within the state is taxable, and even if the non-resident owner of property made taxable here finds himself taxed in the state of his residence on the theory that situs of his moneys and credits follow him, that fact may prove him the victim of misfortune and hardship, but does not in any manner negative the power of this state of property actually within its jurisdiction, nor does it prove the tax invalid.

J. W. KINDIG,
Assistant Attorney General.

ASSESSMENTS OF CROPS GROWN ON LEASED PREMISES.

The landlord's share of crops grown on leased premises are subject to assessment and taxation, if kept on the premises during the year or years succeeding the year in which such crops were raised.

February 18, 1918.

M. R. Hammer, Jr., County Attorney, Newton, Iowa.

Dear Sir: I have your request for the opinion of this department on the following question, pertaining to the assessment of certain property.

You state:

> He is assessing the landlord's share of the grain raised upon the farm during the year 1917, and in his township to the landlord. The landlord does not think he should be assessed in this manner. Other assessors are not assessing share of grain belonging to the landlord raised during the year 1917 and we want to know who is right.

Paragraph 3 of Section 1304 of the 1913 supplement, pertaining to classes of property not to be taxed, provides in part as follows:

> The farm produce of the person assessed, harvested by him, * * * obligations for rent not yet due in the hands of the original payees.

This part of the section seems to bear directly on the question here presented. The rule is well settled in this state that all property not expressly exempt, is subject to taxation, and that exemptions are construed strictly so as not to include or go beyond the clear and express language contained in the exemptions. This rule, I believe, applies to exceptions of whatever nature, in other statutory provisions.

It will be observed that the farm produce which is exempt, must have been harvested by the person claiming the exemption. The words "harvested by him" in the section above quoted should be held to be equivalent to the words "raised by him," and in this case, the farm products were raised by the tenant, and not by the landlord.

You will also observe that the exemptions extend to obligations for rent not yet due in the hands of the original payee.

The evident intention there was that the obligation contemplated was such as a tenant might give to the landlord for rent for the ensuing year, but such evidence of indebtedness, while held by the original payee, does not become taxable until its maturity.

In the case before us, the share of the crop now held by the landlord represents the rental of the leased premises for the preceding year. I am of the opinion that the landlord's share of the crop raised last year, although still situated on the farm where it was raised, is subject to taxation for this year and that it is proper for the assessor to assess it.

J. W. SANDUSKY,
Assistant Attorney General.

MAIL CARRIERS LIABLE FOR POLL TAX

Mail carriers or other employees of Federal Government, as such, not entitled to exemption from poll tax.

August 4, 1917.

George E. Hill, County Attorney, Burlington, Iowa.

Dear Sir: Your communication of August 1st, requesting the opinion of this department on the following question has been referred to me for attention:

> When our county treasurer attempted to collect delinquent poll tax from a railway mail clerk residing in this county, the mail clerk refused to pay, stating that the United States Supreme Court had decided that a state could not levy a tax upon the person of any one employed by the government, and in this connection we were referred to the case of Robbins vs. Commissioner of Erie County; Peters 16-435 Book 10, L. C. P. Co., page 1022.

The writer hereof read the decision referred to and it

occurs to me that perhaps the state cannot levy a poll tax on government employees residing in this state.

According to our state laws, when a man is assessed with poll tax and owns property, he cannot pay his taxes without also paying the poll-tax, and our treasurer is wondering what he should do in the premises.

You perhaps have had this matter called to your attention before, and I am wondering what view of this matter your department takes.

I will thank you very much if you can enlighten us in this matter.

Section 1550 of the 1913 Supplement is 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 years."

Section 1551 requires the road supervisors to 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.

Section 1552 provides certain penalties for failure to perform such labor, to be collected by the road supervisors, and Section 1555 further provides that in case the amount is not collected by the road supervisor it shall be added to such persons property tax and be collected by the county treasurer.

Exemptions are provided certain classes of persons and includes officers and soldiers of the guard during their time of service, and members of fire engine, hook and ladder, hose or any other company for the extinguishment of fire, or the protection of property at fires, under the control of the corporate authorities of any city or town, but all other male residents of the state, within the specified age limit are required to perform the labor, by themselves or satisfactory substitutes, and in the event of failure so to do, and the clerk has certified the tax to the county auditor and he has entered it upon the proper tax list, it becomes the duty of the county treasurer to collect the same.

In the case of Dobbins vs. Commissioners of Erie County,

41 U. S. 434, the question before the court was whether a law of the state of Pennsylvania which rated and assessed the office of captain of a revenue cutter, in the service of the United States, and valued at five hundred dollars, was repugnant to the constitution, and the court held it to be a tax on an office created by the federal government and therefore unconstitutional.

That case is clearly distinguishable from the one before us. In the cited case the tax was levied upon a particular office, that of captain of a vessel in the revenue service of the United States, while in the instant case the tax is levied against a male resident of the state. 'Tis true he is in the service of the federal government, but that does not exempt him from the ordinary burdens that are imposed upon all able bodied male residents of the state of proper age.

The statute does not exempt mail carriers, as such, nor employees generally of the federal government, as such, and I am therefore of the opinion that a person in the employment of the United States government as mail carrier who is able bodied and between the ages of twenty-one and forty-five and who has been duly and properly notified to appear and work upon the roads, was legally bound to do so and in case of failure so to do and the proper amount was certified to the county auditor and entered by him on the proper tax list that it became and is the duty of the county treasurer to collect said amount.

J. W. SANDUSKY,
Assistant Attorney General.

FOR RIVER FRONT IMPROVEMENTS.

A city which is not a special charter city and does not have a River Front Improvement Commission, provided by Chapter 210, Acts 29th G. A. does not come within purview of sec. 1056-a52, Sup. 1913.

October 12, 1917.

Mr. Ralph Stanbery, County Attorney, Mason City, Iowa.

Dear Sir: I have been directed to answer your letter, addressed to the attorney general and dated October 5, 1917.

In your letter of September 22, you say:

> The City Council of Mason City have made a levy in the sum of 55½ mills which they have certified to the board

of supervisors of this county for levy. Section 1056-a52 of the Supplement of 1913 provides that the levies of general and special taxes in cities of this class shall not exceed, in the aggregate, 48 mills on the dollar of the taxable value of the property therein.

This department in giving you its opinion under date of September 24 assumed that Mason City, as stated in your letter of September 22, was within the class of cities referred to in Section 1056-a52 of the Supplement of 1913. The controversy which has developed tends to relate rather to the facts than to the law involved.

If, as a matter of fact, Mason City is not under a special charter and does not have a River Front Improvement Commission, as provided by Chapter 210 of the Acts of the 29th General Assembly, then even though it be governed under the commission plan, Section 1056-a52 of the Supplement of 1913 does not apply to it for the reason that said Section 1056-a52 is limited in its application to the cities referred to in Section 1 of Chapter 66 of the Acts of the 33d General Assembly, the said Section 1056-a52, Supplement of 1913, being Section 5 of said Act.

Chapter 66 of the Acts of the 33rd General Assembly is limited in its application to cities organized under such plan. The application of this Act is limited to cities under the commission plan of government which are organized and acting under special charter and in which River Front Improvement Commissions are organized, as provided by Chapter 210 of the Acts of the 29th General Assembly of Iowa.

J. W. KINDIG,
Assistant Attorney General.

LIEN OF TAX ON PERSONAL PROPERTY.

Unless personal taxes are entered on the tax list opposite the name of the person against whom they are assessed or opposite the description of real estate owned by him or standing in his name they do not constitute a lien upon real estate which may be enforced against a purchaser of the land who acquires same without knowledge of such taxes.

December 4, 1917.

Mr. Ralph Stanbery, County Attorney, Mason City, Iowa.

Dear Sir: Your request of the 30th ult., for an opinion from

this department on the following facts has been referred to me for attention.

You state:

> In this instance one H. S. Brockaw was the owner of certain real estate here in Mason City; he was also the proprietor of a business known as the Colonial Furnace Co. This company was not incorporated but Mr. Brockaw merely used this as a trade name.
>
> Personal taxes were assessed against the Colonial Furnace Co. Mr. Brockaw went through bankruptcy; the personal taxes assessed against the Colonial Furnace Co. were filed as a preferred claim in the bankruptcy proceedings but were not paid.
>
> The county treasurer claims that the personal taxes above referred to became a lien on January 1st on the real estate owned by Mr. Brockaw; but before any entry was made on the tax books with reference to the lien, Mr. Brockaw sold and transferred his real estate; and now after the transfer the county treasurer has advertised the real estate for tax sale for failure to pay the personal tax assesser against the Colonial Furnace Co. I have advised the county treasurer that he cannot sell the real estate for the reason that the lien for the personal tax had not been enforced prior to the transfer; that the abstractor had no way of knowing that Brockaw owed any taxes inasmuch as no record had been made on the tax books calling their attention to this. I think there is no question but that this real estate could have been subjected to the payment of this personal tax if the treasurer had protected the lien prior to the transfer.
>
> The treasurer was anxious to have an opinion from your office on this question and of course I would like to know whether or not my views are right. I trust I have made this matter sufficiently clear.

Section 1383 of the 1913 Supplement of the Code is in part as follows:

> All taxes, except road taxes, which are uniform through out any township or school district shall be formed into a single tax, and entered upon the tax list in a single column, to be known as a consolidated tax, and each receipt shall show the percentage levied for each separate fund. Before 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 provided at the expense of the county for

that purpose, to be known as the tax list, properly ruled and headed, with distinct columns, in which shall be entered the names of taxpayers, descriptions of lands, numbers of acres and values, number of town lots and values, value of personal property and each description of tax, with a column for polls and one for payments, and shall complete the same by carrying out the totals and footings of columns."

By the provision of this section, it is made the duty of the county auditor on or before the first day of January of each year to transcribe the assessments of the several townships in a book to be provided for the purpose with distinct columns, the names of taxpayers, descriptions of lands, number of acres, number of town lots, and value of personal property, and, unless there was entered on this list opposite the name of the owner the personal tax in question, or if there was not entered opposite his name such tax, then there would be no notice to a purchaser which would put him upon inquiry as to the lien or claim for personal tax against either the real estate or its owner. The fact that a personal property tax was assessed against the Colonial Furnace Company, and there being nothing of record which would disclose that Mr. Brockaw constituted or was in fact such company would not impart notice to a purchaser, and in the absence of actual or constructive notice of the tax the purchaser of such property would acquire it free from the lien of the taxes, and I therefore concur in the opinion that you have furnished the county treasurer on the matter.

J. W. SANDUSKY,
Assistant Attorney General.

PERSONAL PROPERTY IN HAND OF AGENT.

Where personal property has been listed for taxation and assessed to an agent having the custody and control thereof, such person should be held liable to pay the tax on such property and this rule should apply to a transfer company to whom automobiles have been consigned.

April 3, 1918.

Mr. Ralph Stanbery, County Attorney, Mason City, Iowa.

Dear Sir: Receipt is hereby acknowledged of your letter of the 1st. instant addressed to the Attorney General, and wherein you refer to the matter of collecting the taxes on automobiles which have been in storage at Mason City, Iowa.

Section 1571-m14 of the 1913 supplement of the code pertains to

the matter of license fee to be paid by dealers in automobiles, and does not, I think apply to the case before us. But section 1320 of the code pertaining to the assessment of taxes, provides that:

> Any person acting as the agent of another, and having in his possession or under his control or management any money, notes and credits, or personal property belonging to such other person, with a view to investing or loaning or in any other manner using or holding the same for pecuniary profit, for himself or the owner, shall be required to list, etc.

and I take it from your letter that the Mason City Transfer Company must have listed the particular property in question, and if so, it should be held for the payment of the tax, and the taxing authorities are not interested in what becomes of the property held by the storage company at the time the assessment was made, and can not be expected to try to recover the tax from individuals to whom the cars may later on have been delivered.

J. W. SANDUSKY,
Assistant Attorney General.

CHANGING ASSESSMENT.

An assessment fixed by the Board of Review cannot be changed by county auditor.

March 28, 1917.

Clarence D. Roseberry, County Attorney, LeMars, Iowa.

Dear Sir: Replying to your esteemed inquiry of the 24th inst., in regard to whether or not the county auditor has the power to arbitrarily change the assessment of property finally placed thereon by the legally and regularly constituted board of review for that particular taxing district, beg to refer you to the following cases:

Ridley vs. Doughty, 85 Iowa, 418;

Jewett vs. Foote, 119 Iowa, 359.

In the Jewett case, the court, in referring to the Ridley case, at page 364, says:

> The facts upon which the second decision rested were as follows: The real property involved was duly assessed for the year 1887. At the June, 1887, meeting of the board of supervisors, sitting as a board of equalization, the assessed valuation of the property was reduced forty-four per cent.

The reduction of the assessment was wholly disregarded by the auditor, and in making up the tax for that year the property was assessed therein at the assessor's valuation. In August, 1888, a demand was made on the auditor that he correct the list to conform to the valuation fixed by the board. This he refused to do, and the action of mandamus followed soon thereafter, and he was ordered to make the correction, because it was his imperative duty under the law. And so it was. He had arbitrarily and without authority disregarded his plain duty under the statute. He had no power to set as an equalizer of assessments; and when he undertook to override the authority of the board in that respect he not only violated the law, but he refused to do the duty imposed upon him thereby, and he could not then sustain his act by the plea that the books had passed into the treasurer's hands, and such is, in effect, the holding, and nothing more.

Pursuant to the foregoing decisions, it is our opinion that your local county auditor exceeded his authority in deliberately changing the assessment returned by the board of review.

W. R. C. KENDRICK,
Assistant Attorney General.

OLD SOLDIERS' EXEMPTION.

A soldier is not to be allowed exemption unless a statement as provided in section 1304-1a has been filed with the county auditor.

April 5, 1917.

J. M. C. Hamilton, County Attorney, Fort Madison, Iowa.

Dear Sir: We have your letter of the 3rd instant enclosing request of your county auditor for your opinion on the following facts:

I would like your written opinion relative to a tax matter regarding soldiers' exemptions.

We have a number of people in the county who are entitled to a soldier's exemption but did not file a claim as required by law and therefore were not allowed the exemption on the tax list of 1916.

Before the law requiring the filing of a claim was enacted, claimants were given the reduction on their assessment at any time they made the claim. Now, if they do not make it before the first day of September they waive their rights to the exempton.

We are going to have quite a few of these cases coming up

and I just want your opinion as to whether you think the board is safe in allowing the exemption.

Also copy of your opinion rendered him which is as follows:

> In reply to your inquiry of March 20th, relative to the soldiers' exemption law, as I understand it, there are a number of people who made no claim for exemption during the year 1916, probably on account of the fact that they were unaware of the existence of the law and who are now asking that their exemption be allowed on the assessment of 1916.
>
> Under section 1304-1a, I do not see how an exemption can be allowed for 1916. I would suggest that you take this matter up with Attorney General Havner, and if his office believe that the 1916 exemption can now be made, I will be very glad to concur,

together with your request as to whether or not we concur in the conclusion you arrived at.

Paragraph 7 of section 1304 of the 1915 supplemental supplement to the code, pertaining to soldiers' exemptions is as follows:

> The property, not to exceed fifteen hundred dollars in actual value, and poll tax, 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 (and 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 fifteen hundred dollars, the same to be made from the homestead of such soldier or widow, if he or she shall so own a homestead of the value of such exemption, otherwise out of such property as shall be designated and owned by the soldier, sailor or widow, such designation to be made either to the assessor or by writing filed with the county auditor on or before July first, each year.

This paragraph of the section has been amended several times and grave doubts might still arise as to the interest and meaning of some parts thereof, but section 1304-1a, acts of the thirty-sixth general assembly, was, doubtless, enacted for the purpose of removing such doubts and is as follows:

> The beneficiary of the exemption allowed by subdivision seven of section thirteen hundred four, supplement to the code,

> 1913, shall file with the assessor a statement under oath that he is the owner of the real property on which such exemption is claimed. Such statement shall be returned by the assessor to the county auditor, and, if no such statement be so filed, no exemption shall be allowed by the assessor, but may be allowed by the board of supervisors if filed before September first of the year for which the same is claimed.

We have given the matter careful consideration and concur in the conclusion you arrived at, namely: That the exemption cannot be allowed unless the statement is filed by the claimant, as provided in the last section.

J. W. SANDUSKY,
Assistant Attorney General.

SOLDIERS' EXEMPTION.

The homestead of a soldier is exempt. If he has no homestead, then other property to the value of $10,000 is exempt, but not both.

July 15, 1918.

Mr. H. J. Ferguson, County Attorney, Tama, Iowa.

Dear Sir: I am in receipt of your favor with inquiry as to whether, if a man has a homestead which is exempt from taxation, said homestead not amounting to $10,000, he can have other property exempt from taxation until the amount of $10,000 is reached.

Section 3 of chapter 380, Acts of the 37th General Assembly, is as follows:

> The homestead of all soldiers, sailors or other persons in the military or naval service of the United States shall be exempt from taxes during their term of service in the present war; or other property to the actual value of ten thousand dollars in the event of no such homestead.

You will notice that the disjunctive "or" is used. The first part of the section says:

> The homestead of all soldiers, sailors or other persons in the military or naval service in the United States shall be exempt from taxes during their term of service in the present war.

There follows the word "war" a semi-colon, and following the semi-colon the disjunctive "or," showing a complete separation of the first part from the part which follows. The remainder of the statute reads as follows:

other property to the actual value of ten thousand dollars in the event of no such homestead.

It is my opinion that if a soldier has a homestead, only the homestead is exempt from taxation. If he has no homestead, then he may have other property exempt to the amount of ten thousand dollars.

H. M. HAVNER,
Attorney General.

SOLDIERS' EXEMPTION.

Under chapter 380 acts Thirty-seventh General Assembly, the exemption applies only to taxes assessed and levied during term of service of soldier.

September 10, 1918.

Mr. H. E. Narey, County Attorney, Spirit Lake, Iowa.

Dear Sir: We have your letter in which you ask us to advise you whether under the provisions of Section 3, of Chapter 380, Acts of the Thirty-Seventh General Assembly, it is proper to allow an exemption for taxes payable in the month of September when the taxpayer has been called into the first half of the tax in the month of March and the last half of the month of September.

You will note that Section 3 in part provides:

> The homestead of all soldiers, sailors or other persons in the military or naval service of the United States shall be exempt from taxes during their term of service in the present war; * *

You will note that the exemption is "from taxes during their term of service in the present war." The taxes which are due in September are for the past year, and covering a time when the one from whom they are due was not in the service of the United States.

It is the opinion of this department that this exemption applies only to the taxes to be assessed and levied during the time the owner of the property is in the military or naval service of the United States.

This is in accordance with an opinion rendered by this depart-

ment to Adjutant General Guy A. Logan on the 17th day of July, 1917.

B. J. POWERS,
Assistant Attorney General.

SOLDIERS' EXEMPTION.

The property of a person in military service is not exempt from special assessments for local improvements under chapter 380, acts Thirty-seventh General Assembly.

September 26, 1918.

Mr. Ralph S. Stanbery, County Attorney, Mason City, Iowa.

Dear Sir: Your letter of the 25th inst., addressed to Attorney General Havner, has been referred to me in his absence for attention.

You ask whether or not your county treasurer should attach penalties and sell the property of a soldier now in the military service of the United States, against which property there is a special assessment for paving.

This department has heretofore held that the statute exempting the property of a soldier from taxes does not include an exemption from special assessments for local improvements. In this position we are supported by the Supreme Court of Iowa, which court has passed directly upon this question. We refer you to the case of Munn vs. Board of Supervisors, 161 Iowa 26.

In the case above cited, the court at page 36 says:

> Undoubtedly the power to tax is a legislative power and may not be delegated save to municipalities to be exercised by the proper legislative authority of the corporation. State vs. Mayor, etc., of Des Moines, 103 Iowa, 76. But, though the authority to levy a special assessment is derived from the same source (i. e., from the legislature), it does not follow that the words "tax" or "taxes" as found in the Constitution or as ordinarily understood means the same thing as or includes special assessments.

It is our opinion, therefore, that there should be no distinction made between the property of a soldier now in the military service of the United States and a person in civil life,

and that the law applicable to special assesments should apply to one the same as to the other.

W. R. C. KENDRICK,
Assistant Attorney General.

INTEREST AND PENALTY ON TAXES.

Explanation of the law relating to the collection of interest and penalty on delinquent taxes.

January 8, 1917.

Clarence I. Roseberry, County Attorney, LeMars, Iowa.

Dear Sir: I am in receipt of your favors of January 3rd and 6th, and am replying to both in this letter.

In regard to the inquiry in your letter of the 3rd, will say that it is the opinion of this department that under Section 1391, Supplemental Supplement Code of Iowa, 1915, penalty and interest may be collected for the first four years on taxes remaining unpaid, though such penalty and interest, or some part thereof, may have accrued prior to the enactment of said section.

We hold that when Section 1391 of the Code of 1897 was repealed and Section 1391 of the Supplemental Supplement Code of Iowa, 1915, was enacted in lieu thereof, there were no vested rights as to the exemption which had been created by Section 1391 of the Code of 1897, and the provisions of Section 1391 Supplemental Supplement Code, 1915, were, as soon as enacted, in full force and effect, even though penalty and interest had accrued prior to the enactment of said last named section.

Answering your favor of the 6th instant, we hold that under Section 510-a, Supplemental Supplement Code of Iowa, 1915, the sheriff is required to pay to the clerk all fees earned, except mileage, for collecting delinquent taxes.

The same rule applies to the deputy, though we can see no objection to the board of supervisors applying any such fees so collected by such deputy, toward the deputy's salary as fixed by them, but the amount paid the deputy out of the treasury of the county, and the amount of fees for the collection of taxes by him could not, under the law, exceed the

amount of salary which was fixed by the board of supervisors for such deputy.

H. M. HAVNER,
Attorney General.

TAXATION OF PRIVATE BANKS.

Funds used in the business of private bank come within term "moneyed capital" and is taxed upon basis provided for in sections 1322-1a, 1310 S. 1913.

March 7, 1917.

A. E. Brown, County Attorney, Osage, Iowa.

Dear Sir: Replying to your request for an opinion from this department as to the proper rate of taxing private banks, beg to advise that it depends entirely upon whether the property to be taxed is moneys and credits, or moneyed capital.

Section 1310, Supplement to the Code, 1913, provides in substance that moneys and credits shall be taxed upon the basis of five (5) mills on the dollar of actual valuation.

Section 1322-1a Supplement to the Code, 1913, provides in substance that bank stock and moneyed capital shall be assessed and taxed upon the taxable value of twenty per cent. (20 per cent) of the actual value thereof.

Now, the question arises: What is moneyed capital? Our legislature failed to define the meaning of that term but used it in connection with Section 5219 of the statutes of the United States, so that in order to arrive at the correct interpretation of the term "moneyed capital" it is necessary to ascertain what the courts have held that term to be within the meaning of said Section 5219.

About the best definition of "moneyed capital" is found in Mercantile Bank vs. New York, 121 U. S. 138. The court, at page 157, says:

> 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. In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as personal property.

See also Head vs. Board of Review, 152 N. W. (Iowa) 600.

Therefore, from all the foregoing, it is clear that the funds used by one engaged in the business of a private bank come within the term "moneyed capital" and are taxed upon the basis provided for in Section 1322-la of the Supplement to the Code, 1913.

W. R. C. KENDRICK,
Assistant Attorney General.

DUTY OF ASSESSOR.

It is the duty of assessor to go to place where property is located, and it is the duty of the owner to render assistance in listing property.

March 12, 1917.

Lew McDonald, County Attorney, Cherokee, Iowa.

Dear Sir: We have your letter of the 8th inst., pertaining to some difficulty between one of the assessors of your county and a property owner, over the listing of his property, and wherein you request the opinion of this department on the following facts:

> The assessor consulted me. We asked the farmer, rather, I did, in a letter, to meet the assessor in the court house on a set date and be assessed, else we would put on the penalty. He refused, insisting that the assessor should come to his farm home. The point is, have we erred in asking him to come to Cherokee, which is the trading place of the man, and be assessed, and by refusing so to do be penalized? The place appointed is outside the township of the man to be assessed.
>
> I have found nothing in the law to support the course I have taken and nothing to defeat it. I would appreciate an early reply.

Section 1352 of the Code, pertaining to the duties of an assessor, provides:

> Each assessor shall enter upon the discharge of the duties of his office immediately after the second Monday in January in each year, and shall, with the assistance of each person assessed, or who may be required by law to list property belonging to another, enter upon the assessment rolls furnished him for that purpose the several items of property required to be entered for assesesment. He shall personally affix values to all property assessed by him.

Section 1354 of the Code, as to the duties of assessor and owners of property, further provides:

> The assessor shall list every person in his township, and assess all the property, personal and real therein except such as is heretofore exempted or otherwise assessed, and any person who shall refuse to assist in making out a list of his property, or of any property which he is by law required to assist in listing, or who shall refuse to make the oath required by the next section, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined in a sum not to exceed five hundred dollars.

Section 1357 relates to penalties for refusal to furnish statement and reads as follows:

> If any corporation or person refuse to furnish the verified statements in this chapter required, or to list his property, or to take or subscribe the oath in this chapter required, the executive council, or assessor, as the case may be, shall proceed to list and assess such property according to the best information obtainable, and shall add to the taxable valuation one hundred per cent, thereof, which valuation and penalty shall be separately shown, and shall constitute the assessment; and if the valuation of such property shall be changed by any board of review, or on appeal therefrom, a like penalty shall be added to the valuation thus fixed.

You will observe from the foregoing sections that the assessor enters upon his duties at a certain time and the manner in which he shall proceed is therein set forth. You will also observe that by the provisions of Sections 1354 the owner is required to assist the assessor in making out a list of his property and for a refusal to do so he is guilty of a misdemeanor, and may be punished therefor. You will also observe that Section 1357 provides that if the property owner refuses to list his property, the assessor shall proceed to list and assess such property according to the best information

obtainable, and shall add to the taxable property one hundred per cent. therefor.

It is our opinion that you had no right to require the property owner to appear at any particular place to list his property, but that it was the duty of the assessor to visit him at his residence, where the property is located, for the purpose of assessing his property. There can be no doubt about it being the duty of the taxpayer to render the assistance required by the statute to the assessor in listing his property, and a failure so to do makes him amenable to the provisions of Section 1354, and also subject to the penalty provided in the last section, and we believe it would be your duty now to advise the assessor to visit the man's premises and offer to assess his property and ask the assistance of the owner for such purpose. If he then refuses so to do, you may resort to the provision of the last named section, or punish him for his failure and refusal to do what the law requires of him, as provided in Section 1354.

J. W. SANDUSKY,
Assistant Attorney General.

TAXATION OF BANK STOCKS.

Method of arriving at the value of bank stock for purposes of taxation discussed.

September 4, 1917.

F. B. Shaffer, County Attorney, New Hampton, Iowa.

Dear Sir: Replying to yours of the 29th ult., will say that this department has heretofore held that the correct method of assessing bank stock is for the assessor to place a value thereon after taking into account the matters mentioned in Section 1322, Supplement to the Code, 1913, and where a part of the capital is invested in real estate a reduction should be made on that account, not of the full value of the real estate, but the assessed value for taxation purposes as fixed by the assessor. See Valley Investment Company vs. Board of Review, 152 Iowa 84; In Re Farmers Loan & Trust Company, 155 Iowa at 542. In other words, from the facts required to be stated in Section 1322 and other knowledge gained by the assessor he should fix the actual value of the stock, for two different banks might have the same capital, surplus, undivided

profits and the same amount of real estate and yet there might be a vast difference in the real value of the stock, depending upon the location of the bank, the volume of business, the amount of deposits, the relative amount invested in real estate, and whether the same was increasing or decreasing.

Where the stock is incorrectly assessed by the assessor or board of review, the auditor is without power to correct said assessment, except for the current year and even then he cannot substitute his judgment for that of the assessor or for the board of review, but if the returns made by the assessor or the board of review show for instance that the full value of the real estate was deducted rather than the assessed value, for the purposes of taxation, and both such values appear on the returns, then the assessor may make the proper deduction and correct the valuations accordingly.

C. A. ROBBINS,
Assistant Attorney General.

SOLDIERS' EXEMPTION.

General review of effect of chapter 380, acts of Thirty-seventh General Assembly, on soldiers' exemption.

July 17, 1917.

Hon. Guy E. Logan, Adjutant General, State House.

Dear Sir: Your request for the opinion of this department on the following questions has been referred to me for attention. You ask:

> 1. Chapter 380, Acts of the Thirty-Seventh General Assembly, being "An ACT" to exempt soldiers and sailors and other persons in the military and naval service of the United States from payment of obligations and granting to such soldiers and sailors exemptions from certain taxes, states in Section 3: "The homestead of all soldiers, sailors or other persons in the military or naval service of the United States shall be exempt from taxes during their term of service in the present war; or other property to the actual value of ten thousand ($10,000) dollars in the event of no such homestead."
>
> 2. Inasmuch as the state of Iowa will have several thousand soldiers and sailors in the service of the United States within the next thirty days most of whom will immediately leave the state and not return until the close

of the war, I desire to secure an opinion from your office relative to the following:

(A) What steps must be taken by such soldiers and sailors to avail themselves of the provisions of the exemptions contained in this section?

(B) Where such soldier or sailor has paid one-half of his taxes on or before March 31, 1917, will he be entitled to an exemption for the second half which is due to be paid on or before September 30, 1917?

(C) Is such soldier or sailor entitled to an exemption on his homestead irrespective of its value or is such exemption limited to $10,000?

(D) Would a soldier or sailor be entitled to such exemption where the title to the homestead is in the name of the wife?

The statute makes certain exemptions for soldiers, sailors and other persons in the military or naval service of the United States, but fails to designate by whom and to whom such exemptions shall be claimed and made. The adjutant general is required to keep a record of all matters pertaining to the organization of the military forces of the state and should on or before the first day of September in each year, during the continuance of the war, certify to the several county auditors of the state a list of all soldiers, sailors, and other persons in the military service of the United States from their respective counties, and from such list, so certified, the county auditor can enter upon the proper tax records of his county the exemption authorized by the statute.

The exemption provided for by the act does not apply to the taxes of 1916, which were ascertained and determined, and, if the first installment thereof had not been paid, were delinquent before the law was enacted.

The exemption extends to the entire homestead, notwithstanding the value thereof may exceed the sum of ten thousand dollars. If applied to other property, it is, of course, limited to that amount.

As to the remaining question, I am constrained to believe, though it is not entirely free from doubt, that the exemption does not extend to a case where the legal title to the homestead is in the wife of such soldier, sailor or other person

claiming the exemption. Provision is made for extending the exemption to other property to the value and extent of ten thousand dollars, if such soldier, sailor or other person in the military or naval service of the United States does not own a homestead, and while it is true that the law attaches a peculiar character to the homestead, giving husband and wife each certain rights therein, which do not obtain as to other property, regardless of whom the legal title thereto may be in, yet it must be held that the exemption herein granted is personal and limited to such sailor, soldier or other person and cannot be extended to property owned by his wife.

J. W. SANDUSKY,
Assistant Attorney General.

SOLDIER'S EXEMPTION A PERSONAL RIGHT.

The right to the exemption from taxation provided by the statute is a personal right and does not descend to the heirs of the soldier.

November 16, 1917.

R. E. Hatter, Assistant County Attorney, Marengo, Iowa.

Dear Sir: Yours of the 15th inst. is received. You state the situation as follows:

> Lyons owned property which was exempt to him, as an old soldier, and both he and his wife died during the year 1914, title naturally vesting in his heirs. Land was entered on the tax books as exempt property for the years 1915 and 1916. The heirs sold the land to DinWiddie on July 12th, 1916. Up to this date no entries were made upon the tax books showing that any taxes were due. On February 26th, 1917, the county auditor made his entry of taxes due for the year 1915 and 1916.

and inquire, first: Are the heirs liable personally for the taxes? In my judgment, this question should be answered in the affirmative. The exemption ceased with the death of the soldier and for subsequent years the property should have been taxed to the heirs.

Your second question is:

> Is the land subject to the tax in the hands of DinWiddie who had no notice of any taxes due upon the books of the treasurer?

Assuming there was nothing of record to show the date

of death of the soldier, I am inclined to think this question should be answered in the negative. If, however, at the time of DinWiddie's purchase administration had been had or other proceedings of record, showing the date of the death of the soldier, then in my judgment, the land would be liable for taxes after the date when such information appeared of record.

C. A. ROBBINS,
Assistant Attorney General.

SOLDIERS NOT EXEMPT FROM AUTOMOBILE LICENSE FEE.

An automobile license fee is not a tax within the meaning of the law exempting soldiers from taxation.

September 10, 1917.

H. A. Allen, Brigadier General, Headquarters 67th Infantry Brigade, Deming, New Mexico.

Dear Sir: Replying to yours of the 6th inst., addressed to the attorney general will say that I am enclosing you copy of the soldiers' exemption law referred to.

I have some doubt as to whether it would apply to the automobile license fee, for while the automobile law provides that this fee shall be in lieu of all other taxes, yet it is more in the nature of a license fee than a tax. If the automobile was not operated upon the highways of this state and was taxed as other vehicles, then in my judgment the exemption might apply thereto.

C. A. ROBBINS,
Assistant Attorney General.

EXEMPTION OF HOMESTEADS OF SOLDIERS.

The right to such exemption is determined by the question of ownership, and if the soldier, sailor or other person claiming the exemption is, in fact, the owner of the homestead, although the legal title thereto, for the time being, is in someone else, he is, nevertheless, entitled to the exemption.

March 7, 1918.

Ernest R. Mitchell, County Attorney, Ottumwa, Iowa.

Dear Sir: Your request for the opinion of this department under date of March 5 has been handed to me for attention, the attorney general being absent from the city.

You state:

I have been requested to get your official opinion on the question of exemption of property of soldiers in the service of the government in the present war, where such property, homestead or other property is of record in the name of the wife, whether or not this property could be exempted under Chapter 380, Acts of Thirty-Seventh General Assembly.

It is the view of this department that Chapter 380, Acts of the Thirty-Seventh General Assembly, should be given a liberal construction with a view of securing for soldiers, sailors and other persons engaged in the military service of the United States the benefits of the exemption provided, and therefore the right to the exemption should not be restricted or limited to a case where the legal title to the homestead is in the name of the person claiming exemption. If the soldier, sailor or other person claiming the exemption is, in fact, the owner of the homestead, although the title thereto for any reason may be vested in someone else, the exemption should be granted. The right turns upon the question of ownership of the property, and as before stated, if the soldier is, in fact, the owner of the homestead the exemption should be allowed, although the legal title thereto may not, at the time, rest in him; otherwise, we think it should be refused.

J. W. SANDUSKY,
Assistant Attorney General.

WAR TAX ON PRODUCTS MANUFACTURED BY THE STATE.

Products manufactured by the state of Iowa at the State Biological Laboratory are not subject to the "war tax" provided for by the act of Congress of October 3, 1917.

October 10, 1918.

P. B. Pontius, Asst. Director State Biological Laboratory, Ames, Iowa.

Dear Sir: Replying to your favors of recent date, in which you ask for our opinion as to the liability of your laboratory to pay an excise tax on the sale of the products of your laboratory, beg to advise that, in our opinion, no tax can be lawfully exacted.

State agencies and instrumentalities are exempt from national taxation, so long as they are of a strictly governmental character; but such exemption does not extend to those agencies

which are used by the state in carrying on an ordinary private business. In other words the federal government can do nothing by taxation in any form, which will prevent the full discharge by a state of its governmental functions, yet whenever a state engages in a business which is of a private nature that business is not withdrawn from the taxing power of the nation. South Carolina vs. United States, 199 U. S., 437. Now let us see how the above rule applies in your case.

Section 2538-w, Supplement 1913, provides for the establishment of a state laboratory for the manufacture of hog cholera serum and other similar products. The purpose of this legislation was for the state to not only assist in, but to practically have full charge of the campaign against starting and spreading of hog cholera in Iowa. This is a police regulation over which the state possesses full power and control. Then for the purpose of placing preventatives and cures in the hands of the owners of hogs afflicted with cholera, the legislature provided that the state could manufacture hog cholera serum, vaccines and the like, and furnish them to persons in the state for use in their herds only, and at the approximate cost of manufacture. In the event the state laboratory accumulated a surplus, then it was provided that such surplus could be sold at a profit, but only to a purchaser living outside the state. It will be seen that the legislature, so far as it was humanly possible to do so, carefully guarded against the probability of the institution losing its functions as part of the state government, and becoming a private enterprise.

Further on, in Section 2538-w3, the legislature placed the sale of serums for treating, curbing and controlling of hog cholera and swine plague under the exclusive supervision of the director of said laboratory, so that fake serums could not be sold by unscrupulous dealers, to the injury of not only the state, but also to the owners of hogs. However, the legislature did not attempt to monopolize the sale of serums, but granted permission to individuals to engage in that business as a business enterprise, provided a standard degree of potency was maintained. It is, therefore, evident that the legislature, in creating a state biological laboratory, intended that it should be one of the instrumentalities of state government.

Now, then, let us examine the revenue act, under which it might be claimed that the state was liable, and see if any provision was made for exempting the state. The original revenue act was passed by the 64th congress, approved September 8, 1916, and found in Chapter 463, 39 U. S. Statutes at Large, page 767. Section 11, sub-division b, provides that:

> There shall not be taxed under this section (relating to incomes of individuals, corporations and the like) any income derived * * * from the exercise of any essential governmental function accruing to any state, etc.

Then at the special session of the 64th congress the income tax law of September 8, 1916, was amended, the amendatory act being known as the war tax act of October 3, 1917. This amendment added the tax of two per centum of the price for which all remedies or specifics for any disease to animals are sold; but the amendatory act failed to carry on exemption to the states. So that it will be seen that when the federal revenue law was enacted congress evidently intended to exempt the several states from its operation; and although congress failed to include an exemption when amending the original law, nevertheless, I believe it was their intention to exempt the states, and evidently believed the original act did that, and it was unncessary to carry an exemption in the amendment.

Therefore, I am of the opinion that the biological laboratory at Ames is performing a governmental function of the state and is exempt from the payment of the tax in question.

W. R. C. KENDRICK,
Assistant Attorney General.

STATE OF IOWA NOT SUBJECT TO WAR TAX ON FREIGHT.

The state of Iowa is not subject to the payment of "war tax" on freight shipped to it.

December 20, 1918.

Board of Control of State Institutions, State House.

Gentlemen: I am in receipt of a letter from your Mr. F. S. Treat, bearing date of December 16th, 1918, in which a request is made for an opinion from this department upon the following question, relating to the government war tax on frieght and express shipped to the state of Iowa:

> The question we desire settled is, What is the state's right in the case of freight prepaid by the shipper and added to the invoice?

The question you ask is governed by the act of congress, approved October 3rd, 1917, and known as the war tax act.

Section 502 of said act declares:

> That from and after the first day of November, nineteen hundred and seventeen, there shall be levied, assessed, collected and paid (a) a tax equivalent to three per centum of the amount paid for the transportation by rail or water or by any form of mechanical motor power when in competition with carriers by rail or water of property by freight consigned from one point in the United States to another; (b) a tax of 1 cent for each 20 cents, or fraction thereof, paid to any person, corporation, partnership, or association, engaged in the business of transporting packages by express over regular routes between fixed terminals, for the transportation of any package, parcel or shipment by express from one point in the United States to another: Provided: That nothing herein contained shall be construed to require the carrier collecting such tax to list separately in any bill of lading, freight receipt, or other similar document, the amount of the tax herein levied, if the total amount of the freight and tax be therein stated. * * * * *

Pursuant to Section 502 aforesaid the treasury department at Washington issued a general order to all the revenue collectors and others concerned, in which the following language will be found:

> Shipments of property belonging to a state, or territory, or the District of Columbia, the charges on which are paid by the state, territory, or District of Columbia, will be free of the tax imposed by Section 500.
>
> Shipments by freight or express of property received by the United States, or any state, territory, or the District of Columbia, are free of the tax imposed by Section 500, provided the United States, or any state, territory, or the District of Columbia, is liable for and pays the transportation charges on such shipments.

It will, therefore, be necessary in all shipments made by freight or express for the representative or employee of the state to satisfy the agent to whom the charges are paid that the service rendered or to be rendered is for the state, in which event the agent collecting the charges will note on the records

of his office the name of the consignor and consignee, and indicate thereon that such shipment covered service rendered to the state, and was not subject to the tax.

So that, when shipments are made to the state the shipper must not pay the tax and add it to the invoice, but should notify the agent of the transportation or express company that the shipment is to the state and demand an exemption of the tax; otherwise, the transportation or express company will have no knowledge that the service is being rendered to the state and the state will lose the benefit of the exemption.

W. R. C. KENDRICK,
Assistant Attorney General.

OPINIONS TO COMMISSIONER OF INSURANCE.

MUTUAL HAIL ASSOCIATIONS MAY LIMIT ASSESSMENTS AND PRORATE LOSSES.

Mutual hail associations may lawfully provide a limit upon the amount of annual assessment upon members and prorating losses if losses and expenses that year exceed aggregate annual assessment collected.

January 20, 1917.

Hon. Emory H. English, Commissioner of Insurance.

Dear Sir: In reply to the question which was propounded to me by yourself, as to whether or not state mutual hail associations organized and operating under Chapter 5, Title IX of the Code, and insuring their members against loss or damage by hailstorm to growing crops may lawfully provide in their insurance contract a limit upon the amount of the annual assessment which they can make upon their members, and may further provide for the prorating of their losses in case the loss and expenses of that year exceed the aggregate of the annual assessment collected.

Inasmuch as you have had an opinion from this department in November, 1916, covering this question, I will not go into

the matter in detail in passing upon it, but refer you to the opinion of this department under date of November 11, 1916. The opinion of Attorney General Mullan, to which our attention has been called, under date of March 8, 1905, addressed to Hon. B. F. Carroll, then auditor of state, which is found on page 205 of the Fifth Biennial Report of the Attorney General, is not in point with the question which is here presented. The question discussed by Attorney General Mullan, in that opinion, had to do with the kind of insurance which the company was authorized to write. This has to do with the form of the policy, or, putting it in other words, has nothing to do with the kind of insurance, but only as to the amount which the company agrees to be liable for in case of a loss, and the opinion of Attorney General Mullan would not be an authority against the position which we take in this matter.

There is force in the argument of Mr. Sampson in his opinion of November 11th, where he calls your attention to the case of Delle vs. State Mutual Hail Insurance Company, 119 Ia. 173. That case is bottomed upon exactly the same form of contract that is in question in this case, and while, as he says "the question is not determined," yet it shows that this form of contract has been permitted by the department for some considerable length of time.

Section 1759-j of the Supplement to the Code 1913, provides:

> Every association contemplated by the preceding section shall provide in its by-laws and specify in its by-laws the maximum liability of its members to the association.

We may, therefore, say that there is no question but that it is not against public policy to so specify in the contract and all that this amounts to, in our opinion, is an agreement upon the part of the policy holder to carry a part of his risk, which he has a perfect right to do.

Our attention has also been called to the American Fidelity Co. vs. Bleakley, 157 Ia. 442, and in response to that authority we have the same statement to make that we did concerning the opinion of Attorney General Mullan. The question involved in that case was the power to insure against that which was not authorized by the statute of the state, or in other words, to deal in a different kind of insurance than that authorized by the law. The same ex-

planation which applies to the opinion of the attorney general meets the case above quoted.

We, therefore, hold that state mutual hail associations organized and operating under Chapter 5, Title IX of the Code, and insuring their members against loss or damage by hailstorm to growing crops, may lawfully provide in their insurance contract a limit upon the amount of the annual assessment which they can make upon their members and may further provide for the prorating of their losses in case the loss and expenses of that year exceed the aggregate of the annual assessment collected.

H. M. HAVNER,
Attorney General.

INSURANCE OF HAZARDS OF WAR.

Insurance may be written against the hazards of war and invasion. An insurance company may insure against other casualties than those stated in section 1709 of supplement to the code, 1913.

May 9, 1917.

Hon. Emory H. English, Commissioner of Insurance.

Dear Sir: Your favor of May 5th with inquiry as to whether a fire insurance company, authorized to transact business in this state can assume the coverage of the following hazards: War, invasion, insurrection, riot, civil war, civil commotion, including strike, military or usurped power and bombardment. You say that the company is authorized by its charter to transact this class of insurance, but there is some doubt in the mind of your department whether the Iowa statutes allow such company to insure against such hazards.

In reply thereto will say that subdivision 1 of Section 1709 of the 1913 supplement provides that:

> 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, sprinkler leakage or other casualty, and make all kinds of insurance on goods, etc.

Section 1710 of the 1913 supplement provides:

> Any stock company organized under the laws of this state, or authorized to do business in this state for this purpose of transacting the business specified in subdivi-

sion one of the preceding section, and whose charter will permit, is authorized, in addition to insuring against the casualties specified in subdivision one, to also insure against the casualties specified in subdivision nine of the preceding section.

Our court has already construed the term "other casualties" in the case of the Casualty Company against the National Bank in 131 Iowa, 456, in which they say referring to the section in question:

> 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. Richards vs. Ins. Co., 89 Cal. 170 (26 Pac. 762, 23 Am. St. Rep. 455); Ins. Co. vs. Crandall, 120 U. S. 527 (7 Sup. Ct. 683, 30 L. Ed. 740); Schneider vs. Ins. Co., 24 Wis. 28 (1 Am. Rep. 157).
>
> In State ex rel. vs. Investment Co., 48 Minn. 110, (50 N. W. 1028), "casualty insurance" is said to have "a well defined meaning as insurance against loss through accidents resulting in bodily injury or death." But it is perfectly apparent that the insurance against casualty provided for by our state as above quoted has no reference whatever to injuries or losses of this class for it is expressly treating of property losses as distinguished from losses by personal injury. It comes rather within the definition of the phrase which is given by the Supreme Court

of Massachusetts in Employers' Liability Assur. Corporation vs. Merrill, 155 Mass. 404 (29 N. E. 529), where, in differentiating between accident companies and casualty companies, it classes under the latter head companies insuring against the explosion of steam boilers and breaking of plate glass. 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. "But counsel say that even if the word "casualty" standing alone is broad enough to include loss by burglary yet under the rule of ejusdem generis its scope must be restricted to casualties of like kind with those specifically mentioned in that connection, and that under this rule the words "other casualty" having been preceded in the same section by reference to loss or damage by fire, they must be read as meaning other like casualty." Of the soundness of the general rule of construction here appealed to by which when specified and general terms are both employed in the same connection, the general terms are held to take their meaning from the specific, there can be no doubt; but it is never used to render words meaningless or to defeat a plainly expressed intent. See State vs. Broderick, 7 Mo. App. 19. For instance, 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," then they mean nothing, and add nothing whatever to the idea which would be expressed by the sentence with these words entirely omitted. Borough vs. Geer, 117 Pa. 207 (11 Atl. 415); Riggs vs. State, 75 Tenn., 475. Such a holding would violate the cardinal rules of construction and deny to the language employed the meaning and effect which it bears in common and approved usage. "Other" is also frequently used in an unrestricted sense—not limited by the rule of ejusdem generis. Flower vs. Witkovsky, 69 Mich. 371, (37 N. W. 364); People vs. Stone, 9 Wend (N. Y.) 182; Hall vs. State, 48 Wis. 689 (4 N. W. 1068). The likeness which the general expression must bear to the specific words employed in order to apply the rule of ejusdem generis to the present case would seem to be likeness in the loss or damage to be insured against rather than in the causes producing it. The specific reference to loss or damage by fire is all

inclusive so far as that cause is concerned, and loss or damage by other casualty must of necessity refer to injuries which are referable to some other cause. Brown vs. Corbin, 40 Minn., 508 (42 N. W. 481). Property injured by fire becomes a partial or total loss, and a casualty other than fire which produces like loss or injury is, we think, a like casualty within the meaning of the statute.

That the rule relied upon by the 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, stock 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.

Thus giving to the term "other casualties" the breadth of meaning accorded it in the case to which we have called your attention. It is the opinion of this department that if the charter of the corporation seeking to issue the policies given to the corporation the privilege of writing the class of insurance referred to that they would be permitted to issue such insurance under section 1709 of the Code.

H. M. HAVNER,
Attorney General.

EXCESSIVE RATES CANNOT BE CONTROLLED BY THE COMMISSIONER OF INSURANCE IN THE ABSENCE OF DISCRIMINATION.

Commissioner of insurance has no power to exercise control over the subject of excessive rates charged by casualty companies, in the absence of any discrimination between policyholders of the same class.

July 23, 1917.

Hon. Emory H. English, Commissioner of Insurance.

Dear Sir: Your oral inquiry in substance is: Does the law give you any power to prevent the casualty companies or as-

sociations from fixing a minimum rate that is unreasonably high?

As I understand the situation these companies are advancing the minimum rate to such an extent that many employers with a small payroll pay 200 per cent to 500 per cent more than they were charged a year ago. In view of the fact that the Workmen's Compensation Act virtually forces all employers of labor, coming within its provision, to take out casualty insurance, the situation is one that calls loudly for relief.

The only section of the law that purports to affect the rates to be charged in Section 1782, Supplement to the Code, 1913, which, as originally drafted, related only to life insurance companies or associations. The Thirty-fourth General Assembly interpolated in the first line the words "or casualty, health or accident" but other portions of the statute were left unchanged and the only portion of the amended act that affects the question in any way reads as follows:

> No life or casualty, health or accident insurance company or association shall make or permit any distinction or discrimination between persons insured of the same class, etc.

It does not seem to me that this statute can possibly be construed so as to prevent the fixing of high rates by the companies, provided they make no discrimination in charges as between the different classes of policy holders. The general rule is that a person can ask what he pleases for any commodity that he wishes to sell, and the prospective purchaser's only remedy is not to buy.

While this is true, it is also true that the business of insurance is impressed with a public use, though not in the sense that the public can demand service as from the common carrier. It has been referred to as of a quasi public character. Atty. Genl. vs. Fireman's Ins. Co., 74 N. J. Eq. 372, 381.

You have called my attention to the fact the commissioner of banking and insurance of New Jersey has recently compelled casualty companies doing business in that state to lower materially their minimum rate charges. But this power was exercised under Chapter 85, Laws of 1913, giving that official auth-

ority to investigate insurance rates and to require a readjustment under certain conditions.

The United States District Court of Kentucky has recently upheld an act of that state for the regulation of fire insurance rates. Citizens Insurance Co. vs. Clay 197, Fed. 435.

The statement of facts give a summary of the law as follows:

> The Kentucky State Insurance Rate Law, effective March 4, 1912, provided that a state insurance board be created; that fire insurance companies file with the board specific data regarding the insurance rates in force in all localities in the state and affecting the propriety of such rates; that the board should then fix and publish schedules and tables showing sufficient basis for forming a reasonable rate for every insurance risk in the state; that the rate obtained by the application of these schedules shall be the lawful rate in the state, and that it shall be unlawful to use any other rate, that no insurance company shall engage or participate in insurance in the state until it has complied with the act, and no company or agent shall write insurance at any different rate from that fixed, or make any refund or concession; that the circuit court may review and vacate any rate fixing order found to be unreasonable, unjust excessive, or inadequate.

The last general assembly repealed Sections 1758i to 1758-s, Supplemental Supplement to Code, 1915, which contained provisions calculated to give you the power to investigate fire insurance rates for the purpose of determining whether discriminatory or unjust rates were being charged.

Until the legislature sees fit to empower you or some other official or board with some such powers over casualty rates we see no way in which you can exercise any control over the subject of excessive rates, especially where no discrimination is being made between the policy holders of the same class.

F. C. DAVIDSON,
Assistant Attorney General.

SERVICE OF ORIGINAL NOTICE.

Power to accept service of original notice in certain cases discussed.

September 25, 1917.

Hon. Emory H. English, Commissioner of Insurance.

Dear Sir: Replying to yours of the 24th inst., in which you

call attention to the provisions of Chapter 180, Acts of the Thirty-Seventh General Assembly, and to a certain subscriber's agreement appointing certain attorneys as their attorney in fact, and conferring upon him certain powers by making use of the following language:

> Said attorney is hereby specifically authorized to do all things necessary to effect compliance under the laws of any state with respect to the exchange of indemnity contracts herein provided for.

And you then inquire:

> In order for an attorney to appoint the commissioner of insurance to accept service, it would appear that he must be authorized to do so by the subscribers. Does the following subscriber's agreement empower the attorney to appoint the commissioner of insurance to accept service of process for the subscribers.

In my judgment this inquiry should be answered in the affirmative for the agreement and the power of attorney should each be construed in the same manner as though the provisions of the statute quoted were inserted in, and hence a part of the contract and power of attorney, and, as thus supplemented, the authority expressly conferred would be sufficient.

C. A. ROBBINS,
Assistant Attorney General.

DIRECTORS OF ASSESSMENT COMPANIES MAY ADVANCE FUNDS.

The provisions contained in chapter 429, acts Thirty-seventh General Assembly, as to advancing funds by directors of assessment mutual companies may apply to similar organizations organized under another chapter.

November 9, 1917.

Hon. Emory H. English, Commissioner of Insurance.

Dear Sir: In yours of the 2nd inst. you call attention to the provisions of Chapter 429 of the Acts of the Thirty-Seventh General Assembly, and especially to Section 8 thereof, making provision for the advancement by directors and officers of the company, and also to the provisions of subdivision 5 of the Section 1709 of the Supplemental Supplement to the Code, 1915, as amended by Chapter 428 of the Acts of the Thirty-Seventh General Assembly; also the provisions of Chapter 7, Title 9 of the Code which authorizes the writing of the same class of

business by assessment mutual associations and you ask the opinion of this department as to whether or not the provisions for advancement of funds found in Chapter 429, Acts of the Thirty-Seventh General Assembly, above referred to, may be construed to apply to similar organizations writing the same class of business but organized under said Chapter 7.

In my judgment this inquiry should be answered in the affirmative.

Our court has frequently held that provisions found in one chapter were to be applied to concerns operating under another chapter.

In the case of Bradford vs. Mutual Fire Insurance Company, 112 Ia. 495, a similar question was involved. The court said at page 501:

> This language is broad enough to include such an association as defendant claims to be, and the reason that induced the passage of the act would apply to such corporation. It was manifestly intended to make a uniform provision, applicable to contracts of insurance, so that the assured often unfamiliar with the terms of his contract, might be apprised by law of his rights.
>
> We have held this provision applicable to life insurance companies doing business on the assessment plan, quoting Christie vs. Investment Co. 82 Ia. 361. We can see no reason for exemption in mutual companies from its requirements.

On page 364 it is held that the act in question which provides for the notice and proof of loss by affidivits applies to life, as well as fire insurance companies, although such provision may have been found in another chapter.

See also Cook vs. Federal Life Association, 74 Ia. 746; Parsons vs. Grand Lodge A. O. U. W., 108 Ia. 10 and States F. & G. Company vs. Egg Shippers Company, 148 Fed. 353 and Kenney vs. Bankers, 136 Ia. 140.

C. A. ROBBINS,
Assistant Attorney General.

INSURANCE UNDER WORKMEN'S COMPENSATION CANNOT BE ON PART OF EMPLOYES ONLY.

Insurance on some employes and not on others prohibited, except such

employes as are working at separate and distinct establishments and then, only, when employer has elected not to come under act as to them.

October 12, 1917.

Hon. Emory H. English, Commissioner of Insurance.

Dear Sir: In the absence of Attorney General Havner, I am requested to answer your letter of October 5, 1917.

You ask:

> Can an employer who has elected to take advantage of the Iowa Workmen's Compensation Act, limit his insurance liability to certain classes of employment under his control?
>
> To illustrate: An employer having in his employ a number of carpenters, brick-layers, painters, plasterers and day laborers, can he cover the carpenters and brick-layers and by posting the statutory notice to the painters, plasterers and common laborers, that he has rejected the law so far as relates to these branches, of his industry, or must he include all employes in his application or reject the act as a whole?

In our opinion both of these questions must be answered in the negative. That is to say, he cannot accept the benefits of the act as to a class and reject it as to other classes. He must accept or reject the act as to all employes at the place where the business is carried on.

Bradbury in the second edition of his Workmen's Compensation text, Volume 1, page 210, after discussing the propositions here considered, says:

> Where the statute is elective as to all classes of employes the election must be made as to all employes or none.

The supreme court of Wisconsin in the case of the Minneapolis Railway Company vs. Industrial Commission, 141 N. W. 1119, in rather indefinite dicta in discussing this proposition say:

> There is, really, no contest on this point; but, if it were otherwise, there would hardly be room for reasonable doubt, that the commission and the circuit court reached the correct conclusion.
>
> The commission and the circuit court held that the rejection must include all or none.

When we consider that at the time the compensation act was adopted by the Iowa legislature there was no law like it on our statute books, the intention of the legislature in framing the act must have been to require the employer to accept the scheme of compensation provided therein, and when a provision was made for his election there can be no doubt that the legislature intended that the election related to the acceptance or rejection of the act as a whole. In other words the legislature intended to put it up to the employer to accept the scheme of compensation provided in the act or remain under the old system and assume the added responsibilities and liabilities provided for in so doing.

The notice provided by the compensation act is such in form as to suggest that the legislature intended the employer to accept or reject the act as a whole rather than as to part of his employes only.

In section 2477-m, in the paragraph immediately following the form of notice prescribed, there is this provision:

> The employer shall keep such notice posted in some conspicuous place which shall apply to the employes subsequently employed by the employer with the same force and effect and to the same extent and in like manner as employes in the employ at the time the notice was given.

In the enactment of this paragraph, it cannot be said that the legislature intended that the employer could post a notice as to certain employes and not as to others. To so hold would make ridiculous the provisions in the paragraph quoted. Should we hold otherwise, it would lead us to the position of saying that a notice directed to John Smith and John Jones, carpenters, would be notice to all future employes or whatever trade, class or character, and those further employed would be bound by a special notice directed to individual persons when perhaps the great majority of the former employes would be otherwise bound. It cannot be. The legislature did not so intend.

Section 2477-m7 provides:

> No contract, rule, regulation or device whatsoever shall operate to relieve the employer in whole or in part from any liability created by this act, except as herein provided.

To us it seems that a notice by the employer to certain only

of his employes would be a device developed by him for the purpose of gaining relief, or partial relief, from a liability which is otherwise imposed upon him by the compensation act and, therefore, by this section quoted, he is prevented from so doing.

The second paragraph of subdivision 4-d of section 2477-m indicates that the employer must accept or reject the act as to all employes at the place where the business is carried on. And as to those employes the act must be accepted or rejected as a whole. If on the other hand, the employer has another place where the business is carried on it appears from this section that it would be necessary for him to post notices there for the benefit of the employes there engaged. It then may be, and perhaps is true, that if the employer has two places where the business is carried on, under the meaning of said section, that he could then accept the act as to the employes at one of such places and reject it as to the employes at the other.

You also ask:

> May more than one insurance company assume the risk by one writing liability upon the carpenters, another upon the bricklayers, etc.
>
> A manufacturing or a railway company may operate a coal mine in another part of the state in order to supply their fuel. Can they cover the home plant and reject the act so far as the coal mine situated elsewhere is concerned? Or may they insure the employes at the mine with an insurance company other than the one covering the home plant?

It is our opinion that the employer may insure his liability under the compensation act in one or more insurance companies as he may deem best so long as each and all of such companies shall have the approval of the State Department of Insurance.

As to how he shall divide the liability among such companies is a matter of contract between him and the company. It appears to us that the only requirement of the employer so far as the insurance is concerned is that the insurance as a whole covers the entire liability of the employer under the act. Were it otherwise, injustice might result to the employes and to the employer as well.

J. W. KINDIG,
Assistant Attorney General.

RIGHT OF JUDGMENT CREDITOR AGAINST INSURANCE COMPANIES.

A judgment creditor having an unsatisfied judgment may collect the same from insurance company when covered by indemnity insurance.

July 9, 1917.

Hon. Emory H. English,
Commissioner of Insurance.

Dear Sir: Your request for the opinion of this department on the following question has been referred to me for attention:

> Chapter 428, acts of the 37th General Assembly, contains among other things an amendment to sub-division 5 of Section 1709, supplement of the code of 1913 which appears in section 2 of the above named act.
>
> The law as it formerly appeared in sub-division 5 of Section 1709 is repealed and a new subdivision 5 enacted in lieu thereof, consisting of four divisions (a), (b), (c) and (d). Following the portion of sub-division 5 indicated by (d) is a paragraph containing a proviso relative 'execution on a judgment.' Question has arisen whether or not this proviso is applicable simply to the automobile insurance covered by the first paragraph under (d) or whether its application is general in nature and may refer also to any provisions in (a), (b) and (c) to which it might be made applicable.
>
> Please render this department an opinion advising with reference to what portion of subdivision 5 the proviso is applicable.

Chapter 427, Acts of the 37th General Assembly, among other things, repeals subdivision 5 of section 1709 of the 1913 supplement to the code, and enacts a substitute therefor. Two changes are made in the subdivision of the section. One divides it into four divisions, "a," "b," "c" and "d," and the other substitutes the word "insured," which appears in the first and second line of the paragraph following sub-division "d," for the words "owner of any such automobile or conveyance." The redividing of the sub-division does not have the effect of changing the sense thereof, from what it was prior to the enactment of the substitute. The several divisions treat of the same subjects and contain the same language, with the exception above stated, as the repealed sub-division did, but the same is not true as to the other change. The words "owner of any such automobile or conveyance," which appeared in the proviso of the repealed subdivision strictly limited such proviso to judgments against the

owner of any such automobile or conveyance, while the provision in the substitute contains in the same connection, the word "insured" which is general and must be held to include all such classes or sorts of insurance as are enumerated or referred to in sub-division 5 of the section. It could not, I apprehend, be claimed that if the word "insured" had been used in the former act, instead of the words "owner of any such automobile or conveyance," that it would not apply to all such classes or sorts of insurance enumerated or referred to in the subdivision, but does the separating of the sub-division as it appears in the new act, accomplish what would not otherwise have been done if no such separation had been made? I am clearly of the opinion that it does not. Such was not the object intended or accomplished in separating the sub-division into the several paragraphs. It was simply to describe a class, sort or kind of insurance, in each paragraph followed with a proviso which included all classes enumerated in the entire sub-division to which it was applicable or might pertain.

The evident object and intent of the legislature in repealing sub-division 5 of section 1709 and enacting the substitute therefor, was to extend the application of the provision to judgment creditors having unsatisfied judgments in all cases where the judgment debtor had been carrying indemnity insurance, in any form, against the particular contingency upon which the judgment was based, and I am of the opinion that the mere separation of the sub-division into the several paragraphs does not limit the application of the proviso to the class or sort of insurance referred to in the paragraph immediately preceding it, but that it includes and applies to paragraph or division "c," with the same force and effect as it does paragraph "d."

J. W. SANDUSKY,
Assistant Attorney General.

STOCK LIFE INSURANCE COMPANIES AUTHORIZED TO WRITE ACCIDENT INSURANCE.

Sec. 1783-d, supplement 1913, authorizes stock life insurance companies to write accident insurance without increasing capital stock.

December 1, 1917.

Hon. Emory H. English,
Commissioner of Insurance.

Dear Sir: I am in receipt of your inquiry:

Must a life insurance company, desiring to write accident insurance, have a greater amount of capital than the minimum required by section 1783-e, supplement to the code, 1913.

It is with some reluctance that I approach this question on account of the fact that under date of December 8, 1914, there was an opinion handed down by my predecessor which reached a conclusion different from the one I am able to reach.

It was held in that opinion that any life insurance company desiring to engage in the business of accident insurance, must increase its capital $100,000 in order so to do, and in this conclusion I cannot concur.

In this connection I might state that while the opinion worked a hardship with certain companies that complied with the requirements as set out in the opinion referred to, and increased their capital $100,000, there is no reason why this department should require an unnecessary burden to be placed on other companies.

Section 1783-d, supplement to the code 1913, provides:

> Any life insurance company organized on the stock or mutual plan and authorized by its charter or articles of incorporation so to do, may in addition to such life insurance, insure the health of persons and against personal injuries, disablement, or death, resulting from traveling or general accidents by land or water, and insure employers against loss in consequence of accident or casualties of any kind, or to property, resulting from any act of the employe or any accident or casualty to persons or property, or both, occurring in or connected with the transaction of their business, or from the operation of any machinery connected therewith. * * *

It is not necessary for me to prolong this opinion by going into the details of the development of the legislation which effects the question here at issue, but it is sufficient to say that the history of the legislation itself convinces me that it was the intention of the legislature to grant to a life insurance company, by the enactment of section 1783-d, supplement to the code 1913, additional rights, and these rights were conferred upon them without any requirement as to increasing their capital.

You will notice that section 1783-d applies, not only to life

insurance companies organized on the stock plan, but also to companies organized on the mutual plan, and no man would undertake to say that a mutual company would be required to amend its article of incorporation so it would have $100,000 of stock before it could engage in the additional line of insurance, and it would be, in my opinion, in direct violation of the statute to say that any different rule was intended to apply to a stock company that to a company operating upon the mutual plan. They are given exactly the same rights in the same section.

It is my opinion that section 1783-d, supplement to the code 1913 authorizes, without the increase of capital, a stock life insurance company to write the two different classes of insurance mentioned therein, namely: life and accident insurance.

H. M. HAVNER,
Attorney General.

BONDS OF FEDERAL LAND BANK NOT ACCEPTABLE AS SECURITIES FOR DEPOSIT WITH INSURANCE COMMISSIONER.

Sec. 1806 enumerates and describes the kinds of securities that may be accepted by the insurance commissioner as reserve assets, and as the bonds of the Federal Land Bank of Omaha do not come within the list of securities enumerated, the commissioner has no discretion in the matter and such securities cannot be accepted.

January 5, 1918.

Hon. Emory H. English,

Commissioner of Insurance, State House.

Dear Sir: Replying to your inquiry of December 28th, wherein you ask if the bonds of the Federal Land bank of Omaha may be accepted for deposit with your department as a part of the reserve assets of a life insurance company, required under section 1806 of the supplemental supplement of the code, will say that the section referred to provides, in part, as follows:

> The funds required by law to be deposited with the commissioner of insurance by any company or association contemplated in the two chapters preceding, and the funds or accumulations of any such company or association organized under the laws of this state held in trust for the purpose of fulfilling any contract in its policies or certificates, shall be invested in the following described securities and no other: etc.

Paragraphs 1, 2, 3, 4, 5 and 6 enumerate and describe the sev-

eral kind of securities that may be accepted, and it must be observed that those specified and no other can be accepted, and, while it may be true that the bonds of such bank may be just as good, possibly better securities than some of those enumerated in the statute, yet they are not so enumerated, and, as I view the law, you have no discretion in the matter and that the bonds cannot be accepted.

J. W. SANDUSKY,
Assistant Attorney General.

POWERS AND DUTIES OF RECIPROCAL OR INTER-INSURANCE COMPANIES.

Powers and duties of reciprocal or inter-insurance companies under chapter 180, acts of the Thirty-seventh General Assembly, may include all the hazards except life insurance companies.

March 7, 1918.

Hon. J. F. Taake,
Commissioner of Insurance, State House.

Dear Sir: Your recent letter addressed to Attorney General Havner, has been referred to me for answer.

You ask:

1. Does the Commissioner of Insurance have authority, under Chapter 180, Acts of the 37th General Assembly, to license a reciprocal or inter-insurance association to transact insurance against all of the hazards enumerated in the Subscriber's Agreement, which is as follows:

> Said attorney (attorney for the reciprocal exchange) shall exchange for me with other subscribers at said exchange, contracts of insurance and indemnity against loss or damage suffered by or imposed upon me by reason of fire, theft, collision, windstorm, property damage or legal liability on account of bodily injuries or death occurring to third persons, by reason of the use, maintenance or operation of the automobile hereinafter described, and shall have power to make, issue, . . . contracts containing such terms, clauses, conditions, warranties and agreements as he shall deem best;

2. If the commissioner does not have such authority, may he license a reciprocal or inter-insurance exchange transacting all of those classes outside of Iowa, to transact any of those classes in Iowa.

3. An "exchange" as contemplated under Chapter 180, Acts 37th General Assembly, does not employ agents. It does, however issue policies, require notice and proof of loss and perform many acts which are subject to statutory regulation in the case of "companies" insuring against the same hazards. In your opinion to just what extent does section 16, chapter 180, Acts of 37th General Assembly, exempt an "exchange" from the provisions of insurance statutes other than chapter 180, Acts 37th General Assembly.

In our opinion, reciprocal or inter-insurance, under chapter 180, Acts of the 37th General Assembly, may include all of the hazards enumerated in the quotation above. In fact, such contract may cover insurance for any loss which may be insured against under the law, except life insurance. Section 1 of said chapter has removed all barriers from this class of insurance, with the one exception, life insurance. The limitations upon other insurance companies and associations as to the loss to be insured against has no application to the reciprocal or inter-insurance.

Section 16 of said Act provides:

> Except as herein provided, the making of contracts as herein provided for and such other matters as are properly incident thereto, shall not be subject to the laws of this state relating to insurance unless they are therein specifically mentioned.

Therefore, with the exception of the law specifically referred to and preserved by said chapter 180, reciprocal and inter-insurance is absolutely free and without restraint so far as the general insurance laws of Iowa are concerned.

Section 14 of said act contains this provision:

> The attorney may insert in any form of policy prescribed by the laws of this state any provisions or conditions required by the plan of reciprocal or inter-insurance, provided the same shall not be inconsistent with or conflict with any law of this state.

This provision, however, does not relate to the kind of risk to be assumed by the reciprocal or inter-insurance concern. The phrase "provided the same shall not be inconsistent with or in conflict with any law of this state," has reference to the pro-

visions and conditions of the policy or contract of insurance and does not relate to or modify the kind of hazard to be insured against.

It seems then that under the provisions of this act you are not restricted in your authority to license a reciprocal or inter-insurance association to assume all of the hazards enumerated in the subscriber's agreement, above quoted.

Because of our view in this regard, the second question which you ask is fully answered by the discussion of proposition number 1.

Because of section 16 of said act, it appears to us that the insurance exchange in that act named is exempt from all of the provisions of the statute of Iowa, which are not referred to and expressly provided for in said act.

While there may be some questions concerning the constitutionality of this act, yet conceding the act to be constitutional, we believe the act to be interpreted as above indicated.

J. W. KINDIG,
Assistant Attorney General.

ORGANIZATION OF RE-INSURANCE COMPANIES.

A company may be organized to write re-insurance exclusively in life insurance.

July 8, 1918.

Hon. J. F. Taake,
Commissioner of Insurance, State House.

Dear Sir: I have your inquiry as to whether a company can be organized under our statute to do exclusively a reinsurance life insurance business.

In order to determine this question we must first ascertain what the term "reinsurance" means.

Reinsurance is insurance upon an underwriter's contracts of insurance.

Commercial Mutual Ins. Co. vs. Detroit, F. & M. Ins. Co., 38 Oh. St. 15.

May on Insurance, sec. 11.

Phillips on Insurance, sec. 374.

> Contracts of reinsurance, by which one insurer causes the sum which he has insured to be reassured to him by a distinct contract with another insurer has always been lawful in this country; and in a suit upon such a contract, the subject at risk and the loss thereof must be proved in the same manner as if the original assured were the plaintiff.

Phoenix Ins. Co., vs. E. & W. Trans. Co., 117 U. S. 323; 29 L. Ed. 879.

> Reinsurance is an insurance by the first insurer of the whole or some part of his interest in the risk created by his contract of insurance.

1 Joyce on Insurance, sec. 112, p. 342.

Our own court has upheld a contract of reinsurance and has defined that term. In the case of

Bartlett vs. Firemen's Fund Ins. Co., 77 Iowa 155,

in speaking of reinsurance, our supreme court said:

> An agreement to reinsure is not an undertaking to answer for the debt or default of the first assured, but is an original undertaking entered into with him to indemnify the owner of the insured property in case a loss occurs. It is in no sense a contract of guaranty or suretyship, but under it, as between the immediate parties, the reinsurer assumes the risk absolutely. He takes the place of the first insurer, assuming his liabilities and is bound in any event to answer for the loss either to him or to the owner of the property.

You will notice in this connection that the court says "it is an original undertaking entering into with him to indemnify the owner of the insured property in case a loss occurs." That can be nothing less than insurance itself, and all that reinsurance can mean, under the definition as given it by the court is, as the court says, "the reinsurance company takes the place of the first insurer, assumes his liabilities and is bound in any event to answer for the loss either to him or to the owner of the property," and it is therefore insurance. Reinsurance is a form of insurance, as stated by Joyce.

The supreme court of Iowa has held that it is competent for an insurance company to effect reinsurance upon its risks in Iowa.

Davenport Fire Ins. Co. vs. Moore, 50 Iowa, 619.

Our statute also recognizes the right of reinsurance.

Code supplement 1913, sec. 1821-n, provides as follows:

> No company organized under the laws of this state to do the business of life insurance, either on the stock, mutual, stipulated premium or assessment plan, shall consolidate with any other company or reinsure its risks, or any part thereof, with any other company, except as hereinafter provided. Provided that nothing contained in this chapter, shall prevent any company as defined in section one of this act from reinsuring a fractional part of any single risk.

If a corporation has a right to issue a policy of insurance originally under our statute, then under the definition of reinsurance, there can be no question but what a company would have a right to organize for the purpose of reinsuring that particular risk, because reinsurance is a form of insurance. It is a part of the whole, and if there is the right existing under the statute to organize a company to do the whole of a business, then there must of necessity exist under and by virtue of that statute to organize a company to do a part of the whole.

We therefore hold that there is the right under the Iowa law to organize a reinsurance company to reinsure risks of any insurance company which may be lawfully organized under our statute.

H. M. HAVNER,
Attorney General.

FRATERNAL BENEFIT SOCIETIES.

Fraternal benefit societies cannot legally issue twenty pay life certificates in Iowa.

October 28, 1918.

Hon. J. F. Taake,
Commissioner of Insurance, State House.

Dear Sir: We have your letter of recent date requesting an opinion from this department as to the power of a fraternal beneficiary society under the laws of Iowa to issue a certificate known in insurance circles as a twenty-pay life.

Whatever powers fraternal beneficiary societies in Iowa possess are derived exclusively from the provisions of chapter nine, title nine, of the code of 1897, and amendments thereof. The

provisions of said chapter material to the question in issue will be found in section 1822 of the supplement to the code, 1913, and sections 1823 and 1825 of the code of 1897. Those sections provide as follows:

> Section 1822: A fraternal beneficiary association is hereby declared to be a corporation, society or voluntary association formed or organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit, and having a lodge system, with ritualistic forms of work and representative form of government. Such association shall make provision for the payment of benefits in case of death, and may make provision for the payment of benefits in case of sickness, temporary or permanent physical disability, either as a result of disease, accident or old age, provided the period of life at which payment of physical disability benefits on account of old age commences shall not be under seventy years, subject to the compliance by members with its constitution and laws. Provided that beneficiary societies or associations, whose membership is confined to the members of any one religious denomination, shall only be required to have a branch system and a representative form of government. Such beneficiary societies or associations shall be governed by the provisions of chapter nine, title nine, of the code, and shall be exempt from the provisions of the statutes of this state, relating to life insurance companies, to the same extent as fraternal beneficiary associations. But the provisions of this chapter shall not be construed to include fraternal orders which only provide for sick and funeral benefits.
>
> Section 1823: The fund from which the payment of such benefits shall be made and the expenses of such association defrayed shall be derived from beneficiary calls, assessments or dues collected from its members.
>
> Section 1825: Such associations shall be governed by this chapter, and shall be exempt from the provisions of the statutes of this state relating to life insurance companies, except as hereinafter provided.

Thus, it will be seen from the statutory provisions above quoted that the theory on which such societies are organzied and conducted is that they shall be purely mutual in character, without any thought of profit, and that the funds from which payment of benefits are to be made and the expenses of the society defrayed shall be derived exclusively from beneficiary calls, assessments and dues collected from its members.

But, before entering into a discussion of the specific question in issue, it will be profitable to consider, in a cursory manner, the history of legislation in this state relating to the subject of insurance, as well as to the holding of the courts in this and other states with reference to the class of business in which associations organized on the assessment plan can legally engage. A careful study of the chapters of the statute relating to insurance discloses a fixed determination on the part of the legislature to draw and maintain a clear distinction between the various classes of insurance. Thus: chapter four deals with insurance other than life; chapter five applies to mutual fire, tornado and hail-storm associations; chapter six to life insurance on the stipulated premium and assessment plan; and chapter nine governs and controls fraternal beneficiary societies. So that, as one reads the various chapters he finds one feature standing out prominently, and that is the purpose of the legislature to keep the different classes of insurance and the laws applicable thereto separate and distinct.

Our legislature has expressly declared:

> No company shall be organized to do business upon both stock and mutual plans; nor shall a company organized as a stock company do business upon the plan of a mutual company; nor shall a company organized upon the mutual plan to do business or take risks upon the stock plan.
>
> Section 1690 of the Code.

Courts have repeatedly held that insurance companies operating on the mutual plan cannot operate on the stock plan. Our supreme court, in passing on this question, held that a mutual company cannot issue policies upon the stock plan, and such policies, if issued, are illegal and void.

> Smith v. Sherman, 113 Iowa 601.

In Smith v. Sherman, supra, it is said at page 609:

> The policy issued to the plaintiff was upon the stock plan, and was clearly illegal and absolutely void because in violation of the statute (Section 1159, Code 1873).

Section 1159 of the code of 1873 was substantially the same as section 1690 of the code of 1897.

Policies written for cash premiums are policies written upon the stock plan.

Corey v. Sherman, 96 Iowa 114.

A company is not transacting business as an assessment company, but as a regular old line company, when it issues a policy for a fixed sum and the payment thereof is in no way dependent upon the collection of assessments upon persons holding similar policies, but in consideration of a fixed premium to be paid at stated intervals, based upon the mortality experience of life insurance companies.

Aloe v. Fidelity Mutual Life Assn. 164 Mo. 675.

Hayden v. Franklin Ins. Co., 135 Fed. 285.

Fraternal beneficiary societies have no power to issue endowment policies.

Rockhold v. Canton Masonic Mutual Benefit Society, 129 Ill. 440.

Such societies have no authority to agree to pay a member a specific sum upon his arriving at a specific age.

McCartney v. Supreme Tent, 132 Ill. App. 15.

If a state statute prohibits the issuing of a certain kind of a contract, then it is illegal to issue such a contract, and the same would be void. So that, not only has the legislature drawn a clear line of distinction between the class of insurance authorized to be written by companies organized under the various chapters of the code, but the courts have also recognized the doctrine that insurance companies organized on one plan cannot operate upon another plan.

The question as to whether fraternal beneficiary societies may legally issue a twenty-pay life certificate has been raised and decided adversely to such societies by at least one court of last resort. This identical question was passed on by the supreme court of Missouri, in the case of State ex rel Supreme Lodge K. of P. v. Vandiver, reported in 213 Mo. at page 187. Justice Valliant, writing the opinion for the court, in denying to fraternal beneficiary societies this power, says at page 196:

> The question for our consideration is: Is it lawful for a fraternal beneficiary society to issue policies of life insur-

ance of the kind above mentioned? * * * If fraternal societies have authority to issue twenty-year paid-up policies and policies non-forfeitable, there is no reason why they may not issue any kind of life insurance policies that a regular life insurance company may issue, and, if so, then they are in the arena of life insurance as competitors of the old-line companies with none of the restrictions that come from supervision of the Insurance Department and investigation of their affairs, none of the deposits that the law requires of the old-line companies for security for policyholders, and no obligations to pay the tax of two per cent per annum on premiums. A statute conferring such authority would not only be vicious class legislation, but it would sanction a course of business obnoxious to the public policy of the state in reference to life insurance, as set forth in our general statutes on that subject.

The superintendent of insurance was right in refusing to grant relator a license under the facts stated in the petition.

The law in Missouri under which fraternal beneficiary societies organized and conducted their business was, at the time the court passed on this question in the Vandiver case, supra, substantially the same as chapter nine, title nine, of the code of 1897, as amended by the 34th General Assembly.

It is, therefore, the opinion of this department that fraternal beneficiary societies in this state cannot issue life certificates on the twenty pay plan.

H. M. HAVNER,
Attorney General.

OPINIONS RELATING TO AUTOMOBILES.

REGISTRATION OF AUTOMOBILE UPON REMOVAL FROM ANOTHER STATE.

Registration of automobiles is required in this state upon removal from another state.

June 8, 1917.

T. M. Rasmussen,
County Attorney, Exira, Iowa.

Dear Sir: I am in receipt of your favor of May 31st with inquiry concerning whether a person who has paid a license fee in the state of Nebraska upon his automobile for the year 1917, may

operate that machine upon his Nebraska number in this state for the same year after he becomes a resident of this state.

It is the holding of this department when a man becomes a resident of this state he must take out a license in this state for his machine the same as any other resident of the state.

The provisions of section 1571-m16 only apply to non-residents of the state, and there are no exceptions other than non-residents.

In your letter you suggest that this would be double taxation, but in this state the license upon an automobile is not a tax; it is a license.

Section 1571-m23 provides for the registration of all motor machines. Section 1571-m25 provides for the registration of the licenses, and provides for the revocation of the license further that "no new certificate shall be issued to such person within six months after the date of such conviction, nor at any time thereafter except in the discretion of the secretary of state."

We therefore say that under the provisions of our statute, it is a license and not a tax, and it is therefore necessary for the person to take out a license under the laws of Iowa.

H. M. HAVNER,
Attorney General.

APPORTIONMENT OF MOTOR VEHICLE FUND.

In making apportionment of the motor vehicle fund the county auditor should always include township road systems.

May 31, 1917.

H. E. Narey,
County Attorney, Spirit Lake, Iowa.

Dear Sir: Your request of the 21st inst., for the opinion of this department on the following proposition has been referred to me for attention:

> "A question has arisen in this county as to what roads are considered by the county auditor in apportioning the motor vehicle fund, as provided in section 1571-m32 of 1915 supplement. Does the auditor consider just county roads or both county highway and township roads? As this statute

is subject to two interpretations would appreciate it if you would advise as to your opinion of the matter."

Some parts of the section referred to, considered alone, are not as clear as they might be, but taken in connection with other sections bearing on the subject I think the intent and meaning is free from doubt.

The section provides, first:

"Ninety per cent of all moneys paid into the state treasury pursuant to the provisions of this act shall be apportioned among the several counties in the same ratio as the number of townships in the several counties bear to the total number of townships in the state."

When this apportionment is made the state treasurer shall remit to the county treasurers of the several counties the amount so apportioned to each.

Second:

"The county treasurer shall pay into the treasury of the cities and incorporated towns in such county a portion of said motor vehicle fund to be determined as follows: Each city or incorporated town shall receive a share to be determined by the ratio of miles of unpaved streets within the limits of said city or incorporated town to the total number of miles of public roads and unpaved streets within the county, provided however, that in no case shall the aggregate amount apportioned to the various cities and towns exceed ten per cent of the total amount apportioned to the county.

Third:

"And such apportionment to cities and towns shall be expended by them only for the purpose of improving the unpaved streets and roads connecting directly with the county or township road systems, or by order of the city or town council or commission the apportionment may be transferred to the county road cash fund and be expended on the county road system."

Fourth:

"For the purpose of making such apportionment the city or town clerk shall file in the office of the county treasurer ten days before the date of the apportionment from the state treasurer a certified statement of the number of miles of unpaved streets within such city or town, and the county auditor shall make a like statement of the number of miles of highway in such county outside the limits of cities and incorporated towns."

Fifth:

> "The total amount of funds so received by the county treasurer, less the amount apportioned to the various cities and towns, as herein provided, shall constitute the county motor vehicle road fund and shall be expended for the following purposes only: the crowning, drainage, dragging or grading of public highways outside the limits of cities and towns, and for the building of permanent culverts on such highways."

The foregoing provisions of the statute provide for the apportionment of ninety per cent of the motor vehicle registration fees received by the state treasurer among the several counties of the state, according to the number of townships in the respective counties, and for an apportionment among certain subdivisions of the several counties according to the number of miles of unpaved streets in cities and incorporated towns and the number of miles of "public roads and unpaved streets," as used in one connection, and "public highways," as used in another, outside the corporate limits of such cities and towns.

Paragraph 5 of section 48 of the code, construing words and phrases, is as follows:

> "The words 'highway' and 'road' include public bridges, and may be held equivalent to the words 'county way,' 'county road,' 'common road' and 'state road.' "

And in section 1511, we find the following:

> "The term 'road' as used in this code means any public highway, unless otherwise specified."

And again in section 1527-s3 of the supplemental supplement this language is used:

> "The highways now designated as county roads by the plans and records now on file in the county auditor's office of each county and all county highways from time to time added thereto, shall be known as the county road system. All other highways in the county shall be known as the township road system."

We have, as the law now stands, the "county road system" and the "township road system," but the roads included in each system may properly be termed "public roads" or "public highways." They are none the less *public* because they are included in the township road system than they would be if included in the county road system, and, as sustaining the posi-

tion that all the roads and highways embraced in the two road systems should be considered in apportioning that part of the motor vehicle fund to be used outside the cities and towns, attention is especially called to the part of the statute which requires that the portion awarded to cities and towns shall be expended by them only for the purpose of improving the unpaved streets and roads connecting directly with the county or township road systems.

From the foregoing provisions of the several statutes cited it is clearly apparent, I think, that all the roads, or highways, included in and which constitute parts of the county road system and the township road system should be considered in making the apportionment of the county motor vehicle road fund.

J. W. SANDUSKY,
Assistant Attorney General.

MOTOR VEHICLE FUND.

Failure of clerk to file with county treasurer ten days before date of apportionments, a certified statement of number of miles of unpaved streets, does not defeat right to proportion of motor vehicle fund if statement is filed before apportionment is made by treasurer.

January 31, 1917.

C. R. Stafford,
County Attorney, Muscatine, Iowa.

Dear Sir: We have your letter of the 27th inst., asking this department for an opinion on the following facts:

> "Where the city or town clerk fails to file in the office of the county treasurer ten days before the date of apportionment from the state treasurer, a certified statement of the number of miles of unpaved streets within such city or town, as provided by section 1571-m32 of the 1915 supplemental supplement to the code; would the county treasurer be allowed to pay such city its proper proportion of the motor vehicle fund, provided, such certified statement was filed at a later date?"

The section referred to is as follows:

> "Ninety per cent of all moneys paid into the state treasury pursuant to the provisions of this act shall be apportioned among the several counties 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 first day of April and the first day of August of each year. When such apportionment has been made the state treasurer shall forthwith remit to the state the amount of money so apportioned to the respective counties, and the county treasurer of each county, immediately upon receipt of such money shall charge himself therewith and forthwith give notice to the county auditor of the amount of money so received. The county treasurer shall pay into the treasury of the cities and incorporated towns in such county a portion of said motor vehicle fund to be determined as follows: Each city or incorporated town shall receive a share to be determined by the ratio of miles of unpaved streets within the limits of said city or incorporated town to the total number of miles of public roads and unpaved streets within the county; provided, however, that in no case shall the aggregate amount apportioned to the various cities and towns exceed ten per cent of the total amount apportioned to the county. And such apportionment to cities and towns shall be expended by them only for the purpose of improving the unpaved streets and roads connecting directly with the county or township road systems, or by order of the city or town council or commission the apportionment may be transferred to the county road cash fund and be expended on the county road system. For the purpose of making such apportionment the city or town clerk shall file in the office of the county treasurer ten days before the date of the apportionment from the state treasurer a certified statement of the number of miles of unpaved streets within such city or town. * * *"

The purpose of that part of the statute which makes it the duty of the city clerk to file with the county treasurer, ten days before the receipt of the apportionment of the tax due his county from the state treasurer, a certified statement of the number of miles of unpaved streets within such city, is to enable the county treasurer to determine the amount of the tax that should be apportioned to such city, and we are clearly of the opinion that the failure of the city clerk to perform such duty cannot defeat the city's right to its proportion of such fund, especially if the statement was subsequently—and before the apportionment was made by the county treasurer,—filed with him.

The object and purpose was attained and no injury or prejudice resulted. See Taylor vs. McFadden, 84 Iowa 262.

J. W. SANDUSKY,
Assistant Attorney General.

RIGHTS UNDER DEALER'S LICENSE.

A dealer who owns only one auto cannot operate it for his private use while displaying a dealer's license only.

July 22, 1918.

Hugh Stuart, County Attorney, Dubuque, Iowa.

Dear Sir: Your letter of the 15th inst., addressed to Attorney General Havner, has been referred to me for reply.

You ask whether the following provision of Section 1571-m14, Supplement of 1915, would prohibit a dealer who owns only one auto, from operating it for his private use while displaying a dealer's license only:

> Nothing in this section shall be construed to apply to a motor vehicle operated by a manufacturer or dealer for private use or for hire, which said motor vehicle or vehicles shall be individually registered as provided, in sections seven and and eight of this act, but no dealer or manufacturer shall be required to keep more than one car registered for his private use.

While the Supreme Court has not had occasion to construe that particular section of the statute, yet its provisions are clear and unambiguous. When the legislature placed automobiles into two classes for the purpose of registration, it had a definite purpose in view, and that purpose was to relieve manufacturers and dealers in automobiles from the same burden imposed upon those who owned cars solely for pleasure. So that, when an automobile is being operated on the public highway, whether it is operated as a dealer's car under the statute, or is his individual car for his private use, it is a question of fact to be determined in each individual case.

It occurs to us, however, that reason should be exercised in all such cases, and where a dealer owns but one car, you should feel that he is violating the law before bringing charges against him. If he is using the car for his private use, then there can be no doubt that he is violating Section 1571-m14, and to avoid the uncertainty of a prosecution it would be to his best interest to have his car individually registered, and in the event of a sale, the difference of the registration fee could be easily adjusted.

W. R. C. KENDRICK,
Assistant Attorney General.

REGISTRATION OF MOTOR VEHICLES.

Registration of motor vehicles should be refused where the records show that the registration fee for any previous year is unpaid.

October 2, 1917.

C. O. Gunderson, County Attorney, Northwood, Iowa.

Dear Sir: Your favor of the 29th ult., addressed to the Attorney General, has been referred to me for reply.

You say:

> A person purchases a used car in 1915 on which the fee was not paid for 1913 and 1914, and he fails to pay the fee until he makes application for registration in 1917. Can the secretary of state require and should I, as county attorney, collect from the present owner of the car the delinquent fees for 1913 and 1914 during which period he did not own the car?

Section 1571-m6, Supplement of 1913, provides:

> Registration shall be renewed annually in the same manner and upon the payment of the annual fee as provided in section for registration, to take effect on the first day of January in each year; provided, that the secretary of state shall withhold the re-registration of any motor vehicle the owner of which shall have failed to register the same for any previous period or periods for which it appears that registration should have been made, until the fee for such previous period or periods shall be paid. 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 1571-m1, Supplement of 1913, defines the term "owner" to be "Any person, firm, association or corporation renting a motor vehicle, or having the exclusive use thereof * * * for a period greater than thirty days."

It seems to us that the intention of the legislature when enacting the foregoing provisions was to make all unpaid registrations first follow the car, rather than follow the various owners of the car during its years of existence. That intention then in viewing the term "owner," as used in Sections 1571-m1 and 1571-m6, Supplement of 1913, would have a broader meaning than merely the "present owner," that is, the owner at the time registration is applied for and withheld by the secretary of state.

The law relating to registration of motor vehicles as found in Chapter 2 B, Supplement of 1913, and amendments thereto, being

penal in nature would also prohibit reading anything into said sections and require a strict construction.

We are, therefore, of the opinion that the above sections compel the secretary of state to withhold the re-registration of any motor vehicle when the records in his office show that the registration fee has not been paid for any previous period, and that the person applying for re-registration must pay up all back fees, regardless whether or not such applicant owned the car at that time.

As to the lien on the car for unpaid registration fees, such lien would, of course, attach from and after January 1st, 1916, only.

W. R. C. KENDRICK,
Assistant Attorney General.

FEE OF COUNTY ATTORNEY FOR COLLECTING AUTOMOBILE LICENSE FEES.

County attorney not entitled to commission in collecting automobile transfer fees. Sec. 1571-m, supplement 1915, applies only to license fees. Sec. 1571-m9 does not provide for county attorneys collecting transfer fees.

July 24, 1917.

Guy E. Mack, County Attorney, Storm Lake, Iowa.

Dear Sir: Your favor of the 18th inst., addressed to the Attorney General relative to a construction of Section 1571-m7 of the 1915 Supplement, regarding commissions due the County Attorney for collection of delinquent automobile license tax has been referred to me for answer.

As we understand it, it is your claim that by virtue of this section you are entitled to a commission of ten per cent upon the collection of the transfer fee.

You will notice that said section, after providing for the amount of license tax which should be paid upon automobiles further provides:

> "It shall be the duty of the county attorney to collect these fees, including all penalties provided by law, the county attorney to receive ten per cent of the fees and penalties thus collected as his full compensation in the matter."

It is further provided by said section:

> "Immediately upon collecting any license fee, the said county attorney shall execute to the party paying same a receipt

> therefor, showing name of person paying the amount, showing the amount thereof and a general description of the car upon which paid, giving make of car and factory number and the persons so paying same may forward such receipt to the secretary of state with his application for registration and the secretary of state shall thereupon register said car, charging the county attorney so issuing said receipt, with the amount thereof, proper credit to be made when remittance is made by said county attorney."

You will observe that this section deals wholly with the license fee and makes no reference whatever to the transfer fee.

Section 1571-m9, Supplement of 1913, has reference to the transfer fee and is as follows:

> "Upon the sale or transfer of a motor vehicle registered in accordance with the provisions of this act, the vendor shall immediately give notice thereof with his name, postoffice address and registration number and the name and address of the vendee to the secretary of state, and the vendee shall, within ten days after the date of such sale or transfer, notify the secretary of state thereof, upon a blank furnished by him for that purpose, stating the name, postoffice address and business of the previous owner, the number under which such motor vehicle is registered and the name, postoffice address, with said number, if in a city, including county and business address of the vendee. Upon filing such statement duly verified, such vendee shall pay to the secretary of state a fee of $1.00 and upon receipt of such statement and fee the secretary of state shall file such statement in his office and note upon the registration book or index such change in ownership."

You will observe that there is nothing in this section imposing any duty or conferring any authority upon the county attorney. There is no provision by which this fee shall be paid to the county attorney nor that he shall receipt therefor.

So far as we have been able to find, the only section which imposes any duty or confers any authority upon the county attorney, with reference to the collection of fees, is Section 1571-m7 of the 1915 Supplement, and has reference only to license taxes and not to transfer fees.

You will observe also that the section providing for transfer fees assumes that the car has been previosuly registered, which could not be unless the license tax had been paid.

It is therefore the opinion of this department that Section 1571-m7 of the 1915 Supplement has reference only to license taxes and that the county attorney is not entitled to a commission on the transfer fee thereunder.

It is also the opinion of this department that under Section 1571-m9, Supplement of 1913, that no duty is imposed upon the county attorney to collect such transfer fee and no authority given him to receipt therefor, and he is not therefore entitled to any commission thereon.

H. M. HAVNER,
Attorney General.

OPINIONS RELATING TO CHILD WELFARE.

DEPENDENT AND NEGLECTED CHILDREN.

The court ordering a dependent or neglected child committed to a state institution has no further authority.

February 26, 1917.

W. J. Dixon, Chairman Board of Control.

Dear Sir: We have your request for the opinion of this department as to your authority and duty where courts in committing children to the Soldiers' Orphans' Home at Davenport, include in or attach to the order of commitment a right or reservation to make subsequent and further orders in relation to the child committed, and which, in the judgment of the board of control, does and may seriously impair the carrying out of the plans and regulations adopted for the care and custody of the children committed to the institution and the management thereof.

At this time we will not attempt to discuss all the features of this case or set out the reasons upon which we base the conclusions arrived at.

Section 254-a 20 of 1913 Supplement to the Code, confers upon juvenile courts the authority to commit dependent or neglected children to a suitable state institution, of which the Soldiers' Orphans' Home at Davenport is one, and when so committed they become

wards of the state and subject to placement and contract by the superintendent of the institution, with the written approval of the board of control, as provided in Chapter 6, Title 13 of said Supplement, and we are of the opinion that the court ordering the commitment of a dependent or neglected child to such home has no authority to retain jurisdiction of the cause for future or further orders therein, or to attack to or include in the order of commitment the reservation or right to make further or subsequent orders in relation to the child committed. In other words, that the law conferring jurisdiction upon the court in these matters and authorizing the commitment of dependent or neglected children to the home at Davenport does not contemplate that the court shall retain jurisdiction of the cause for any purpose whatever, but, instead, that the court's whole duty has been performed when the child has been placed in the custody of the home, and that the superintendent, under your advice and instructions, would be justified in refusing to accept or receive into the institution any child sought to be committed thereto by a mittimus containing any such reservation. Nothing herein, however, should be construed to prevent the court, ordering the commitment, or any other court having jurisdiction, to release such child to those who would be able to establish their right to its custody upon the institution of a new and independent proceeding by habeas corpus, when the situation or conditions requiring the child's commitment have changed and this right would exist after as well as before the child has been placed under articles of agreement.

J. W. SANDUSKY,
Assistant Attorney General.

TREATMENT OF DEFORMED CHILDREN AT STATE HOSPITAL.

When deformed children are committed to the state hospital by order of court, commitment is not terminated by removal of parents from this state.

January 26, 1917.

W. T. Graham, Superintendent University Hospital, Iowa City, Ia.

Dear Sir: Mr. A. H. Davison, secretary of the executive council, has referred to this department your letter of the 18th instant wherein you request an opinion on the following facts:

> In the case of a patient under treatment in the Orthopedic Department, committed under the Perkins act, the parents removing from the state, would treatment have to be terminated at once unless the parents would express a willingness to pay?

The so-called Perkins Act is an amendment to the juvenile court statutes and is embraced in Sections 254-b to 254-l, Supplemental Supplement to the Code, 1915. Sections 254-b, 254-c, the first paragraph of 254-d, 254-e, 254-f and 254-g are as follows:

> Sec. 254-b. That any district or superior court of the state, or any judge thereof, sitting or acting as a juvenile court, as provided by law, may on his own motion, or on complaint filed by any probation officer, school teacher or officer, superintendent of the poor, or physician authorized to practice his profession in the state of Iowa, alleging that the child named therein is under sixteen years of age and is afflicted with some deformity or suffering from some malady that can probably be remedied, and that the parents or other persons legally chargeable with the support of such child are unable to provide means for the surgical and medical treatment and hospital care of such child, shall appoint some physician who shall personally examine said child with respect to its malady or deformation. Such physician shall make a written report to the court or judge giving such history of the case as will be likely to aid the medical or surgical treatment of such deformity or malady and describing the same, all in detail, and stating whether or not in his opinion the same can probably be remedied. Such report shall be made within such time as may be fixed by the court, and upon blanks to be furnished as hereinafter provided. The court or judge may also appoint some suitable person to investigate and report on the other matters charged in said complaint.
>
> Sec. 254-c. Upon the filing of such report or reports, the court or judge shall fix a day for the hearing upon the complaint and shall cause the parent or parents, guardian or other person having the legal custody of said child to be served with a notice of the hearing, and shall also notify the county attorney, who shall appear and conduct the proceedings, and upon the hearing of such complaint evidence may be introduced. And if the court or judge finds that the said child is suffering from a deformity or malady which can probably be remedied by medical or surgical treatment and hospital care, and that the parent or parents, guardian or other person legally chargeable with his support is unable to pay the expenses thereof, the court or judge, with the consent of the parent or parents, guardian or other person having the legal custody of such child, shall enter an order directing that the said child shall be taken or sent to the hospital of the medical college of the state university of Iowa for free medical and surgical treatment and hospital care.

Sec. 254-d. It shall be the duty of the person in charge of the hospital of the college of medicine of the state university, or other person designated by the authorities in control of said medical college, upon such child being received into the hospital to provide for such child if available, a cot or bed, or room in the hospital, and such person shall also designate the clinic of the college of medicine at the state university hospital to which the patient shall be assigned for treatment of the deformity or malady in each particular case. * * * *.

Sec. 254-e. No compensation shall be charged by or allowed to the physician or surgeon or nurse who shall treat such patient other than the compensation received from the university.

Sec. 254-f. The superintendent of the university hospital, or other person designated by the authorities in control of the university college of medicine shall keep a corrct account of the medicine, treatment, nursing and maintenance furnished to said patient, and shall set forth therein the actual, reasonable and necessary cost thereof, and shall make and file with the secretary of the executive council of the state of Iowa an itemized sworn statement, as far as possible, of the expense so incurred at said hospital other than the free medical and surgical treatment and nursing, as hereinbefore provided, and said statement shall be made in conformity with rules prescribed by the executive council of the state of Iowa.

Sec. 254-g. The secretary of the executive council of the state of Iowa shall present the said statement to the executive council which, upon being satisfied that the same is correct and reasonable, shall approve the same, and shall direct that warrants be drawn by the auditor of state upon the treasurer of state for the amount of such bills as are allowed from time to time, and the said warrants shall be forwarded as drawn by the auditor of state to the treasurer of the state university of Iowa, and the same shall be by him placed to the credit of the university funds which are set aside for the support of the university hospital, and the treasurer of state shall pay said warrants from the general funds of the state not otherwise appropriated.

The evident purpose and intent of this act is to provide free medical and surgical treatment and hospital care at the hospital at the state university for indigent children afflicted with deformity or suffering with some malady who are committed by the court for such purpose to such institution.

It is true that, as a general proposition, the residence or domicile of a parent fixes that of their minor children but, in this

instance, the child is committed to the institution by the order of a competent court and the temporary, or even permanent, removal of the parents from the state cannot affect the order of commitment, and we are of the opinion that in the case referred to the removal of the parents from the state cannot, of itself, terminate the time fixed in the commitment and that the treatment required should be continued the same as though such removal had not taken place.

J. W. SANDUSKY,
Assistant Attorney General.

CHILD LABOR.

A foreman of a plant, who is also a part owner, may employ his own child under fourteen years of age.

August 2, 1917.

A. L. Urick, Commissioner of Labor, State House.

Dear Sir: I have your favor of the 24th ult., asking for an opinion upon the following questions:

1. Under this provision, can a foreman of a plant who is a stockholder or small part owner employ his own minor child when under fourteen years of age?

2. If so, can a foreman who is a stockholder or small part owner where he is one of a number of foremen working under a manager or superintendent, employ his own child when under fourteen years of age?

An opinion upon the foregoing questions is asked in connection with the last paragrah of Section 2477-a, Supplement of 1915, which reads as follows:

> Provided that nothing in this section shall be construed as prohibiting a child from working in any of the above establishments or occupations when such are owned or operated by their own parents.

Bouvier's Law Dictionary defines "owner" to be "one who has dominion over a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases." Bouvier also says that "the word 'owner,' when used alone, imports an absolute owner."

It has also been held that an owner is one who has a legal right or exclusive title to anything, and the word "owner" is synonymous with the word "proprietor."

Turner vs. Cross, Tex. 218.

Corporate property is owned by the corporation, and not by the stockholders. Stockholders own the stock in the corporation, and are entitled to dividends on their stock, if the property of the corporation is intelligently and prudently handled so as to produce dividends; but the property itself is owned by the corporation.

The term "operate" is used synonymously with the word "control." For instance, a petition in an action against a railroad for personal injuries alleged that the railroad company "used and operated" a certain turn table, and it was there held that the word "operated" was equivalent to using the word "control" of said turn table.

Nagel vs. Missouri Pacific Ry. Co., 75 Mo. 653.

It was evidently the intention of the legislature, when enacting the child labor law, to protect the children of tender age and prohibit their employment in certain industries, classed more or less dangerous to their health and limb, as well as injurious to their morals. And with that thought in view, the legislature evidently concluded that the health and morality of the child under fourteen years of age would be more or less protected when the owner or operator of the establishment, wherein the child was employed, was the parent of said child. For that reason, the legislature must have inserted the exception found in the concluding paragraph of Section 2477-a, supra. So that unless the parent of the child employed in a given business or industry is also the owner or operator of said enterprise the foregoing exception does not apply.

However, it is fair to assume that the legislature did not intend to limit that ownership to a sole ownership; but that if such ownership was of such a character as to give the parent a voice in the policy and management of said business or industry, and said parent actually held a supervisory position in the operation of said plant or business, such as general manager or superintendent of large concerns, or foreman of small ones, so that he could watch over his child and furnish him or her more protection than the child would ordinarily receive from an absolute stranger, then and in that event, such ownership comes within the exception aforesaid.

Therefore, applying the foregoing rules, decisions, and reasonings to your questions, the natural conclusion would be that the foreman of a plant, who is also a stockholder in the corporation operating said plant, would not be considered an owner or operator within the meaning of Section 2477-a, supra, but that a foreman who is also a small part owner of said plant, would properly be considered an owner or operator within the meaning of said statute.

As to the second question, the facts stated therein would not bring the foreman within the exception of the statute and your second question must therefore be answered in the negative.

W. R. C. KENDRICK,
Assistant Attorney General.

EMPLOYMENT OF MINORS.

Employment of minors as carrier boys discussed.

March 1, 1917.

W. H. Knott, Circulation Manager, Clinton, Iowa.

Dear Sir: Replying to your esteemed favor of recent date, asking for an opinion from this department relating to the matter of carrier boys in Clinton and the Iowa statutes regulating the employment of minors as such carriers, beg leave to advise as follows:

Under the Iowa statutes no boy under eleven years of age, nor girl under eighteen years of age, except in exceptional cases and upon permit by the superintendent of schools, or person authorized by him, upon sufficient showing made by a judge of the superior or municipal court, shall be employed in connection with street occupations such as a distribution or sale of newspapers in cities of ten thousand in population or over.

Further, no boy between eleven and sixteen years of age shall be so employed unless he complies with all the requirements for the issuance of such permits, except the filing of an employer's agreement, and, provided further, that the school record required shall certify only that the boy is regularly attending school and that the work in which he wishes to engage will not interfere with his progress at school. Upon complying with the requirements regarding permits, boys of the above age can be employed between

4:00 a. m. and 7:30 p. m. on school days when school is not in session, and during the summer vacation until the hour of 8:30 p. m. (Sec. 2477-a1 Supplemental Supplement to the Code, 1915.)

A work permit shall be issued only by the superintendent of schools or by a person authorized by him in writing, or, where there is no superintendent of schools, by a person authorized in writing by the local school board in the community where such child resides, upon the application of the parent, guardian or custodian of the child desiring such permit (Sec. 2477-d Supplemental Supplement to the Code, 1915.)

No permit shall be issued, except as hereinbefore mentioned, until the person authorized to issue work permits has received, examined, approved and filed the following papers, duly executed, namely:

(1) Agreement by employer to give the child employment and describing the character of work.

(2) School record of the child.

(3) Certificate of medical inspector of schools or physician showing physical examination.

(4) Evidence showing said child to be of sufficient age. (Sec. 2477-d Supplemental Supplement 1915.)

A duplicate of every work permit shall be filed with the commissioner of labor between the first and tenth of the month following the month in which it is issued.

We are, therefore, of the opinion that no boy under eleven and no girl under eighteen years of age can legally be employed as carriers of newspapers upon the public streets of a city in Iowa of a population of ten thousand and over, except in extraordinary cases; and then, only upon permission granted by the superintendent of schools in the city where such employment is desired, after sufficient showing has been made by a judge of either a superior or municipal court. Further, that no boy between the ages of eleven and sixteen years can be legally so employed, except upon permit, as above set forth, being first obtained and certificate thereof duly filed with the commissioner of labor.

W. R. C. KENDRICK,
Assistant Attorney General.

OPINIONS RELATING TO COUNTY OFFICERS.

QUALIFICATION FOR MEMBER OF BOARD OF SUPERVISORS.

The matter of the residence of a member of the board of supervisors as affecting his qualification for holding office discussed and residence defined.

January 20, 1917.

Hugh Mossman, County Attorney, Vinton, Iowa.

Dear Sir: Replying to your esteemed inquiry of the 8th instant, relative to the D. H. Stickney matter, beg to advise that from the facts stated in your letter, it is the opinion of this department that Mr. Stickney was legally entitled to qualify as a member of the board of supervisors of your county at the time he attempted to qualify, in January 1917.

Section 411, Supplement to the Code 1913, specifically provides that no member of the board of supervisors shall be elected who is a resident of the same township with either of the members holding over. Therefore, the primary question determining the qualification of Mr. Stickney in this case is that of residence. To constitute a residence, as employed in the election statutes, there must be not only the fact of abode, but also an intent to make it a permanent home. It occurs to us that the true rule in determining a person's residence is as laid down in State vs. Minnick, 15 Iowa 123. The court, at page 126, says:

> A man may actually stay and sojourn in a township for six (6) months and still not be a resident of such township, and he may be a resident when he has not sojourned a week. It is the intention of the party that is the rule. It must be a residence in good faith. A voter may come into a township and remain there ten (10) days or longer, for the sole purpose of voting, with no intention of remaining, and yet his residence is not changed. And then he may remove into such township an hour before he offers his vote, and if such removal is bona fide he is entitled to vote. * * * A mere present intention of removing from the place where a person may reside, does not change such residence; but to come to a place with no intention of remaining, with the purpose of returning as soon as some temporary object is accomplished, does not fix the residence. Such a person is a temporary sojourner and not a resident within the meaning of our election laws.

A case which we believe to be squarely in point with the case at bar, is the case of Robinson vs. Charleton, 104 Iowa 296. In that case the court says:

> The evidence shows that the plaintiffs moved to Humboldt for the purpose of educating their children, and intended, as soon as this was accomplished, to return to the farm. The stock was sold, but the implements were retained for some time, and finally disposed of because nothing could be obtained for their use. A harrow, corn cultivator, and plow were kept and the last repaired in the summer of 1893, with a view of using it the following spring. Robinson repeatedly refused to sell or exchange the land, giving as a reason that he expected to move on it again. He declined to rent it for more than one year, because he expected to return. The family arranged to do so in the spring of 1894, when the son was to perform the farm work, and Robinson continue in his employment as traveling salesman. No other home was purchased. Both Robinson and his wife testify to their intention of moving back to the farm, and that this was their abiding purpose from the time they went to Humboldt, in 1890, to the date of their son's death, in September, 1893, is fully established by the evidence. The testimony of alleged statements and admissions either relate to a time subsequent to the sale, or else is discredited or overcome by the weight of evidence. That Robinson talked about exchange of property with those proposing a trade, or said he was not built for farming, or stated what he considered the land worth, if true, does not establish his purpose of abandoning it, when considered in the light of the surrounding circumstances. He voted in Humboldt in 1891 and this is a very strong circumstance tending to show a permanent change of residence. He explains it, however, by saying he supposed one might vote "where he resided temporarily and got his washing done." This erroneous impression is quite common, and we cannot regard the mere fact of voting in a precinct other than that of the homestead conclusive of an intention to abandon it. The point was not decided in Painter vs. Steffen, 87 Iowa, 171, and was not regarded controlling in Conway vs. Nichols (Iowa) (71 N. W. Rep. 183). While, as a general rule, a man will be presumed to reside where he exericses the right of suffrage, this is subject to such explanations as will show the real intention of the party in removing from the former residence, whether animo revertendi.

The rule adopted in the foregoing case has been universally followed by our supreme court. See Vanderpoel vs. O'Hanlon, 53 Iowa 246; State vs. Savre, 129 Iowa 122; State vs. Van Beck, 87 Iowa 569.

While from your statement of facts we would hold that the residence was never changed, yet even if there was any impediment at the time of election, to the qualification, and that was removed between the time of his election and the time he sought to qualify, he would still be able to qualify. In support of this proposition we call your attention to the case of State vs. Van Beck, 87 Iowa 569, at page 579, where it is said:

> Disqualification relates to the time of assuming the functions of a member. * * *. If the appellee's disability was removed, as alleged, he was certainly capable of being sheriff or acting as sheriff and of holding the office of sheriff. It cannot be said in such case that he was incapable of being elected or ineligible as a candidate or ineligible to hold office.

Assuming that the facts stated in your letter are correct, D. H. Stickney was a resident of Taylor township at the time he sought to qualify as a member of the board of supervisors, and in our opinion he was entitled to qualify and serve as such member of the board of supervisors of Benton county.

H. M. HAVNER,
Attorney General.

MEMBER OF BOARD OF SUPERVISORS CANNOT BE INTERESTED IN FURNISHING SUPPLIES TO COUNTY.

Where a member of the board of supervisors is also a member of a co-partnership, such co-partnership is precluded from handling a contract for cement for construction of bridges and culverts for county work.

March 3, 1917.

Maxwell A. O'Brien, County Attorney, Oskaloosa, Iowa.

Dear Sir: Your favor of the 1st instant, addressed to the attorney general, has been referred to me for answer.

In your letter you state that a member of the board of supervisors of your county is a member of a co-partnership which has the exclusive right in that territory to handle a certain brand of cement. You also state that some months ago this co-partnership made a contract with the cement company to job their product in this district; that the board of supervisors accepted the bid of a contractor to build bridges and culverts for the county and that this contract was approved by the highway commission. You also state that the man to whom this contract was let was to furnish all the material he is to use and that he wishes to buy this particular brand of cement which is now being jobbed by the co-part-

nership of which a member of the board of supervisors is a member, and you ask whether or not the fact that the member of the board of supervisors is also a member of the co-partnership handling this cement, which this contractor wishes to use in the construction of bridges and culverts, would preclude the co-partnership from selling the cement to the contractor under Section 468-a, Supplement to the Code, 1913.

In reply we have to say that this department is of the opinion that the co-partnership of which the member of the board of supervisors is a member would not be authorized to sell this cement to the contractor. The section to which you refer expressly provides:

> 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.

It is the view of this department that, inasmuch as the board of supervisors must pass upon the work which the contractor performs for the county, he would necessarily be in a position where he must indirectly, at least, be interested in the furnishing of the cement to the contractor.

In this connection we call attention to one or two cases which have been decided by our supreme court which we believe would prohibit the member of the board of supervisors from becoming a party to the contract to which you refer. We call attention to the case of Bay vs. Davidson, 133 Iowa, 688. The defendants were the mayor and members of the town council of the town of Grand River. The defendant Binning was a merchant in the town. While he was a member of the town council, he sold and delivered, for the use of the town, certain lumber and other material in the construction and repairing of sidewalks, etc. The court held in that case that, inasmuch as the defendant was a member of the town council, he could not lawfully sell any merchandise to the town for the reason that, as a member of the town council, it was necessary for him to pass upon the bills and that it was against public policy for him to be interested in any bill which, as a member of the town council, he must pass upon and allow.

We call attention also to the case of James vs. The City of Hamburg, 156 N. W., 394. In that case the plaintiff operated a lumber yard in the city of Hamburg. McMaken & Sons Company had entered into a contract with the city of Hamburg for the construction of certain sewers. In the progress of the work it became necessary for them to procure money with which to carry out their contract. In doing so, they borrowed money from the intervenor, and, for the purpose of protecting the intervenor, made a certain assignment of certificates which they held against the city. The cashier of the intervenor bank was a member of the town council. The bank was a co-partnership. The plaintiff also received an assignment of certain certificates to him and brought an action in mandamus to compel the issuance of certificates to him. There is no question in the case of the good faith of the parties. The money was loaned by the bank to the contractor and was used by him in the construction of the sewers. The assignment to the bank was long prior to that made to the plaintiff. The court held that, inasmuch as the cashier of the intervenor bank was a member of the town council and must, as such, pass upon and approve the work of the contractor, he was interested in the contract and that, because of such interest, the assignment made to the bank of which he was a member was absolutely void. They held this upon the theory that it is against public policy for any one holding an official position, such as a member of the town council, to be interested in any contract which he must, as such officer, pass upon and approve.

The opinion is quite lengthy and well reasoned and, in our opinion, is authority for the view which we take that a member of the board of supervisors cannot be interested, directly or indirectly, in any contract of work which he must, in his official capacity, necessarily be called upon to pass upon and, inasmuch as the work of the contractor must be passed upon by the board of supervisors, we believe this case clearly holds that any such contract would be absolutely void as against public policy.

It is true that this case deals with a member of a town council, but the prohibition against a member of the town council being interested in any contract is not different from the prohibition contained in Section 468-a above referred to.

In James vs. City of Hamburg, supra, the court at page 397 says:

The intervener in the instant case had its own interests to serve in securing an approval and acceptance of the work done by McMaken & Sons Company. Baldwin was charged with the duty to serve the intervener, and to secure for it the proceeds of the contract with McMaken & Sons Company. This only could be secured by having the work of McMaken & Sons Company approved and accepted by the city. He had also a duty to the city to see to it that the work was not accepted unless it conformed strictly to the requirements of the contract, and was done in fulfillment of its terms. This duty he owed to the city and its citizens. The acceptance of this assignment created in Baldwin a double character, and invited him into a position where he might be tempted to use the opportunity to secure his own interests at the expense of the city, whose interests, as a public officer, he was, under the law, bound to serve.

Some men are big enough and strong enough to waive all personal considerations and discharge fairly and impartially a public duty, but all men are not so constituted. The law would remove from the public officers these temptations to which, owing to the weakness of human nature, men do sometimes yield.

We call attention particularly also to paragraph (1) on page 396 where the court, at some length, announce the principles to which we have called attention.

H. H. CARTER,
Assistant Attorney General.

COMPENSATION OF BOARD OF SUPERVISORS FOR COMMITTEE WORK.

A member of the board of supervisors is not entitled to compensation for committee work not assigned to him by said board.

March 29, 1917.

I. C. Hastings, County Attorney, Garner, Iowa.

Dear Sir: Your letter was received some time since but answer has been delayed on account of rush of work. You request the opinion of this department on the following facts:

Has a member of the board of supervisors a right to charge for committee work where he is consulted or interviewed at his private office about county or drainage work, and when such matter has not been referred or assigned to him by any action of the board and he has not gone upon or in any manner inspected the work of district inquired about?

Section 469 of the 1913 Supplement to the Code in part provides as follows:

> The members of the board of supervisors shall receive four dollars per day exclusive of mileage for each day actually in session, and four dollars per day, exclusive of mileage when not in session, but employed on committee service, and five cents for every mile traveled in going to and from the regular, special and adjourned sessions thereof and in going to and from the place of performing committee service.

There can be but little, if any, question about what the legislature intended by this section. The section in question limits the number of days that may be devoted to session work but, as you know, does not limit the number of days of committee work and, under the name or guise of committee work, divers things are included. Webster's definition of the word "committee" is as follows:

> One or more persons elected or appointed to whom any matter or business has been referred, either by a legislative body, or by a court, or by a collective body of men acting together.

It is our opinion that some action of the board constituting committees is essential to give the member, or members, acting that character and, in the absence of such action, the act of the member is that of an individual for which no compensation may be allowed.

The mere fact that a resident of the county would talk with a member of the board and ask him about contemplated improvements in the county or the necessity of such improvements is an ordinary occurrence and it would be strange, indeed, if a member should feel that he was entitled to charge the county for time so spent. It is true that a great part of the work is done as committee work or service but such service should follow the designation or assignment to committees of the particular work and we are of the opinion that the member, under the circumstances which you have described, was not engaged in committee service and should not be allowed compensation therfor.

As we understand your second question, the answer to the former one is, in fact, an answer to the second.

J. W. SANDUSKY,
Assistant Attorney General.

BOARD OF SUPERVISORS MUST ADVERTISE WHEN REPAIR WORK WILL COST MORE THAN $2.000.00.

The board of supervisors have no authority to erect or repair a building, the probable cost of which will exceed the sum of two thousand dollars, except upon written contract, and after properly advertising in official papers.

County funds may be deposited in any bank in the state.

November 19, 1917.

Maxwell A. O'Brien, County Attorney,
Oskaloosa, Iowa.

Dear Sir: I have your favor of the 17th inst. wherein you ask the opinion of this department on the following two propositions:

(1) It has become necessary for the court house in this county to be re-wired. The insurance companies insist that this work be done, or they will not be able to give us the same rate, but will be compelled to charge for the additional risk, which would make the insurance almost prohibitive. We figure that it will cost over $2,000.00 to have this work done.

However, if the supervisors can hire their own labor, and buy the material, neither item would amount to $2,000.00. If the job was let upon contract, of course estimates would have to be made, and the thorough survey of the property obtained before this could be done, which would cost $200.00, at least. It was our idea that it might be possible to save money by the county furnishing their own labor and buying the materials separate. This would enable them to save a considerable amount. Could this be done without advertising for bids? Kindly let me know by return mail, if possible, as this work must be cared for immediately, and the Board meets Wednesday to decide.

(2) The banks in this county have refused to cash the county warrants, although there is over $125,000.00 on deposit in them of county funds. There are other banks outside of the county that would be glad to carry this deposit, and cash these warrants at par. Would it be possible for the board to deposit this money in banks outside the county, upon requiring approved bonds, so that these warrants could be cared for?

As to the first proposition, I will call your attention to paragraph 5 of section 422 of the 1915 supplement to the code. This paragraph provides for the building and keeping in repair of the necessary buildings for the use of the county and of the courts and provides that no such building shall be erected or repaired

when the probable cost thereof shall exceed $2,000, except upon an expressly written contract and upon proposals therefor invited by advertising for four weeks in all the official papers of the county in which the work is to be done.

The language of this subdivision of the section is too clear and explicit to admit of doubt and if the probable cost of the wiring in the instance to which you refer will exceed the sum named in the statute, the work must be done by contract as therein provided.

As to the second question, section 1457 of the 1913 supplement to the code provides in part as follows:

> That a county treasurer shall be liable to a like fine for loaning out or in any manner using for private purposes state, county or other funds in his hands, but the county treasurer shall, with the approval of the board of supervisors as to place of deposit, by resolution entered of record, deposit such funds in any bank or banks within the state, to an amount fixed by such resolution, the interest at the rate of at least 2%.

Express provision is here made for the county treasurer, after a proper resolution of the board of supervisors has been entered, to deposit funds in any bank in the state, and therefore, if satisfactory arrangements cannot be made with the banking institutions of your county, it will be proper to make the arrangements with banks in another county, having in mind the usual safeguards as to proper security.

J. W. SANDUSKY,
Assistant Attorney General.

POWERS OF BOARD OF SUPERVISORS.

The board of supervisors of counties having a population not to exceed fifteen thousand, have no power to authorize the construction of a bridge, the probable cost of which will exceed fifteen thousand dollars without such construction being authorized by a vote of the county.

November 20, 1917.

J. H. Ames, Bridge Engineer, Iowa Highway Commission,
Ames, Iowa.

Dear Sir: I have your favor of the 12th inst. pertaining to the construction of a bridge in Humboldt county, and in reply will say that the section you refer to, section 424, of the code, remains unchanged and as it has stood for a half century.

It provides that the board of supervisors of any county having a population of more than 10,000 may appropriate for the construction of any one bridge a sum not exceeding $15,000, but in any county having a population exceeding 15,000, they may appropriate for such purpose not to exceed $25,000. It is true, as you suggest, that since the time the statute was enacted the manner of constructing bridges and the materials used for such purposes have greatly changed, but I will call your attention to section 423 of the 1915 supplement which was amended by the Thirty-sixth General Assembly and wherein section 424 of the code is referred to, which section, as amended, is as follows:

> The board of supervisors shall not order the erection of a court house or jail when the probable cost will exceed ten thousand dollars or a county home or other building, or bridge, except as provided in section four hundred twenty-four 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 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, if one be published in the county, and, if none be published therein, then by written notice posted in a public place in each township in the county.

From which you will observe that the restrictions and limitations embraced in section 424 are still adhered to and must govern and control, and I am therefore compelled to say to you that I know of no provision of the law which would authorize or permit the board of supervisors of Humboldt county to construct a bridge which would cost in excess of the sum limited by section 424, and without such construction being authorized by a vote of the electors of the county, and as bearing on the questions which might arise from such action of the board, I cite you to the case of Harrison county vs. Edw. F. Ogden, et al, 165 Ia. 325, wherein the action of the board in entering into a contract under like circumstances was held to be ultra vires and void.

J. W. SANDUSKY,
Assistant Attorney General.

BOARD OF SUPERVISORS MAY PROVIDE COUNTY ATTORNEY WITH TYPEWRITER, ETC.

The board of supervisors has the power to buy a typewriter and employ a stenographer to facilitate the county attorney in performing the county business, under section 422, paragraph 11 supplement of 1915.

February 2, 1918.

Henry H. Jebens, County Attorney, Scott County,
Davenport, Iowa.

Dear Sir: I am in receipt of your request for an opinion from this department on the following question:

> Is the board of supervisors authorized under the statute to buy a typewriter and hire a stenographer for the county attorney's office, and pay for the same out of the treasury of the county when the office of the county attorney is located in the court house and when all of the work done by such stenographer is done for and on behalf of the county?

Section 468 of the code, to which you call our attention, does not cover the case. This section only authorizes the purchase of

> Fuel, lights, blanks, books and stationery necessary to enable the officers to discharge the duties of their respective offices.

The items above enumerated would not cover the purchase of a typewriter nor the employment of a stenographer.

It has been suggested, however, that the volume and character of the business pertaining to and connected with the office of county attorney of Scott county has now assumed such proportions as to make the services of a stenographer indispensable, and that it should be held to be within the general powers conferred upon the board of supervisors by paragraph 11 of section 422, 1915 code supplement, and that such statute would, under such statement of facts, authorize the employment of a stenographer for the county attorney's office of that county, and the purchase of a typewriter, and would authorize the payment for the same from the county treasury. The paragraph referred to is as follows:

> To represent the respective counties, and to have the care and management of the property and business thereof, in all cases where no other provision shall be made.

This particular paragraph of the section was referred to and construed in the case of

Wilhelm vs. Cedar County, 50 Iowa, 254, which was an action to recover from the county upon a contract made between Wilhelm and the board of supervisors for the collection of certain delinquent taxes, and the court, in passing upon the question, said:

> It is made by statute the duty of the county treasurer to receive taxes voluntarily paid, and to enforce the payment of all other taxes where it can be done by sale of the property. Here we think his duty in this respect ends. Yet it seems that the defendant county found it practicable in some instances to collect taxes from delinquent tax payers from whom forcible collection could not be made. It succeeded in obtaining their promissory notes, which were afterwards paid. Now, because the statute does not expressly authorize the board of supervisors to employ a special agent or attorney to assist in the collection of taxes not collectible by the county treasurer in the discharge of his duty, it does not follow that they may not have the implied power to do so. They have the power to represent their respective counties, and to have the care and management of the property and business of the county in all cases where no other provision is made. Revision, Sec. 312, Code Sec. 306. It is the business of the county to collect taxes, and to use all reasonable means to do it. We think, therefore, the board of supervisors had the power to employ the plaintiff to render the service in question.

In the case of Dishbrow vs. Board of Supervisors, 119 Iowa, 538, which was an action brought by a tax payer to restrain the board of supervisors from paying one Wellman an amount claimed to be due under a contract with the board for a certain per cent of taxes collected on omitted property which had been uncovered and reported for taxation by him, and in passing on said matter, the court denied the writ of injunction, and in the opinion said:

> Subdivision 11 of Section 422 of the code gives the board of supervisors of a county power "to represent the respective counties, and to have the care and management of the property and business thereof in all cases where no other provision has been made." Construing this statute in Wilhelm vs. Cedar County, 50 Iowa, 254, we held that it was the duty and business of the county to collect taxes, and the board of supervisors had the power to employ a special agent to assist in such work.

In the case of Call vs. Hamilton County, 62 Iowa, 448, which was an action for services in assisting the defendant county in making sales of lands, in which action the plaintiff averred in substance that in 1880 the defendant was the owner of certain swamp lands and that it employed plaintiff to find a purchaser for the land, and that the plaintiff did find a purchaser and arranged a sale which was adopted and completed by the defendants. A demurrer was filed to the petition on the ground that the petition did not show the sale was authorized by a vote of the people of Hamilton county, or that it was made at auction, or that the county board was authorized to employ an agent to make a sale, and on the further ground the law does not in fact authorize the employment of agents other than county officers to sell swamp lands. The demurrer was sustained by the lower court and the plaintiff appealed, and in passing upon the matter, the court said:

> We think the petition shows a cause of action and that the demurrer should have been overruled. It may be true, as the county contends, that it has no power to employ an agent to sell its lands. But the plaintiff was not employed for that purpose, but quite a different one, and that was to find some one who wanted to buy and to whom the county through its officers could sell. He might have had, and doubtless did have, greater facilities for finding a purchaser than the county officers had, and was employed for that very reasen. While county officers could not divest themselves of the responsibility imposed upon them by law in making the sale, they might aid themselves in matters preliminary to the sale. The statute imposes upon the board of supervisors the care and management of the county property; and, as incident to the exercise of such power, they may in a proper case employ an agent to aid them Wilhelm vs. Cedar County, 50 Iowa, 254.

It will be observed that the powers conferred by paragraph 11 of Section 422 may be exercised in all cases where no other provision has been made, and if other provisions have been made, then such power does not exist.

In the case of Call vs. Hamilton county, supra, the court, speaking with reference to the plaintiff, said:

> He might have had, and doubtless did have, greater facilities for finding a purchaser than the county officers had, and was employed for that very reason.

A stenographer is employed not for the purpose of transacting the law business of the county attorney's office, but for the purpose of facilitating the accomplishment of that business by the county attorney and his assistants. A stenographer is employed to do clerical work for the county in the office of the county attorney for the purpose of facilitating the work of such office. As the court said, in the case of Call vs. Hamilton county, supra: "While county officers could not divest themselves of the responsibility imposed upon them by law * * * they might aid themselves in matters preliminary" to their work.

The inquiries which we should make under the holding in the above cases are:

(1) Is the clerical work which would be performed by a stenographer in the county attorney's office a part of the business of the county?

If it is, then the board under subdivision 11 of Section 422 would be authorized to make such employment if there was no other provision made in connection therewith under the statute. We think this question must be answered in the affirmative. There does not appear to be any reason why this class of clerical work is not as much a part of the work of the county as any other clerical work which it would be compelled to have done in its behalf.

(2) Is the clerical work of the county attorney's office a part of the duties imposed upon him by statute?

Section 301 of the 1915 Supplement to the Code, pertaining to the office of county attorney and his duties is as follows:

> It shall be the duty of the county attorney: * * *.
>
> 7. 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 officer, 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; but he shall not appear before the board of supervisors upon any hearing in which the state or county is not interested, or in applications to establish, vacate or alter highways.
>
> 8. * * * To prepare all bills of indictment; but he must not be present when an indictment is considered or found.
>
> * * *

10. To promptly notify the attorney general of every criminal case appealed from his county to the supreme court, and when the appeal is taken by the state, at least forty days prior to the term at which the case is to be heard, prepare and deliver to the attorney general a typewritten manuscript of the abstract of the case; and when the appeal is taken by the defendant, he shall prepare and deliver to the attorney general when necessary a typewritten manuscript of the amended abstract of the case in ample time to have the same printed and filed within the time prescribed by the rules of the supreme court; said manuscript of the abstract or amended abstract shall be in the form and manner prescribed by law; and the rules of the supreme court.

11. To make reports relating to the duties and the administration of his office to the governor or the attorney general whenever called upon by the governor or the attorney general so to do.

12. To perform such other and further duties as are now or may hereafter be enjoined upon him by law.

Subdivision 10 provides for delivering to the attorney general a typewritten manuscript of the abstract of any case which is appealed from the county.

Surely it could not be contended that the county attorney could be compelled to do the clerical work of typewriting an abstract under the provision above referred to. Neither could he be compelled to pay the expense of having the same done out of his own funds. Therefore, such expense as the making of an abstract could be properly paid by the board of supervisors under subdivision 11 of Section 422, and if such clerical work is properly chargeable under subdivision 11 of Section 422, then any other clerical work which would facilitate the business of the office could as properly be paid for as the making of the typewritten copy.

(3) Is it an increase of the salary of the county attorney?

The county attorney is to receive no part of this compensation. This is paid wholly to the stenographer or clerical help in the office and is done for the purpose of facilitating the business of the office and to enable a better enforcement of the law, and is, therefore, no addition to the salary of county attorney.

We therefore hold that it is a part of the business of the county in connection with which the board would be authorized to act under subdivision 11 of Section 422 of the Supplement to the Code of 1913, and that it is a matter in which the board are authorized to use and exercise their discretion, and if in their judgment it facilitates the work of the office of the county attorney, they have the same right and authority to employ clerical assistance under such circumstances for the office of the county attorney as they would have for any other officer in the county.

It should be borne in mind, of course, that the county should not be put to the expense of the employment of a stenographer for any private business which the county attorney may have, but if this caution is borne in mind, I see no reason why the county may not properly employ a stenographer to take care of the clerical work which would otherwise take the time of the county attorney.

H. M. HAVNER,
Attorney General.

BOARD OF SUPERVISORS MAY GRANT FRANCHISE FOR ELECTRIC TRANSMISSION LINES.

Sec. 2120-n supplement 1913, granting authority to the railroad commissioners for the erection of electric transmission lines in Iowa does not repeal Sec. 1527-c, supplement 1913, granting the board of supervisors power to enfranchise transmission lines in their respective counties.

December 23, 1918.

W. B. Downing, County Attorney, Primghar, Ia.

Dear Sir: We desire to acknowledge receipt of your letter of the 20th, in which you ask for an opinion as to whether the board of supervisors have authority to grant franchises for electric transmission lines under authority of Section 1527-c, Supplement of the Code. You further call attention to Section 2120-n, of the Supplement, authorizing the railroad commissioners to grant franchises for the erection of electric transmission lines.

You further call our attention to the fact that the authority granted the board of supervisors was enacted by the 33rd General Assembly, while the railroad commmissioners derive their

authority from an act passed by the 35th General Assembly. In other words, you have two statutes upon practically the same subject matter, one of which was passed by the 33rd General Assembly, and the other by the 35th General Assembly, and the question is, which act prevails and governs the granting of franchises.

You will note that Section 1527-c of the Supplement of 1913 provides that:

> The board of supervisors of any county may, upon written application designating the particular highways, the use of which is desired, grant to any person or incorporation engaged in the manufacture of electric light and power, the right to erect and maintain poles and wires, for the purpose of conducting electricity for lighting, heat and power purposes, in any public highway in their county for a period not to exceed twenty years, subject to the following conditions and such further reasonable regulations as the legislature or the board of supervisors may hereafter prescribe: * * * * *.

Section 2120-n of the Supplement of 1913 grants authority to the railroad commissioners to issue such franchises, and in part provides:

> Upon petition to the railroad commission of the state of Iowa, said railroad commission may grant to any individual or corporation organized under the laws of Iowa, * * * * * the right within the state * * * * * to erect, use and maintain poles, wires, guy wires, towers, fixtures and other necessary construction for the purpose of conducting electricity for lighting, power and heating purposes, over, along and across any public lands, highways or streams or the lands of any person or persons, and to acquire the necessary interest in real estate therefor.

This act further provides that such corporation when granted a franchise by the railroad commissioners shall be vested with the right of eminant domain.

You will note that the provision of the law authorizing the board of supervisors to act limits them to granting a franchise within their county, while the railroad commissioners may grant a franchise over or thru any or all the counties within the state.

In the early case of Edgar vs. Greer, 8 Iowa 394, it was held that when two statutes exist upon the same subject matter and

are in conflict, the one last enacted will prevail. This rule has never been modified in this state, except by a well established line of authority holding that repeal by implication is not looked upon with favor. The rule in construing such statutes has been concisely stated in the case of Perry Savings Bank vs. Fitzgerald, 176 Iowa, 446-449, where it was said:

> It is a familiar doctrine, not requiring the citation of authority, that repeals by implication are not favored; that all statutes upon a subject will be upheld and sustained, if possible, and, when the statutes cover in whole or in part the same matter and are not absolutely irreconcilable, no purpose of repeal being clearly expressed or indicated, it is the duty of the court, if possible, to give effect to both.

In view of the rule above stated, it is the opinion of this department that the two sections of the code above referred to should both be held to be in force and effect, if not absolutely repugnant to each other. Careful comparison of the two sections show that they may be construed together, and that the board of supervisors may grant a franchise for the erection of transmission lines within their county, and that the railroad commissioners may also grant a franchise for the erection of lines, not only within any particular county, but through any number of counties and over land owned by a private individual.

You should therefore instruct your board of supervisors that the authority vested in them by the virtue of Section 1527-c of the Supplement of 1913 is not repealed by the provisions of Section 2120-n of the Supplement of 1913.

B. J. POWERS,
Assistant Attorney General.

BOARD OF SUPERVISORS SHOULD ALLOW SHERIFF EXPENSES FOR RETURNING PRISONER.

The board of supervisors may allow sheriff necessary expense incurred in going to a neighboring state and apprehending a person indicted for a crime and for whom a bench warrant has been issued.

February 13, 1918.

O. T. Naglestad, County Attorney, Sioux City, Iowa.

Dear Sir: In your letter of February 11th you ask:

> 1st. Has the board of supervisors legal authority to, and does the statute contemplate that they should reimburse

> the sheriff for trips made out of the state in pursuit and return of law violators, who have been indicted in the district court, or for whom a warrant of arrest has been issued?

We assume in the case stated that requisition has not been made. It is our opinion that the board of supervisors has the authority under the statute to reimburse the sheriff for the necessary expenses incurred by him in going into a sister state and there obtaining a defendant under indictment in your county, or for whom a warrant of arrest has been issued by a proper court in your county. Undoubtedly the statute contemplates that the board shall compensate the sheriff for such expense.

Section 499 of the Supplement of 1913 provides:

> It shall be the duty of the sheriff, by himself or deputy * * * to ferret out crime, to apprehend and arrest all criminals and insofar as it is within his power, to secure evidence of all crimes committed in his county, and present the same to the county attorney and the grand jury * * .

In view of the fact that the statute expressly imposes upon the sheriff the duty of apprehending and arresting all criminals, the said officer is clearly performing his duty when with the warrant within his hands, he goes into the jurisdiction of another state to there apprehend and return to the proper county a defendant who has violated the laws of the state of Iowa. In fact should such officer fail to so apprehend such defendant he would be neglecting the express duties imposed upon him by Section 499 of the Supplement of 1913 above referred to.

Paragraph 2 of Chapter 49 of the Acts of the 37th General Assembly provides that each sheriff is entitled to charge and receive the following fees:

> For every warrant served, $2.00, and the repayment of necessary expenses incurred in executing such warrant so sworn to by the sheriff. If service of the warrant cannot be made, a payment of all necessary expenses actually incurred by the sheriff while attempting in good faith to serve such a warrant.

and paragraph 11 of the same act provides that the sheriff shall receive

> Mileage in all cases required by law, going and returning, ten cents per mile, provided that this paragraph shall not

> apply where provision is made for expenses, and in no case shall the law be construed to allow both mileage and expenses for the same services and for the same trip,

and paragraph 17 of said act contains the following provision:

> Whenever mileage or expenses of the sheriff are to be paid from the public treasury, he shall file an itemized claim for the same, verified by affidavit and accompanied by proper vouchers, before the same can be allowed or paid.

It is plain, then, first, that it is within the duties prescribed by law that the sheriff shall go into a neighboring state and there apprehend and arrest a defendant and return him to the state of Iowa. Second, it is plain because of the provisions of the Acts of the 37th General Assembly above referred to that the sheriff shall be entitled to all expenses necessarily incurred in executing a warrant or in attempting in good faith to serve such warrant and that in proper cases where he is not entitled to the expenses referred to in serving the warrant, he is entitled to mileage in all cases required by law, going and returning.

These paragraphs are most surely broad enough to cover the case when the sheriff, in the performance of his duties as required by law, goes into another state to apprehend a defendant.

Paragraph 4, Section 422 of the Code of 1915 provides that the board of supervisors, at any regular meeting, shall have power

> to examine and settle all accounts of the receipts and expenditures of the county, and to examine, settle and allow all claims against the county, unless otherwise provided by law.

This provision of the statute is clearly broad enough to enable the board of supervisors in the case above to allow the sheriff the necessary expense of going into a neighboring state and returning a defendant to Woodbury county, Iowa.

You also ask:

> 2nd. When the sheriff makes a trip out of the state for a fugitive, having in his possession, extradition papers issued by the governor of another state, upon requisition from the governor of Iowa, and returns the fugitive to the county in which the offense was committed, and after the return

> and delivery of the fugitive to the jurisdiction of the Iowa court, and the defendant is tried and acquitted, or the case is dismissed without prosecution, has the governor authority and does the law contemplate that he should authorize reimbursement to the sheriff?

It is not the sheriff as such who is entitled upon requisition to incur the expense referred to, but it is the agent appointed by the governor under and by virtue of the authority granted by Chapter 88 of the Acts of the 37th General Assembly, who may incur this expense and return the fugitive. This agent may, of course, be the sheriff, but not necessarily so. Under the said chapter the said agent is entitled

> not exceeding ten cents per mile each way for all necessary travel of himself and for each fugitive five cents per mile additional, for the number of miles which he shall have been conveyed. Bills for such expense shall be made out so as to show the actual route traveled, the number of miles and be verified and accompanied by proof that the fugitive for whom requisition was made has been returned and delivered into the custody of the proper authorities.

If then the agent, whoever he may be, under the appointment of the governor, returns the fugitive to the sheriff of Woodbury county, if that is the place where he is to be prosecuted, the said agent at that time is entitled to the compensation above named. Under the old section as it appeared in the Code of 1897 it was necessary to wait until the trial, or until satisfactory showing was made that a failure to go to trial was not the fault or neglect of those interested in the prosecution. The new act, you will notice, changes the situation. The answer to your question then is that the said agent is entitled to the said compensation when he has delivered the fugitive to the proper officer of the proper county.

You further ask:

> 3rd. When the sheriff makes a trip out of the state for a fugitive, acting upon authority granted by requisition papers, and the fugitive successfully resists extradition, and the sheriff is compelled to return without the fugitive, is the state legally bound to reimburse the sheriff for the trip?

What we said in answer to question No. 2 above, about the agent and not the sheriff being entitled to the compensation is equally true here. In order for the sheriff to obtain the said

compensation it is not necessary that he return the fugitive under Chapter 88 of the Acts of the 37th General Assembly. The said agent is entitled to the proper compensation when he properly itemizes and verifies his account and accompanies it by proof that the delivery of said fugitive by said agent has been refused by the authorities of said other state or foreign government.

J. W. KINDIG,
Assistant Attorney General.

MILEAGE OF BOARD OF SUPERVISORS.

Members of the board of supervisors are entitled to mileage at the rate of five cents per mile going to and from the regular, special and adjourned sessions thereof, but they are not entitled to mileage where they, for their own convenience, leave any of the above sessions to go home or elsewhere during such sessions.

February 26, 1918.

John Weir, Ass't. County Attorney, Davenport, Iowa.

Dear Sir: Your letter of February 22nd, 1918, addressed to Attorney General Havner has been given me for answer.

You ask:

> Is a member of the board of supervisors entitled to mileage other than 5c for every mile traveled in going to and from the regular, special and adjourned sessions of the board and in going to and from the place of performing committee service. That is to say, is such member of the board entitled to mileage going and returning each day of a regular, special or adjourned session and each day in going to and from the place of performing committee service?

It is our opinion that a member of the board of supervisors is entitled to 5c for each mile traveled (1) in going to and from a regular session, (2) in going to and from a special session, (3) in going to and from adjourned sessions and (4) in going to and from the place of performing committee service.

Section 469 of the Code, 1913, provides that

> The members of the board of supervisors shall receive four dollars per day each for each day actually in session and four dollars per day exclusive of mileage when not in session but employed on committee service, and five cents for every mile traveled going to and from the regular, special and adjourned sessions thereof and in going to and from the place of performing committee service * *.

In other words it is our opinion that a member of the board of supervisors is entitled to one mileage traveled in going to a regular session and one mileage in going from the regular session. What we have said regarding the regular session is also true of special and adjourned sessions and to committee service.

If a member of the board of supervisors, while attending the regular session desires, for his own accommodation, or for any other reason, to return to his home during one of said sessions, this does not entitle him, under the section of the statute quoted, to mileage for each day he leaves the session and returns, or for each time he leaves the session and returns should he choose to make the trip more frequently than once a day.

We believe this is in accordance with an opinion rendered by Mr. C. A. Robbins, Assistant Attorney General of Iowa in the year 1914, which we believe is reported in the Revenue Laws of Iowa, 1917, page 125, Section 150.

J. W. KINDIG,
Assistant Attorney General.

POWER OF BOARD OF SUPERVISORS TO DIVIDE WORK.

Under sec. 422, Supplemental Supplement, 1915, the board has power to divide the county into districts and assign members to certain districts for sake of convenience,

March 4, 1918.

M. R. Hammer, Jr., County Attorney, Newton, Iowa.

Dear Sir: Your favor of the 22d ult., addressed to the Attorney General has been referred to me for reply.

You state that your board of supervisors has followed the practice of dividing the county into districts and assigning a particular district to each member for him to look after.

You ask in substance whether or not such proceeding is legal, and, when followed by the board, whether or not it would be binding on the members assigned to the respective districts.

Section 422, paragraph 22 of the Supplemental Supplement, 1915, authorizes the board of supervisors:

> To make such rules and regulations, not inconsistent with law, as it may deem necessary for its own government, the transaction of business, and the preservation of order.

Pursuant to the foregoing statutory provision it has been the practice of boards over the state to divide the county into as many districts as there are members of the board and assign each member to a particular district, keeping in mind at all times the best interests of the county and the convenience of the individual member. It has been the uniform policy over the state to avoid assigning a member to more territory than he can properly look after, and to that end the boards have followed the policy of assigning a member to that part of a county in which he resides. The wisdom of such a policy is apparent at a glance.

However, in counties which have not been divided into districts for the purpose of electing supervisors from that particular district each member of the board is elected by the entire county and it is his duty to serve the county in its entirety. If he is derelict in that respect he will be held accountable on his bond.

So that while the above section is authority for permitting the board to divide the county into districts for the convenience of the individual members of the board to look after, provided the district assigned to the member is agreeable and satisfactory to him, nevertheless said statutory provision would not be authority for absolutely limiting the jurisdiction of such member to the district assigned to him, so as to prevent his taking any action with reference to other sections of the county. But as before stated it has been the policy over the state to assign a member to that district in which he resides, as he is more familiar with its needs, and his recommendations are usually followed by the entire board when in session.

W. R. C. KENDRICK,
Assistant Attorney General.

POWERS AND DUTIES OF BOARD OF SUPERVISORS.

Ordinarily the board of supervisors have a discretion in the matter of constructing the bridges and where they have exercised such discretion it cannot be controlled by the courts. As to whether such discretion exists as to rebuilding a bridge which was formerly built by the county, is involved in doubt and an opinion on that point is reserved.

May 13, 1918.

W. H. Childs, County Attorney, Clinton, Iowa.

Dear Sir: Receipt is hereby acknowledged of your letter of May 9th pertaining to the question of whether or not the board of supervisors may be compelled to construct a certain bridge in your county.

This department has had no occasion to consider the question you present since Mr. Havner took charge of the office on the first of January, 1917. We have made a diligent search through the files and records of the office to see if the question had been presented to a former administration but are unable to find any evidence that it ever was.

The question you present is involved in doubt, and I must admit my inability to determine with any degree of certainty whether the proposed action can be maintained or not.

Section 1527 s-8, Supplemental Supplement to the Code of 1915, to which you refer, embraces and deals with divers subjects which include powers and duties of the highway commission, powers and duties of the board of supervisors, the establishment and maintenance of the county road system, establishment and maintenance of the township road system, and other subjects and matters. That portion of the section dealing with the survey and plans of the county road system is in part as follows:

> The county auditor shall, upon receipt of the approved and modified survey and plans, record the same at length in a county road book, and the board of supervisors shall thereupon proceed to the construction of the road, bridge, tile and culvert work in accordance therewith, and as herein provided.

Doubtless, this may impose a duty upon the board of supervisors regarding which they may have no discretion, but the following language "the duty to construct and maintain all bridges and permanent culverts throughout the county is im-

posed upon the board of supervisors" must be construed in the light of reason and may be given full force and effect by holding that all bridges and permanent culverts (outside certain classes of cities) when they are constructed, shall be constructed and maintained by the board of supervisors. In other words, the expense of constructing and maintaining such bridges and culverts is to be borne by the county at large and in no case by any particular subdivision thereof.

The rule of law approved in the case of Leonard vs. Wakeman, 120 Iowa 140, is doubtless a sound and correct principle but must give way in cases where the statute enjoins a particular duty upon the board of supervisors, as was held in the case of Clerk Buffcorn et al, vs. Thomas Chapburn, et al, 166 Iowa 611, but the provisions of the statute there involved were very dissimilar to the provisions of Section 1527-s8, Supplemental Supplement to the Code of 1915, making it the duty of the board of supervisors "to construct and maintain all bridges and permanent culverts throughout the county," and I do not believe that it was the intention of the legislature that this provision should take away the discretion of the board recognized by the court in the case of Leonard vs. Wakeman, supra.

The principle involved in the case in your county is similar to those involved in the case of McCarl vs. Clarke county, 167 Iowa, 14, where a judgment rendered against the county was reversed. I am constrained to believe that you can defeat the action in your case, though as before stated, I am not entirely clear on the subject.

J. W. SANDUSKY,
Assistant Attorney General.

BOARD OF SUPERVISORS TO PAY FOR DETENTION HOSPITAL.

If a detention hospital is erected under the provisions of section 2571-a, supplement of 1913, the board of supervisors should pay for it.

June 28, 1918.

Ralph S. Stanbery, County Attorney, Mason City, Iowa.

Dear Sir: We have your request of recent date relative to the establishment of a detention hospital in your county.

In your request for an opinion on the question of whether or not the county or city would be liable for the erection of a detention hospital you refer to Section 2571-a, Supplement of 1913, and also to the case of Kurtz Company vs. Polk county, 136 Iowa, 419. In reading both the statute and the opinion of the court, and also Section 422, paragraph 21, Supplement of 1913, it seems that the board of supervisors is given full authority to erect a detention hospital.

Section 422, paragraph 21, Supplement of 1913, which is the section of the statute conferring certain powers upon the board of supervisors, provides:

> To have and exercise all the powers in relation to the poor given by law to the county authorities.

It is true that you do not find any statute stating in express terms that the county board of supervisors may erect a detention hospital but from the reading of the statute cited above it shows that it was the intention of the legislature that when a detention hospital was erected it should be at the expense of the county.

In the case of Kurtz Company vs. Polk county, supra, the supreme court, on this point, stated at page 423:

> As to other expenses, if any, and especially expenses made in establishing and fitting up property of a permanent character which remains the property of the city or county, while the statute does not in express terms say they are to be paid by the county, the provision that they shall be certified to, and audited by, the board of supervisors cleary indicates that such was the legislative intent.

It is the opinion of this department that if a detention hospital is erected it should be at the expense of the county.

C. G. WATKINS,
Assistant Attorney General.

INCOMPATIBLE OFFICES.

The offices of county attorney and city solicitor are not incompatible.

February 23, 1917.

Tom Boynton, County Attorney, Forest City, Iowa.

Dear Sir: We have your favor of recent date requesting the opinion of this department on the following facts:

I am duly elected, qualified and acting county attorney of this (Winnebago) county. The city of Forest City, our county seat, employs a city solicitor by the year and I have reason to believe that I may have the appointment to said office. I should like your opinion upon the question as to whether or not said offices are incompatible and whether or not the same person can legally qualify for and hold both offices, before allowing the city council to proceed with my appointment.

The common law rule that a person cannot hold two offices at the same time, which are incompatible, obtains in this state. Offices are held to be incompatible when the nature of the duties of the two offices are such as to render it improper, from considerations of public policy, for one person to hold both, as where the duties to be performed under one office are, or may be, subordinate to, or interfere with, the duties of the other. Mere physical inability to discharge the duties of the two offices in every instance at the same time does not render them incompatible although such has sometimes been held to be the rule.

Incompatibility in 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 incumbent to retain both. It does not necessarily arise when the incumbent places himself, for the time being, in a position where it is impossible to discharge the duties of both offices.

Bayou vs. Cattell, 15 Ia., 538.

At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two,—some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him.

State ex rel Walker vs. Beis, 135 Mo., 325.

The functions of the two offices should be inherently inconsistent and repugnant.

State vs. Goff, 15 R. I., 507.

Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of one is the vacation of the other. The force of the word, in its appli-

> cation to this matter, is, that from the nature and relation to each other of the two places, they ought not to be held by the same person, from contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate one to the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law. Per Fogler, judge, ir
>
> People vs. Green, 58 N. Y., 295.

We are of the opinion that the duties of county attorney are not incompatible with those of city solicitor and that you may legally qualify and hold the office of county attorney and that of city solicitor at the same time.

Yours truly,

J. W. SANDUSKY,
Assistant Attorney General.

THE COUNTY ATTORNEY CANNOT BE DELINQUENT TAX COLLECTOR—ASSESSMENT OF AUTOMOBILES.

The county attorney cannot also be the delinquent tax collector of his county.

Automobiles kept in stock for which no registration has been taken out are subject to ordinary taxation.

February 26, 1917.

F. H. Don Carlos, County Attorney, Perry, Iowa.

Dear Sir: Replying to your inquiry of recent date, for information concerning the following matters, to-wit:

> (1) As to whether or not you could be properly and legally delinquent tax collector while you are occupying the office of county attorney, and
>
> (2) As to the assessment of automobiles in stock which are kept for sale,

beg to advise:

As to the first proposition, 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, 280;
Heath vs. Albrook, 123 Iowa 559;
Sec. 301, par. 5, Supplemental Supplement, 1915.

From the foregoing 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, and for that reason you could not with propriety accept the position of delinquent tax collector.

As to the second proposition, unless registration is taken out on automobiles kept in stock and for sale by dealers, they are assessed as other personal property after January 1st.

W. R. C. KENDRICK,
Assistant Attorney General.

COUNTY ATTORNEY CANNOT INSURE COUNTY PROPERTY.

The county attorney can not consistently write insurance on county property.

April 7, 1917.

Richard C. Leggett, County Attorney, Fairfield, Iowa.

Dear Sir: We have your letter of the 5th instant, wherein you request the opinion of this department on the following facts:

> Beside doing some law business I am also interested in an insurance agency and the question has arisen whether I can write any business for the county while I am county attorney. Of course, I want to make all the money I can legitimately make but I do not want to violate the law for the sake of a few small insurance premiums. Will you please write me whether or not I can legitimately write insurance for Jefferson county while I am county attorney?

Section 545 of the code is as follows:

> No county officer shall appear as agent, attorney or solicitor for another in any matter pending before the board of supervisors.

This, as we understand it, is simply a declaration of a common law principle recognized everywhere. In the case of B. C. Bay vs. J. S. Davidson, et al., 133 Iowa, 688, this particular principle is discussed at some length. There are, of course, other cases but it is unnecessary to cite them. Most men, like yourself,

want to make some money and there are some, no doubt, that are not so very particular whether they make it legitimately or not but such men would not make the right kind of public officers.

It would be your duty to counsel and advise the board in case of a loss under a policy of insurance that you might write for them, as it would also be your duty to counsel and advise them if any disputes should arise between the board and the company pertaining to any provision of the policy and, therefore, we are of the opinion that the proper thing for you to do would be to cease writing insurance for the county while you hold the office of county attorney.

J. W. SANDUSKY,
Assistant Attorney General.

COMPENSATION OF COUNTY ATTORNEY.

The county attorney is not entitled to charge and receive, from the county, attorney fees which may be taxed as a part of the costs against the defendent in prosecution under sec. 2419, code 1897, when such fees cannot be recovered from the defendent.

April 16, 1918.

E. E. Cavanaugh, County Attorney, Fort Dodge, Iowa.

Dear Sir: Your request for the opinion of this department on the following question has been referred to me for attention. You state:

> Under the provisions of Section 2419 the justices here have been adding to the regular fine the sum of $10.00 attorney's fees, and where the fine has been paid have collected the amount.
>
> In their transcripts they have added in each of the cases the sum of $10.00 covering those that have had to pay their penalty in being confined in the county jail.
>
> There is now the sum of $60.00 so placed upon the auditor's books, the amounts being $10.00 in 6 different cases, and for those who have not paid.
>
> Am I, as the county attorney, and the attorney who appeared in the cases, entitled to the amount set out as fees for the attorney appearing in the cases?

Section 308 of the 1915 Supplemental Supplement to the Code fixes the compensation of county attorneys according to the pop-

ulation of the respective counties, and in addition to the salary thus fixed, they 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, which is to be in full compensation for his services as county attorney and you would, therefore, not be entitled to receive from the county fees taxed as a part of the costs in cases tried under Section 2419 of the Code, and the question you have propounded is therefore answered in the negative.

J. W. SANDUSKY,
Assistant Attorney General.

TRAVELING EXPENSES OF COUNTY ATTORNEY.

Th county attorney is entitled to his reasonable traveling expenses, including auto hire to reach home when waiting for a train would greatly delay matters.

April 24, 1917.

J. M. Berry, County Attorney, Belmond, Iowa.

Dear Sir: Your letter of the 23rd instant wherein you ask the opinion of this department on the following facts has been assigned to me for attention:

> During the month of January I was called to Dows, Wright county, to appear in an assault and battery suit and as it was Saturday evening when we finished, it would have been impossible to return to Belmond by railroad until Monday morning or by way of Clarion Sunday afternoon. I hired a car to bring me to Belmond and presented the bill with the monthly expense statement and the board refused to allow it ,and in fact some members of the board thought the salary covered all expense which I should pay.
>
> The code provides that the county attorney shall appear when possible to prosecute such actions and it appears to me he should be entitled to auto hire when considerable delay would occur by waiting for train.
>
> If in your opinion the county attorney is entitled to this expense under the section mentioned, kindly write a letter so advising and one that I may present to the board.

Section 1308 of the Code, pertaining to the office of county attorney, fixing the salary and providing for expense is in part as follows:

> His necessary and actual expenses incurred in attending upon his official duties at a place other than his residence and the county seat.

It is clear that the legislative intent was to provide for the actual expenses of the county attorney in attending to his public duties at places other than his residence and the county seat. It would, of course, be his duty to use the most reasonable means of transportation to get to and from different places where his duties call him and I am of the opinion that in the case to which you refer, where there was not other and cheaper means of transportation by which you could reach your home when the business you were attending to was completed, it was proper for you to secure the services of an automobile to take you home and that the expense so incurred should be audited and allowed as provided by law.

J. W. SANDUSKY,
Assistant Attorney General.

FEES OF CLERK OF COURT.

Value of estate as the basis for determining the clerk's fee does not include real estate.

August 21, 1917.

Joe Jenks, Clerk District Court, Algona, Iowa.

Dear Sir: Replying to yours of the 17th inst., addressed to the Attorney General, will say, with reference to the case of the Estate of Pitt, 153 Iowa 269, construing Section 296, Supplement to the Code, 1907, that in my judgment the amendment to this section contained in Chapter 14, Acts of the 34th General Assembly, does not change the rule of the law therein announced; that the real estate belonging to the deceased should not be taken into account in determining the amount of the clerk's fees.

It will be noted that there was no change in the words "for all services performed in the settlement of the estate of any decedent," but the amendment simply added thereto the words "minor, insane person, or other persons laboring under any legal disability" and while it is true that the word "estate" was changed to read "property of the estate" yet this does not change the legal effect of the statute for still it is only the estate that is being administered that is to be taken into account.

Of course where it becomes necessary for the administrator to sell part of the real estate for the purpose of paying debts, then the value of the portion so sold should be taken into account, not for the reason it was property of the estate, but for the reason that it was administered upon by the administrator. In the absence of such proceedings to sell, the administrator under the ruling of our supreme court in the case referred to and others, has nothing whatever to do with real estate, the same passing directly to the heirs of the decedent instead of to the administrator.

C. A. ROBBINS,
Assistant Attorney General.

CLERKS OF COURT NOT A STATE OFFICIAL.

Clerks of the district court are county officials, and not state officials.

December 10, 1917.

Hon. Guy E. Logan, Adjutnat General of Iowa, State House.

Dear Sir: Complying with the verbal request from your department for an opinion as to whether the clerk of the district court is a county or a state official, beg to advise that in our opinion the clerk of the district court is a county official.

The definition of a county official is defined in 11 Cyc. page 414 as follows:

> Official of a county is one by whom the county performs its usual political functions or government functions.

Although the clerk of the district court will be found grouped under the judicial department, yet it is manifest that the clerk was so grouped for convenience only, and you will find the county attorney, lawyers and jurors also grouped under that title.

On the other hand, under the provision for the election of county officers you will find the clerk of the district court grouped with the rest of the county officers. (Section 1072, Supplement 1913). Also under the heading "of duties of county officers" Section 549 of the Code of 1897 you will find the clerk of the district court listed with the other county officers. It will also be noticed that the salary of the clerk is fixed by the board of supervisors and paid out of a county treasury. (Section 297, Supplement 1913). Also that all fees collected by the clerk shall be paid into the county treasury, (Section 296, Supplement

1913; Section 300, Code of 1897) and that the clerk shall report to the board of supervisors the amount of fees received by him as clerk.

It is therefore evident that the clerk of the district court is to be classed as a county official and not as a state official.

W. R. C. KENDRICK,
Assistant Attorney General.

APPOINTMENT OF DEPUTY CLERKS.

1. County clerk has not absolute right to appoint deputy without consent of board of supervisors.
2. Board of supervisors do not have the right to cut off a deputy.
3. The appointment of deputy is not a contract.

January 9, 1918.

R. L. Saley, County Attorney, Hampton, Iowa.

Dear Sir: Pursuant to your request over the phone, I herewith enclose you the holding of this department upon the three following questions, to-wit:

First: Does the clerk of the district court have the absolute right to appoint a deputy, regardless of the written consent of the board of supervisors?

Second: Subsequent to the appointment of a deputy, and prior to such appointment being revoked by the clerk, has the board of supervisors the right to "cut off" the deputy?

Third: Would the appointment of a deputy by the clerk for a definite period constitute a contract within the legal meaning of that term?

The power of the clerk of the district court to appoint a deputy, as well as the conditions under which such appointment can be made, is determined by statute. Section 298 of the Supplement of 1915 provides:

> Each clerk of the district court 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 require bond, which bond shall be approved by the officer who has the approval of the principal's bond. Such appointment may be revoked in writing, which appointment and revocation shall be filed and kept in the auditor's

> office. The person or persons thus appointed shall qualify by taking the same oath as his principal, endorsed upon the certificate of appointment. The deputy, in the absence or disability of his principal, may perform all the duties of the principal pertaining to his office. He shall receive a salary not exceeding nine hundred dollars a year, to be fixed by the board of sueprvisors, except that in counties having a population of thirty-five thousand or over, the salary of the first deputy shall be one-half of that of the principal, and in case additional deputies or clerks are needed, the board of supervisors may make such allowance therefor as they may deem reasonable.

It will be observed by reading the foregoing section that the clerk of the district court "with the censent of the board of supervisors" may appoint one or more deputies. The affairs of the county, like that of the state, are managed, and the functions of the corporation are discharged by servants elected by the people, to whom such servants are directly responsible. These servants are given, by the people, power to appoint agents or deputies with restricted authority to serve in designated capacities, but in granting this power the people may direct its control and how much shall be exercised. The legislature, in conferring power upon the clerks to appoint deputies, has evidently limited that power and made the appointment contingent upon the consent or confirmation by the board. (Thurber vs. Duckworth, 165 Iowa 685.)

We would therefore answer your first question in the negative.

The above section not only authorizes the clerk to appoint a deputy, with the consent of the board of supervisors, but also expressly provides that "such appointment may be revoked in writing, which appointment and revocation shall be filed and kept in the auditor's office." It is evident that under this statute the deputy's appointment may be terminated at any time at the pleasure of his principal, and I do not believe that any lawyer will seriously contend that such is not elementary legal doctrine.

Your second question should also be answered in the negative. (Sommers vs. State, 58 N. W. 804; 59 N. W. 962).

As to whether or not the appointment of a deputy partakes of the nature of an irrevocable contract, I can answer that ques-

tion better by quoting from the opinion in Iowa City against Foster 10 Iowa 191, which is the following:

> The principle is that public officers, and the officers of public corporations, are created for the public benefit, and that they and their offices, duties and emoluments, are governed by considerations relating to the common good, and that there is nothing in the nature of contract pertaining to that, in the sense of the constitution.

It is therefore clear that your third question should be answered in the negative.

W. R. C. KENDRICK,
Assistant Attorney General.

PAYMENT OF INTEREST OF BONDS.

When no levy is made to take care of interest on county bonds, treasurer is not legally authorized to pay interest out of general fund.

September 9, 1918.

J. A. Murphy, Acting County Attorney, Ida Grove, Iowa.

Dear Sir: Your favor of the 4th inst., addressed to Attorney General Havner, has been referred to me for reply.

You state that your county issued bonds last spring, but failed to make the levy necessary to take care of interest on the bonds.

You then ask whether or not the treasurer could legally pay the interest out of the general county fund, or any other fund.

Ordinarily, when a bond issue is authorized, a levy is made for the purpose of taking care of the principal and interest as the bonds mature or are redeemed. The statute requires that this fund should be held inviolate for this express purpose. Consequently, when a special fund is authorized by statute, the fund so created should be used for no other purpose, except when otherwise provided.

Now, the only fund that could possibly be used for payment of interest on county bonds, when the original levy failed to provide for accruing interest, would be the general county fund. The statute does not expressly authorize the payment of such interest out of the general fund, but limits the general fund to

the payment of ordinary county expenses. (Sec. 1303, par. 2, Supplement of 1915). As a general practice, it would be the wisest policy for the treasurer to refuse to pay interest bearing coupons when no levy has been made to cover the same. If the holder of the coupon is not willing to wait until the board of supervisors can correct the over-sight, then let such owner pursue his remedy contained in Section 408 of the Code.

However, if there is no special reason why the interest should be paid now, no question may ever be raised if paid out of the general fund, inasmuch as the board is now in session and can make a levy sufficient to take care of all accrued interest.

The board might properly consider the transaction merely as a loan from the general fund. However, if there is no urgent reason why the interest should be paid at this time, the better plan would be to refuse payment until the oversight has been corrected.

W. R. C. KENDRICK,
Assistant Attorney General.

COUNTY TREASURER CANNOT EMPLOY EXTRA HELP.

No provision is made whereby the county treasurer can employ extra help to make lists of taxable property.

January 23, 1917.

E. J. Wenner, County Attorney, Waterloo, Iowa.

Dear Sir: Replying to your inquiry of the 15th instant, asking for an opinion from this department relative to the legal right of the treasurer of the county to employ extra help in preparing lists of taxable property to be sent out to various banks over the county, for the purpose of permitting taxpayers in those localities to pay their taxes at said banks, payment for said extra help to be made by the county, beg to advise that the statute makes no provision for such an expense.

According to the statement of your county treasurer accompanying your letter, the lists referred to were prepared by the ordinary office force during that period of the year when business in the office was quiet. Relative to the county treasurer's office, the law provides that "in case additional deputies or clerks are needed, the board of supervisors may make such allow-

ance therefor as they may deem reasonable." (See Sec. 491 ss. 1915). The statute here clearly contemplates a condition in the treasurer's office wherein the ordinary office force cannot take care of the official business. So that, even though it would be a great convenience to both the treasurer and public to have such lists prepared and placed in the hands of banks throughout the county, affording the taxpayers an opportunity to pay their taxes nearer home, yet the law does not contemplate such a method of collecting taxes and makes no provision for re-imbursing the county treasurer for expenses created in preparing such lists, as was done in the instant case.

W. R. C. KENDRICK,
Assistant Attorney General.

QUALIFICATIONS OF COUNTY TREASURER.

A woman cannot hold the office of county treasurer, either by election or appointment.

August 3, 1918.

Ralph S. Stanberry, County Attorney, Mason City, Iowa.

Dear Sir: Your letter of the 29th ult., addressed to the Attorney General, has been referred to me for reply.

You state that the county treasurer of your county has entered the military service of the United States, and you then ask whether or not his wife can be appointed county treasurer in his place, and if not, whether the office could be carried on during the absence without the appointment of a successor.

Beg to advise that only those who are qualified electors are capable of holding office, unless by special statutory provision. State vs. Van Beck, 87 Iowa, 569.

We know of no such statutory provision which permits a woman to hold the office of county treasurer.

No successor could be legally appointed to fill the office of county treasurer unless that office becomes vacant. The fact that the present incumbent has entered the military service of the United States does not create a vacancy; however, it is the duty of the present incumbent to take care of the duties of the office, and if he can not do so personally, he should appoint

some person to do it for him, who would be acceptable to the board of supervisors.

W. R. C. KENDRICK,
Assistant Attorney General

COMPENSATION OF SHERIFF.

Supervisors should allow reasonable sum for waiting on and doing washing for prisoners.

February 7, 1917.

E. J. Wenner, County Attorney, Waterloo, Iowa.

Dear Sir: Replying to your esteemed favor of the 1st instant, enclosing copy of petition in re D. B. Henderson vs. Black Hawk County, and asking for an opinion from this department as to whether a sheriff is entitled to additional compensation, other than his regular salary, for waiting on and washing for prisoners, beg to advise that it is our opinion the law requires the board of supervisors to allow the sheriff a reasonable sum for such services.

It occurs to us that paragraph 17 of Section 511, Supplement to the Code, 1913, should not be construed in a constricted, literal sense as a fee, but rather in a broader view, as a legitimate expense incident to the confinement of prisoners and the proper performance of the duties of sheriff, for which reasonable expense the law always makes ample provision.

However, as to whether or not fifteen cents per person per day is a reasonable compensation for the services performed, is a matter of fact upon which we do not feel at liberty to express an opinion. We would, therefore, suggest that you ascertain what would be the reasonable value of said services and advise your board of supervisors to offer settlement on that basis.

W. R. C. KENDRICK,
Assistant Attorney General.

FEES OF SHERIFF.

The sheriff may not retain fees received as delinquent tax collector.

September 24, 1917.

Tom Boynton, County Attorney, Forest City, Iowa.

Dear Sir: On the 22nd instant the sheriff of your county submitted to this department the following inquiry:

> Would like your opinion in regard to the matter of collecting taxes. In several cases of late, the county treasurer has appointed me his agent to collect taxes. Acting as agent, not sheriff, I have done so. Would like to know if the per cent allowed for collecting has to be turned over to the county as fees, since they are not earned as sheriff's fees. * * *.

He was advised that under the rules of this department opinions are only given to state officials and county attorneys, and also advised that the opinion had been sent to you covering the question.

Section 1407, Supplement of 1913, empowers the county treasurer to collect delinquent taxes by distress and sale, also authorizes him to appoint collectors to assist him and fixes their compensation, and further provides that if no collector be appointed, the treasurer shall place the same in the hands of the sheriff or a constable who shall proceed to collect the same, and either shall be entitled to receive the same compensation in addition to the five per cent as constables are entitled to receive for the sale of property on execution. In this case, I am of the opinion that the matter should be treated as though no collector had been appointed and that the list has been placed in the hands of the sheriff as such for collection. Hence, you would have to account to the county for the fees earned in making such collection; to permit him to collect same as the agent of the treasurer instead of as sheriff would be against public policy, and therefore, a tendency to cause the sheriff to put in his time in the collection of delinquent taxes rather than in the performance of duties of his own office for which his salary is provided.

C. A. ROBBINS,
Assistant Attorney General.

FEES OF SHERIFF.

The board of supervisors cannot legally allow the sheriff more than the statutory fee for feeding prisoners.

September 5, 1918.

Ralph S. Stanberry, County Attorney, Mason City, Iowa.

Dear Sir: Your letter of the 4th inst., addressed to Attorney General Havner, has been referred to me for reply.

You ask whether or not the board of supervisors may legally allow the sheriff more than the sum provided by statute for feeding prisoners confined in the county jail.

This same question was before the supreme court in the case of Wapello County vs. Monroe County, 39 Iowa 349. The court in passing upon this question says at page 350:

> His (the sheriff's) compensation for this service is thus fixed by law, and he has no more right to ignore the provisions of the law and to claim and recover a quantum meruit than has the governor or a judge * * *. The intention is unmistakably to limit the compensation of all officers to the fees and salaries fixed by law.

As far as we are able to find, the rule established in the case above cited has never been changed by either the legislature or the courts; and if the doctrine therein announced was good law then it certainly ought to be good law today.

We are therefore of the opinion that the fee fixed by the statute to be allowed sheriffs for feeding prisoners is the limit which can be legally allowed by the board of supervisors. We know of no method by which a large amount can be lawfully obtained for such purpose.

W. R. C. KENDRICK,
Assistant Attorney General.

COUNTY TO FURNISH BEDDING FOR JAIL.

The county, rather than sheriff is required to furnish bedding for prisoners in county jail.

September 14, 1917.

Alfred Pizey, Ass't. County Attorney, Sioux City, Iowa.

Dear Sir: I have yours of the 13th inst., and in reply will say that I am of the opinion that it is incumbent upon the

county rather than the sheriff to furnish the necessary bedding for the lodging of prisoners.

In my judgment, Subdivision 12 of Section 1, Chapter 49 of the Acts of the 37th General Assembly, quoted by you, does not require the sheriff to furnish such bedding and that the compensation there provided for is for the service in connection with the lodging of the prisoners.

Section 5643 of the code provides:

> The keeper of each jail shall furnish the necessary bedding, clothing, fuel, and medical aid for all prisoners under his charge and keep an accurate account of same

and Section 5651 of the code provides:

> All charges and expenses for the safe-keeping and maintaining of convicts * * * shall be allowed by the board of supervisors.

C. A. ROBBINS,
Assistant Attorney General.

SALARY OF OFFICERS DURING TIME OF SERVICE IN THE UNITED STATES ARMY.

A county officer, who by enlistment or draft, has entered the military or naval service of the United States in the present war may continue to hold the nominal title to the office and resume the duties and accept the emoluments thereof, at any time during the period for which he was elected, if such military service is terminated during such time, and there is no impropriety in his receiving any part of the salary remaining after deducting therefrom the expense of conducting such office during his absence.

April 4, 1918.

J. M. C. Hamilton, County Attorney, Fort Madison, Iowa.

Dear Sir: Receipt is hereby acknowledged of your letter of today, concerning the office of county auditor of your county, and in reply will say, that Chapter 12, Acts of the Thirty-seventh General Assembly, repealed Paragraph 7 of Section 1266 of the Code, which made the acceptance of a commission in the military service, and absence from the state for sixty days, constitute a vacancy in office, and on account of such repeal we take the view that it was the legislative intent that state and county officers might retain the nominal title to the office to which they had been elected, and if their term of service in the army or navy was terminated before the expiration of their term of

office that they might resume such office and receive the emoluments thereof for the balance of the term, but we have not, and cannot hold that they are entitled to the salary of the office during the time they are absent therefrom and physically incapable of performing the duties thereof.

We think, however, that there would be no impropriety in paying such officer any part of the salary of the office remaining, after defraying the expense incident to the proper and efficient conduct thereof during his absence therefrom, and the plan adopted in the present case substantially complies therewith.

It would, doubtless, have been better if the legislature had clarified this matter by proper enactment, but, as it did not do so, this department is constrained to hold that no greater sacrifices should be required or more serious consequences result to a patriotic state or county officer, who by voluntary enlistment or conscription, enters the military or naval service of the government during the present war, and, therefore, there should be no "splitting of hairs" in determining questions of this kind when the duties of the office are properly and satisfactorily performed without additional expense to the public.

You were correct in informing the board, that so long as the duties of the office were being satisfactorily performed, they might continue paying the salary of the county auditor. You were also correct in holding that a woman is not eligible to the office of county auditor.

J. W. SANDUSKY,
Assistant Attorney General.

EFFECT OF ESTABLISHMENT OF MUNICIPAL COURT ON MAYOR'S COURT.

The establishment of a municipal court does not abolish a mayor's court in an independent incorporated town in the same civil township.

March 16, 1918.

E. J. Wenner, County Attorney, Waterloo, Iowa.

Dear Sir: Your letter of February 26th has been handed to me for reply.

You ask for an opinion of this department as to whether the establishment of a municipal court in Waterloo would abolish the mayor's court in the incorporated towns of Cedar Heights and Castle Hill, the municipalities of Cedar Heights and Castle Hill being situated within the civil townships in which Waterloo is situated.

It seems apparent that when the law establishing the municipal court was adopted that the condition stated in your proposition was not considered and the answer to your inquiry will depend entirely upon the construction placed upon Section 694-c1, Supplemental Supplement of 1915, which says that:

> Any city * * * having a population of twenty thousand (20,000) or more, may organize a municipal court * * * The limits of any such city shall be held to extend to the limits and include therein all civil townships in which said city or any part thereof is located.

Section 694-c5, of the 1915 Supplement, provides that:

> After the adoption of the proposition to establish a municipal court under the provisions of this act, and upon the election and qualification of the officers herein provided for, the police court, mayor's court, justice of the peace court and the superior court in and for the territory within the municipal court district, shall be abolished.

These sections should be construed under code Section 3446, which provides as follows:

> The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. Its provision and all proceedings under

it shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice.

The fundamental rule in the construing of statutes is to ascertain and give effect to the intention of the legislature. In the first place it was to give an opportunity to establish a municipal court in the city with a population of twenty thousand (20,000) or more, and when the court was so established it carried with it the abolishment of the police court, mayor's court, justice of the peace court, and superior court within the municipality in which the municipal court was established.

In order to include the justice of the peace, whose jurisdiction was the territory lying outside of the municipality, yet within the civil townships, in which the municipality was located, where the municipal court was established, the language found in Section 694-c5, 1915 Supplement, was used "in and for the territory within the municipal court district shall be abolished." This was right and proper as no reason could be given why a justice of the peace court should longer be in existence after the establishment of the municipal court.

This cannot be said of the mayor's court of Cedar Heights and Castle Hill. There is a good reason why these courts should continue to exist, in order to enforce the laws and ordinances which are alone applicable to the separate municipalities. It will be noticed that in the above sections quoted, that police court, mayor's court, and superior court are in the singular, signifying that it was the intention of the legislature that but one of such courts was to be abolished.

It is a well established rule when necessary to give effect to the legislative intent that words in the plural number will be construed to include the singular, and words importing the singular only will be applied to the plural of persons and things.

It seems that if a liberal construction should be placed upon the statute, as is provided by the code section above quoted, and taking the intention of the legislature that enacted the statute establishing the municipal court, that it would not include the abolishing of the mayor's court of Cedar Heights and Castle Hill.

This department also received a letter from Hon. Geo. W. Wood, chairman of a committee from the bar association of your

county giving an opinion on this same question, and the above is in harmony with their opinion. The law as stated in this opinion can well be considered with the above.

C. G. WATKINS,
Assistant Attorney General.

ESTABLISHMENT OF MUNICIPAL COURTS.

The establishment of a municipal court by a vote of the people within the territory included within the limits of the court district does not, of itself, abolish the justice of the peace courts within such district and such courts are not abolished until the election referred to in Sec. 694-c5 is held and the officers therein provided for are elected.

April 26, 1918.

E. J. Wenner, County Attorney, Waterloo, Iowa.

Dear Sir: Your letter of the 3rd inst. has been referred to me for attention.

You state:

> On the 25th inst. the people of Waterloo voted upon the question of establishing a municipal court. The vote was taken at the same time the municipal election was held, and the proposition to establish the court carried by the vote of approximately two to one.
>
> A meeting of the bar association was held on Monday of this week and the association endorsed one of the members for the position of judge of the municipal court, and a request is to be made to Governor Harding to appoint the man endorsed. The present justices of the peace of the two townships seem to be of the opinion that the court is not legally established and they have asked me to request an opinion from you. It seems they also take the position that if the court is legally established there is no vacancy which can be filled by an appointment of the governor, but on the contrary that the officers can not be elected until the next regular municipal election.
>
> I enclose herewith the written request which came to me from the justices, and to it is attached a brief which they desire you to examine.
>
> I should be pleased if I may have your opinion at an early date.

The request submitted to you by the justices of the peace now holding office within the territory embraced in the municipal

court district, and to which is attached a so-called brief or opinion, is as follows:

Waterloo, Iowa.
April 1, 1918.

Hon. E. J. Wenner, County Attorney, Waterloo, Iowa.

Dear Sir: We, the undersigned, justices of the peace of Waterloo, Iowa, respectfully submit to you for your consideration the enclosed brief on the question of abolishing the offices of justices and police court in Waterloo, Iowa. At the recent municipal election there was submitted to the voters of the city for adoption the question of establishing a municipal court. This was adopted although that part of the townships lying outside of the city limits were not permitted to vote upon the proposition. Besides there is some division of opinion as to whether the legislature intended to create such a vacancy in the present offices above referred to as to authorize the governor to appoint a judge of the municipal court, or whether this should not be filled at the next regular municipal election. This latter is the question in which we are most interested at this time, and the one on which we earnestly solicit an early opinion from you.

Respectfully yours,

Signed:

Wm. A. Cook,
James T. Knapp,
Upton B. Kepford,
East Waterloo, Twp.
Black Hawk Co., Iowa.
Frank F. Knapp,
Justices of the Peace,
Waterloo, Iowa.

The several questions or propositions included in the request of the justices are discussed at considerable length and with much force and logic in the brief referred to, and I am constrained to believe that the conclusions therein arrived at are correct, as applied to so-called vacancies in the office of judge, clerk and bailiff of the municipal court, and which it is sought to fill by appointment, and which are held not to exist, and, therefore, may not be filled by appointment. I also concur in the conclusion that the justice of the peace courts in and for the territory within the municipal court district are not and

will not be abolished until the municipal election referred to in Section 694-c5 is held and the officers therein named are elected.

J. W. SANDUSKY,
Assistant Attorney General.

APPORTIONING OF JURY.

County auditor should apportion the number of grand and petit jurors among the respective precincts.

October 30, 1918.

J. M. C. Hamilton, County Attorney, Ft. Madison, Iowa.

Dear Sir: Replying to your verbal request for an opinion as to whether it is still the duty of the county auditor to apportion the number of grand and petit jurors among the precincts from which the same are to be drawn, beg to advise that it is our opinion it is still his duty so to do.

There is no conflict between section 336 of the code, and section 5, chapter 267, acts of the 37th General Assembly. Section 336 makes it the duty of the auditor to make the apportionment on or before the first Monday in September in each year, while section 5, chapter 267, requires the jury commission to meet on the first Monday after the tenth day of November in each year, and draw the number so apportioned by the auditor from each of the voting precincts.

By reference to section 6, chapter 267, aforesaid, you will find it is made the duty of the county auditor to furnish the jury commission "a statement of the number of persons apportioned by him to be drawn from the respective voting precincts of the county as jurors."

It is, therefore, evident that no conflict exists between section 336 of the code and section 5, chapter 267, acts of the 37th General Assembly, and the duties of the county auditor under section 336 remain the same as they did prior to the creation of the jury commission by the 37th General Assembly.

W. R. C. KENDRICK,
Assistant Attorney General.

FEES OF WITNESSES.

In a criminal case, the county attorney or board of supervisors may agree to pay more than the statutory fee to a nonresident witness.

November 3, 1917.

Henry H. Jebens, County Attorney, Davenport, Iowa.

Dear Sir: At the request of the Attorney General I am writing you with reference to the question as to whether or not the county attorney or the board of supervisors may lawfully agree to pay a nonresident witness more than the fees allowed by law in order to procure his attendance as a witness in a criminal case.

There seems to be little direct authority on the proposition, but I call your attention to the case of Dodge vs. Stiles, 26 Conn. 466, where it is said:

> If the witness agrees with the party that he will attend and testify without being summoned and is not summoned and so is not brought up under the order or censure of the court, we suppose that any reasonable promise for compensation is good and may be enforced for the proceedings or service is not under nor in pursuance of the statute.

It seems to me that this would apply to a nonresident witness who is beyond reach of the process of the court. Of course if the witness was within the reach of the subpoena, then any agreement to pay more than the statutory fees would be against public policy. In the case above cited the court seems to recognize the right to indemnify witnesses for loss by reason of their attendance at a great distance rather than the right to pay higher fees for attendance and testimony.

See also the case of Clifford vs. Hughes, 124 N. Y. Sup. 478 and Hough vs. The State, 124 N. Y. Sup. 878. In the latter case, an agreement with the Attorney General was held binding upon the state. See also note to the case of Neece vs. Joseph, 30 L. R. A. (N. S.) 278 at 280.

In view of these cases I am of the opinion that the board of supervisors or the county attorney might lawfully agree to pay a nonresident witness the reasonable value of his time lost and expense of transportation in attendance upon court, in lieu of the statutory fees, allowed to witnesses who are within the jurisdiction of the court and whose attendance may be enforced by subpoena.

C. A. ROBBINS,
Assistant Attorney General.

CERTIFICATION OF JURORS.

Section 6, chap. 267, acts 37th G. A. applies to jurors who have actually served on a case in court of record during the year.

November 6, 1917.

E. W. McManus, County Attorney, Keokuk, Iowa.

Dear Sir: Your letter of the 2nd instant, wherein you ask the following question, was duly received:

> Some question has arisen in this county in relation to the construction that is to be placed upon that part of section 6, chapter 267, of the laws of the last general assembly, which provides that the names of jurors who have served for the preceding year shall be certified to the jury commissioners. The question is just what jurors are to be included among those who have served, whether it means only those who have actually served on cases or the entire panel.

Chapter 267, acts of the 37th General Assembly, amends chapter eleven of title III of the code, as amended, relating to the selection of grand and petit jurors, and, by its terms, is in addition thereto. Section 6 of the act is as follows:

> For the purpose of aiding the commission, in making the lists of grand and petit jurors and talesmen, the county auditor shall furnish the commission with the poll books of the last preceding general election, and a statement of the number of persons apportioned by him to be drawn from the respective voting precincts of the county as jurors, together with the names of all persons who have served as grand or petit jurors, after the first day of January, preceding the time of the meeting of the commission. No person who has been drawn, and has served in a court of record as a grand or petit juror, during the year beginning the first day of January, preceding the time of the meeting of the commission, and no person who has requested to be selected as a grand or petit juror, or talesman, shall be selected by the commission as a grand or petit juror or talesman. And if the name of any such person shall be selected by the commission, the fact that he has requested to be selected, or that he has served as a grand or petit juror, in a court of record, during the year, shall be ground for challenge for cause.

The phraseology or wording of the section is, in some respects, quite similar to a part of section 337, of the 1913 supplement to the code, which deals with the same subject matter, and the part thereof to which we refer, is as follows:

> And the judges of election or board of supervisors shall omit from said lists the name of *any person who has served as a grand or petit juror in a court of record since January first preceding* *** and if the name of any such person is returned, the fact that he *** *has served such juror in a court of record during the year* *** shall be a ground for challenge for cause.

It may be conceded, though in the opinion of the writer it was always involved in doubt whether, under the provisions of the preceding section, actual service as a juror in a court of record, within the time limited, was not contemplated or required to disqualify such person or prevent the placing of his name on the panel, but, however that may have been, it will be observed that the clause in the new act, dealing with the exact question involved in the language underscored above, is materially and substantially different in that it provides that "no person who has been drawn, and has served in a court of record, as a grand or petit juror, during the year beginning with the first of January preceding the time of the meeting of the commission * * * shall be selected by the commission as a grand or petit juror, or talesman." The insertion of the additional word, "no person who has been drawn and" * * * followed by the closing sentence of the section, was, doubtless, for the purpose of fixing the distinction between the terms, "drawn" and "served" and I am, therefore, of the opinion that the latter term includes only those who have actually served on a jury in a court of record within the time specified and does not include the entire panel regardless of the question whether they did or did not actually serve on a jury.

J. W. SANDUSKY,
Assistant Attorney General.

LIABILITY OF COUNTY FOR FEES AND COSTS.

The county is liable for copy fees taxed in favor of county attorney in criminal prosecutions even though the action fails. The county is also liable where the state is successful and the costs cannot be recovered from the defendant.

May 8, 1917.

H. F. Garrett, County Attorney, Corydon, Iowa.

Dear Sir: Yours of the 3rd inst., addressed to the attorney general has been received and assigned to me for attention.

Your first question is:

> Is a county liable to an attorney for copy fees or other fees taxed in his favor in criminal cases where the prosecution fails?

This question should be answered in the affirmative.

Your second question is:

> Is it liable in cases where the prosecution is successful but the defendant is unable to pay the costs?

This question should be also answered in the affirmative where the particular item of costs in question was incurred in behalf of, and in the instance of the state or county.

Your third question is:

> What would be the rule as regards copy fees and similar items of costs in actions in equity to enjoin and abate liquor nuisances where the party enjoined is unable to pay the costs? Would the county be liable for such fees?

In my judgment the same rule would apply to civil cases mentioned as in criminal cases as stated above. (See Sec. 3855 of the code.).

C. A. ROBBINS,
Assistant Attorney General.

COMPENSATION OF JURY COMMISSIONERS.

Compensation of jury commissioners is limited to four dollars per day or fraction thereof, for not to exceed two days at any one meeting or session of the board. No compensation is provided for meetings held prior to the time fixed in the statute for the first meeting.

November 26, 1917.

George Claussen, County Attorney, Clinton, Iowa.

Dear Sir: Your request for the opinion of this department on the following questions has been referred to me for attention.

You state:

> Under the provisions of chapter 267 of the acts of the 37th G. A. the judges of the district court of this district appointed jury commissioners. Notwithstanding the express provisions of Sec. 5 of this chapter the commissioners held sessions on the following days, to-wit: October 15, 16, 22, 23, 29, 30, November 2, 3, 6, 7, 12, 13, 14, 15. You will note

that the commissioners were not in session more than two consecutive days with the exception of 12th, 13th, 14th and 15th of November.

The question is now submitted as to whether or not each one of the two days periods would constitute a session of the board for which each commissioner would be entitled to be paid at the rate of $4.00 per day, or whether all these meetings constitute the one session in which event the total compensation would be $8.00, the limitation of section 4 of this chapter providing that compensation shall be at the rate of $4.00 per day for not to exceed two days at any meeting of the commission.

In order that there may uniformity throughout the state I would like your opinion on this question, and I would also like to know what your opinion is as to paying the commissioners for any time prior to the first Monday, November 10th. In this connection you will note that it is possible for the first Monday after the 10th to fall on the 16th of the month.

The chapter provides that on or before the 10th day of October in each year the judge, or judges, shall appoint three competent persons commissioners to select the grand and petit jurors and talesmen for the district court of the county for the year beginning on the first day of January next after their appointment, who shall be known as the jury commission. The appointment shall be in writing and filed with the clerk of the district court and upon the filing of the written appointment the clerk shall at once, by registered letter, notify each commissioner of his appointment. The commission shall, after their appointment and on or before the 10th day of October in each year qualify by taking the oath of office as provided in section 1180 of the code.

Under the provisions of the act the commission may be required to hold a number of separate and distinct meetings or sessions, as provided in sections 5, 9, 11, 13 and 14 of the chapter.

First. On the first Monday after the 10th day of November in each year the commission is required to meet in a room provided by the board of supervisors in the court house, and at which time they shall select the names of the requisite number of persons having the qualifications of jurors to serve as grand and petit jurors and talesmen in the district court for the year beginning on the first day of January next after such meeting.

Second. On the day fixed by the clerk, not less than twenty, nor more than thirty days before the first day of each term of the district court held after the 31st day of December, 1917, at which a petit jury is required, the commission shall meet at the office of the clerk of the district court and draw the requisite number of names to serve as petit jurors for the next ensuing term of the court.

Third. On the determination of the court that the jury was illegally drawn, selected or summoned, the commission shall meet at the office of the clerk at such time as the court may direct and draw the number of petit jurors required under the order of the court.

Fourth. On the failure of the juorors summoned, or a part of them, to appear, or if part have been excused by the court, the commission shall, on the order of the court, meet at the office of the clerk, at a time fixed by the court and draw the names of the number of jurors required by the court to fill the panel.

Fifth. On the order of the court or judge thereof, either before or during a term of court, or for the trial of any particular case, as may be deemed necessary, the panel or a part of it may be discharged and a new panel ordered drawn, and the names of such jurors shall be drawn by the commission in the manner herein provided and the commission shall, upon the order of the court, meet at the office of the clerk for such purpose.

The part of Section 4 pertaining to the compensation of the commission is as follows:

> Each commissioner shall be paid from the general fund of the county, as compensation for his services, four dollars for every day, or fraction thereof, not exceeding two days, at any meeting of the commission, during which he is actually engaged in the duties of his office, and the time which the commissioners are actually employed in the duties of their office shall be certified by the clerk of the district court to the county auditor, and the auditor shall thereupon draw a warrant upon the proper funds of the county, and deliver the same to the commissioner entitled thereto, for the amount to which such commissioner is entitled.

As before stated, the act contemplated that conditions may arise which would require the commission to meet a number of times, or hold a number of separate and distinct sessions, and, while it does not fix the number of meetings or sessions, it clearly de-

fines the conditions which must exist before they are held, limits the time to be devoted thereto, defines the duties to be performed thereat and fixes the rate per day and amount of compensation therefor and I am clearly of the opinion that the section quoted, which is all that is contained in the act bearing upon the question, limits the compensation of the commissioners to four dollars per day for not to exceed two days, at any one of said meetings or sessions, regardless of the fact that the commission may see fit to devote more than that amount of time to any such meeting or session.

As to paying the commissioners for any time prior to the first Monday following the 10th day of November, when they are required to hold their first meeting, I am entirely at a loss to understand upon what theory such payment can be claimed or justified. The statute does not require or contemplate the performance of any service whatever by the commission prior to the time fixed for the first meeting in November, neither does it make any provision for compensation for services that may be performed by the commission prior to that time.

J. W. SANDUSKY,
Assistant Attorney General.

FEES OF JURY AND COURT REPORTER.

The county is liable for the expense of a jury and court reporter of the superior court.

March 10, 1917.

H. K. Lockwood, County Attorney, Cedar Rapids, Iowa.

Dear Sir: We have your letter of the 6th inst., asking for the opinion of this department on the following facts:

> I would like to have an opinion from your office as to whether or not there is any authority for having Linn county pay for one-half of the expense of the jury and court reporter of the superior court of the city of Cedar Rapids, Iowa. It has been the custom to divide the expense between the city and the county in regard to these two items, but please give me an opinion as to the legality of this.

As we understand the law, your county has no just cause for complaint if they are only asked to pay one-half of the expense of the jury and court reporter of your superior court, because, as we find the law, we are of the opinion the county is liable for

the entire expense. It is true that provision is made for the city to pay one-half and the county the other half of the judge's salary, but no such provision is made for the expense of the jury or court reporter.

We call your attention to section 254-a2 supplement to the code, 1913, and sections 70 and 75 of the code; also sections 280-a, 280-c and 280-d of said supplement; also section 263, which provides that all statutes governing the district court as to venue, costs, etc., shall apply and govern superior courts except when inconsistent with the chapter relating to such courts.

J. W. SANDUSKY,
Assistant Attorney General.

OPINIONS TO DAIRY AND FOOD COMMISSIONER

WHAT CONSTITUTES A PACKAGE.

Wrappers on hams and bacon do not constitute a package under Section 4999-a31c, Supplement, 1913.

May 3, 1917.

W. B. Barney, Dairy and Food Commissioner, State House.

Dear Sir: Your favor of recent date requesting an opinion from this department as to whether the wrappers used in wrapping hams and bacon could be construed within the term "package" in paragraph five, Section 4999-a31-c, Supplement, 1913, has been referred to me for attention.

The question is, does paragraph 5, Section 4999-a31-c, Supplement to the Code, 1913, impose upon packers, distributors, or dealers in hams and bacon, the imperative duty to stamp or print on the outside of the wrapper the net weight of said hams and bacon, when the same are wrapped in paper or cloth, and sold, offered or exposed for sale.

In order to reach an intelligent conclusion it is not only necessary to ascertain the reason for such a law, but also whether the remedy provided is practicable in its application. It is evident that in enacting the so-called pure food legislation it was

the intention of the legislature to enact against fraud or deception being practiced upon the public by manufacturers and dealers in articles of food. For many years it was the general custom among merchants to weigh and sell their goods over the counter in bulk form, and the practice of selling it in carton or package form is of comparatively recent origin. This new method of merchandising opened a vast and productive field for fraudulent practice on the part of unscrupulous and designing men, and almost instantly the market was flooded with fake breakfast foods, misbranded and adulterated food of all descriptions, packed in cartons, pasteboard boxed, short in weight and deleterious in quality. It was largely to correct this evil that pure food legislation was enacted, requiring manufacturers and dealers so engaged to print in plain words and figures the exact weight and ingredients of the contents of such packages. Surely it was not the intention of the legislature to apply the law to articles of merchandise which were open to the inspection of the customer and which were weighed out to him over the counter. Evidently, it was the intention of the legislature, when using the term "package" in paragraph 5, Section 4999-a31-c, Supplement to the Code, 1913, to limit the meaning of that term to bundles, boxes, cans or receptacles in which food products are packed, presumed to contain a particular article of food, weighing a definite amount, and to which the customer is denied personal inspection and examination without breaking the bundle, box, can or receptacle. It certainly does not apply to food products wrapped up in paper or cloth for the purpose of preservation or sanitation, when there is no question as to the contents, and which are actually weighed before the sale, or sold at the weight then found together with the wrapper and the customer knows and understands exactly what he is getting. Even though it would be practicable to weigh each ham and side of bacon when encased and print the net weight on the outside of each wrapper, yet it would be absolutely impossible to ascertain in advance just how much each ham and each side of bacon would shrink each day, week or month, on account of evaporation and heat, and print on the outside of the wrapper just what the net weight would be at each intervening change. To hold that the term "package" includes the paper or cloth wrapper around hams and bacon would require a superhuman

compilation of figures, a task wholly beyond the pale of human effort, a result arrived at entirely by conjecture, and unquestionably beyond even the contemplation of the legislature when the law in question was enacted.

It is, therefore, my opinion that sub-division 5, Section 4999-a31-c, Supplement, 1913, does not apply to hams and bacon wrapped in paper or cloth packages when said packages are sold at their actual gross weight at the time of sale, with the knowledge and acquiescence of the customer.

W. R. C. KENDRICK,
Assistant Attorney General.

A SACK OF FLOUR MUST CONTAIN 49 POUNDS.

The legislature having provided that a sack of flour shall contain 49 pounds it is unlawful to offer for sale sacks containing 48 pounds.

May 18, 1917.

W. B. Barney, Dairy and Food Commissioner, State House.

Dear Sir: I have your request for the views of this department, as to whether it would be permissible for dealers in flour to continue to sell the same in sacks containing only forty-eight pounds after the taking effect of the act of the last legislature, which fixed the legal weight of a sack of flour at forty-nine pounds, provided the net weight is distinctly marked on the package. This question should have been considered and passed upon in the opinion rendered you some time since, relative to this new law, but, as it was not you will please consider this as supplemental to that opinion.

Statutes should always be construed with reference to the object sought to be accomplished by their enactment. In this instance, the purpose was to determine and fix as stated in the opinion referred to the number of pounds that should constitute a barrel of flour, which is one hundred and ninety-six pounds, and a sack of flour, which is forty-nine pounds. In other words, the number of pounds that should be contained in a barrel of flour, and in a sack of flour, and in view of the fact that the custom had long prevailed in this state to consider forty-eight pounds of flour, as a sack of flour it should be held that it was the legislative intent to prohibit the sale of flour in sacks con-

taining only forty-eight pounds. The opportunity for deception and imposition, in this particular instance, the difference being only one pound, is so apparent that argument or illustration is wholly unnecessary, and it is also apparent that this would not be overcome, though it might, to some extent, be removed by marking in distinct figures on the sack the net contents thereof. As further evidence of such legislative intent it should be borne in mind that the act does not take effect until January first, 1918, which affords reasonable opportunity for manufacturers and dealers to dispose of stocks on hand in such form.

I will also call your attention to the fact that it is proper and lawful for the dairy and food commissioner, under the powers conferred upon him by the pure food act, to prohibit the selling of food products in sacks or other kinds of receptacles or containers, which in quantity, form of package or otherwise, would be likely to mislead or deceive the ordinary purchaser as to the number of pounds or quantity actually contained in such sacks, receptacles or other containers.

J. W. SANDUSKY,
Assistant Attorney General.

STOCK FOOD LICENSES AND INSPECTION FEES.

The law relating to manufacture and sale of stock foods received and an explanation of the license and inspection fee given.

May 12, 1917.

W. J. Barney, Dairy and Food Commissioner, State House.

Dear Sir: Your request for the opinion of this department on the following proposition has been assigned to me for attention.

> This department is frequently called upon to advise manufacturers and dealers relative to the application of the law regulating the sale of concentrated commercial feeding stuffs, especially as to the so called "stock remedies," some of the manufacturers of which claim the law does not apply to them, for the reason their product is not "concentrated commercial feeding stuffs," not "stock foods," but "stock remedies," medicines to cure diseased animals, not food to sustain and nourish them, and, therefore, they should not be required to comply with the provisions of Chapter 189, acts of the 32nd General Assembly, now Sections

> 5077-a6 to 5077-a12 of the 1913, Supplement to the Code, which, among other things, requires furnishing to the commissioner samples of product and certified statement of purity of same and payment of inspection and license fees, before offering such product for sale, and I desire the opinion of the department of justice construing the law, as to its application to manufacturers of and dealers in these so-called remedies.

In order that a clear and distinct understanding may be had of what is embraced in Chapter 189, acts of the 32nd General Assembly bearing on the subject before us, and of the legislative intent, as therein expressed, we deem it necessary to set out in full the section defining "concentrated commercial feeding stuffs," and to refer at some length, to other sections of the act.

Section 5077-a8 provides:

> The term concentrated commercial feeding-stuffs, as used in this act, shall include alfalfa meals and feeds; dried beet refuse; ground beef or fish scraps; bean meals; dried blood; brewers' grains, both wet and dry; cerealine feeds; cocoanut meals; corn feeds; corn and oat feeds; corn, oat and barley feeds; compounds under the name of corn and cob meals; corn bran; clover meal; cottonseed meal and feeds; germ feeds; distillers' grains; gluten meals; gluten feeds; hominy feeds; linseed meals; malt refuse; malt sprouts; meat meals; meat and bone meals; mixed feeds of all kinds; oil meals of all kinds; oat feeds; oat bran; oat flour; oat middlings; oat shorts; pea meals; poultry foods; rice bran; rice meal; rice polish; rye bran; rye middlings; rye shorts; starch feeds and starch factory by-products; tankage and packing house by-products; wheat bran; wheat middlings; wheat shorts; and low grade wheat flour; and all materials of similar nature used for domestic animals; also condimental stock foods; patented, proprietary or trademarked stock or poultry feeds claimed to possess medicinal or nutritive properties or both; and all other materials intended for feeding to domestic animals. But it shall not include: hay; straw; whole seeds; unmixed meals made from the entire grains of wheat, rye, barley, oats, Indian corn, buckwheat, and broom corn; nor wheat flours nor other flours fit for human consumption.

This section places concentrated commercial feeding stuffs in what may be termed four classes: (A) commercial feeds (B) condimental stock foods, (C) patented proprietary or trademarked stock or poultry feeds, claimed to possess medicinal properties, nutritive properties, or both medicinal and nutritive prop-

erties, (D) with certain exceptions, all other materials and substances intended for feeding to domestic animals.

The language of the statute defining these food stuffs is very broad and comprehensive, and seeks to and does include, with the exceptions stated, all forms, combinations and mixtures of stock foods, stock and poultry foods and so-called stock remedies, and so-called stock and poultry remedies. It may be true that in many if not all, the diverse preparations advertised and offered for sale, including "stock food," "stock remedies," "hog remedies," "hog cholera remedies," "poultry remedies," "poultry tonics," "hog tonics," and various other kinds of cures and remedies for domestic animals, may be found more or less sulphur, salt, charcoal, copperas, juniper, ginger, chalk, calomel and other kinds of drugs and chemicals but when compounded with any of the ingredients enumerated in the statute the composition or product constitutes the "concentrated commercial feeding stuffs" contemplated by the statute, and, by an inspection of the certificate of analysis, which must be filed with the commissioner, as hereinafter pointed out, together with the sample of the product which must accompany the same, he determines whether the commodity shall bear the inspection fee, or the license fee hereinafter referred to.

Section 5077-a9 provides that before any concentrated commercial feeding stuff, as above defined, is offered or exposed for sale, the importer, manufacturer or person who sells or offers it for sale in this state, for use in the state, for each and every feeding stuff bearing a distinguishing name or trademark, shall file with the food and dairy commissioner, a certified copy of the statement named in section one of the act and a sealed glass jar containing one pound of the feeding stuff to be sold, accompanied by affidavit that it is a fair, average sample thereof and corresponds with the feeding stuff it represents, and Section 5077-a10 further provides that before any maufacturer, importer, dealer or agent shall offer or expose for sale any of the feeding stuffs referred to in Section 5077-a18, he shall pay the commissioner an inspection fee of ten cents per ton for each ton sold or offered for sale in the state, except that every manufacturer, importer, dealer or agent for any condimental, patented, proprietary or trademarked stock or poultry foods, or both, shall pay the com-

missioner on or before the fifteenth day of June in each year a license fee of one hundred dollars, in lieu of such inspection fee, and the commissioner is empowered to prescribe and adopt such regulations as may be necessary for the enforcement of the provisions of the act.

This section places concentrated commercial feeding stuffs in two classes, on the sale or exposing for sale of one of which an inspection fee of ten cents per ton is charged and on the other a license fee of one hundred dollars is charged, the latter class including what is termed "condimental," "patented," "proprietary," or trademarked stock or poultry foods, or both, and under the latter may be classed all of the so-called "stock remedies," "stock and poultry remedies," "hog remedies," "poultry tonics," "hog cholera cures," and divers other kinds of remedies and cures, all of which, no doubt, come within the purview and operation of the statute and should not be exempted on account of the peculiar names given thereto or results claimed therefor, which, as a rule, may and should be treated as clever and artful means and subterfuges to evade the law and escape payment of the license fee required.

We do not mean to hold that it is not possible to prepare or compound a stock remedy, a medicine for the treatment of sick and diseased domestic animals, which might not or would not come within the very comprehensive definition given in the statute, but we do mean to hold that the so-called stock remedies, whatever name may be given thereto and whether containing medicinal or curative properties, including drugs and chemicals, or not, and whether they contain and are compounded with any of the ingredients enumerated in the statute or not—if such remedies are to be fed through the mouth to domestic animals they are concentrated commercial feeding stuffs within the meaning of the act, and we also hold that the commissioner, in applying and enforcing the provisions of legislation of this character, should construe and apply it with a view to further and accomplish the object and purpose for which it was enacted, the chief one of which, doubtless is, the protection of the public from the purchase and use of worthless, fraudulent, unwholesome and dangerous substances, and it also devolves and becomes obligatory upon him to make thorough analysis of the samples depos-

ited with him by the manufacturers and dealers offering such food stuffs and remedies for sale.

J. W. SANDUSKY,
Assistant Attorney General.

SALARY OF DEPUTY DAIRY AND FOOD COMMISSIONER.

The Salary of the Deputy Dairy and Food Commissioner may not be increased by Retrenchment and Reform Committee.

May 8, 1917.

W. B. Barney, Dairy and Food Commissioner, State of Iowa.

Dear Sir: I am in receipt of a letter from Hon. Clem F. Kimball, chairman of the retrenchment and reform committee, addressed to you with reference to the proposed increase of the salaries of the deputy dairy and food commissioner, and in reply will say that the difficulty with the whole proposition is that the salary of the deputy commissioner is fixed by statute. Section 2515, Supplemental Supplement to the Code, 1915, provides:

> The commissioner may appoint a deputy commissioner at a salary of $1800.00 per year.

This fixes the salary of the deputy unless the statute itself is changed. In our opinion, if the power were given to the retrenchment and reform committee to increase this salary, they would also have the power to decrease it, which in our judgment, they do not have.

It is suggested in the letter of Senator Kimball that the provisions of the Joint Resolution No. 15 of the 37th General Assembly might change the situation with reference to the increase of this salary. We call your attention to said resolution found on page 1869 of the Senate Journal, which is in part as follows:

> Until July 1, 1919, the number of employees and provisions for compensation therefor for the various offices and departments of the state at the seat of government, except where otherwise provided by law, Shall not exceed the number named herein of the compensation to each per annum, and for such employment shall be the amounts as hereinafter fixed.

FOR THE OFFICE OF DAIRY AND FOOD COMMISSIONER.

Two clerks, each at a salary not to exceed $900

One janitor for rooms occupied by dairy and food commissioner at a salary not to exceed $840

One stenographer at a salary not to exceed $900

For clerical assistance to be used in case of necessity and upon approval of the executive council, not to exceed the sum of $500

The expression "for clerical assistance to be used only in case of necessity" would not include, and in our judgment, could not be construed to include the changing of any salary fixed by law. It is for assistants other than those provided for by statute or by Resolution No. 15. The only employees whose salaries are provided for in the resolution are the ones above set out, and in no manner does the resolution refer to the deputy commissioner which is mentioned in Section 2515 of the Supplemental Supplement to the Code, 1915, and we therefore hold that you could not use any part of the $500.00 provided for on page 1874 of the Senate Journal, of Resolution No. 15 for the purpose of increasing the salary of the deputy commissioner.

It is also suggested by the letter of Senator Kimball that a part of the $10,000.00 fund provided for on page 1875 of the Senate Journal which is placed at the disposal of the retrenchment and reform committee might be used for the purpose of increasing the salary of said deputy. In this connection we call your attention to the following which is found on page 1875 of the Senate Journal:

> For other state purposes, including assistants in the various departments, to be expended only under the authority of the committee.....$10,000
>
> * * * No additional help shall be employed by the head of any department, and no additional pay shall be granted or authorized to any of the employees provided for in this act without first having received the approval of the committee on retrenchment and reform. The employees and extra help provided for the various offices and the additional compensation for service provided in this resolution shall at all times be subject to reductions, limitation or other disposition by the committee on retrenchment and reform, whenever such committee shall find that the number of employees and the amount of additional help and

compensation for the purposes named in this resolution should be reduced, eliminated or changed.

I think it is perfectly apparent from the language of the resolution that it was not intended that the retrenchment and reform committee should have any right to affect the salaries of any employees, except those named in the resolution, and inasmuch as the deputy commissioner is not one of those named in the resolution and his compensation is provided for by statute, that under no circumstances could the retrenchment and reform committee have any authority either to add to or take from his salary as fixed by statute.

H. M. HAVNER,
Attorney General.

MAY CARRY LIABILITY INSURANCE ON AUTOMOBILE.

Dairy and Food Commissioner, has the right under provisions section 4999-a31-f to secure liability insurance on automobiles purchased for use of the department.

April 24, 1917.

W. B. Barney, Dairy and Food Commissioner, State House.

Dear Sir: Your request for the opinion of this department on the following proposition has been assigned to me for attention:

> For the purpose of enabling the commissioner to enforce the laws pertaining to his department and to provide means of transportation for employes thereof, eight automobiles have been purchased and are now in use and, it being, in the judgment of the commissioner, expedient and proper that liability insurance on such automobiles should be carried, I would esteem it a favor if you will advise whether such expense may be incurred under Section 4999-a31-f of the 1915 Supplemental Supplement to the Code.

The section to which you refer is as follows:

> For the purpose of enabling the commissioner to enforce the provisions of the various laws, the enforcement of which is vested with the state food and dairy commissioner, for the making of such analysis for other state departments as may be authorized by the executive council, for necessary traveling and miscellaneous expenses of assistants and experts and for all other expenses herein provided, the sum of thirty-four thousand dollars annually, or so much thereof as may be necessary, is hereby appropriated from (any funds in) the treasury not otherwise appropriated.

The purpose of this section was to place at the disposal of the dairy and food department a certain appropriation to cover traveling and other expenses pertaining to such department and, as it has been held to cover the expense incident to the purchase of automobiles, it may, with equal propriety, be held to cover the expense of carrying liability insurance thereon, as such protection would seem to be necessary and proper in connection with the use of the automobile.

J. W. SANDUSKY,
Assistant Attorney General.

OPINIONS RELATING TO ELECTIONS.

COST OF ELECTIONS.

Charge for rent of rooms used as a polling place in cities at general elections is to be paid by city.

October 29, 1918.

R. P. Scott, County Attorney, Marshalltown, Ia.

Dear Sir: Replying to your verbal request of the 19th inst., as to who should pay the rent on the polling place where a general election is held, beg to advise that Section 1113 of the Code provides, among other things, as follows:

> In townships the trustees, and in cities and towns the mayor and clerk, shall provide suitable places in which to hold all elections provided for in this chapter, and see that the same are warmed, lighted, and furnished with proper supplies and conveniences, including a sufficient number or supply of booths, shelves, pens, penholders, ink, blotters and pencils to enable the voter to prepare his ballot for voting, screened from all observation as to the manner in which he does so.

Our supreme court has passed upon the same question, arising under Section 391 of the Code of 1873, which provided:

> The trustees shall designate the place where elections will be held * * * *

In that case the court held that the township and not the

county was liable for the rent of the polling place in which a general election was held.

Turner & Co. vs. Woodbury County, 57 Ia. 440.

It is a well recognized rule of law that before a county can be made liable on a claim there must be some law requiring or authorizing its payment. The legislature has declared that the county shall furnish certain things used in connection with general elections. For instance, the county auditor shall print the ballots (Sec. 1107 Supplement 1915); the ballot boxes shall be furnished by the board of supervisors (Sec. 1130 Supplement 1915); the poll books shall be furnished by the county auditor (Sec. 1132 of the Code); the card of instructions shall be furnished by the county (Sec. 1129, Supplement 1913); and under certain conditions the board of supervisors may furnish polling places for country precincts (Sec. 1091 of Code). But nowhere is the county made expressly liable for the rent of the polling place, except as provided in Section 1091 of the Code.

I am, therefore, of the opinion that the rent of the place used as a polling place inside the limits of a city at a general election shall be paid by the city and not the county.

W. R. C. KENDRICK,
Assistant Attorney General.

NOMINATION AT COUNTY CONVENTION.

County convention is not limited to nominate only candidates who received votes in the primary.

June 17, 1918.

R. P. Scott, County Attorney, Marshalltown, Ia.

Dear Sir: Your favor of the 15th inst., addressed to the Attorney General has been referred to me for reply.

You state:

> We had five candidates before the republican primary for sheriff and not one of them was able to get the thirty-five per cent. There are probably two prospective candidates besides the five before the primary who wish to come into the convention and try for the nomination.

You then ask:

> Whether new candidates may enter a county convention

for a county office, if no candidate at the primary has received the thirty-five per cent vote.

On this question Sec. 1087-a25 of the Supplement of 1913 provides:

> * * * When the delegates, or a majority thereof, or when the delegates representing a majority of the precinct, thus elected, shall have assembled in the county convention at the time herein prescribed, and at the county seat, the convention shall be called to order by the chairman of the county central committee, who shall present the certified list of delegates and members of the county central committee, and a list of the officers for which no nomination was made at the primary election, by reason of the failure of any candidate for any such office to receive thirty-five per cent of all the votes cast by such party therefor. * * * * 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 percentum of all votes cast by such party therefor * * * * * *.

A similar provision is found in our statutes with reference to nominations by district and state conventions. See Sec. 1087-a26 and Sec. 1087-a27, Supplement of 1913.

It is undoubtedly the rule that political conventions under the delegate system can nominate whomsoever they please as candidates for political offices within their power to fill. Therefore, inasmuch as Sec. 1087-a25 supra does not expressly limit the county convention to the candidates of the primary, when making nominations for candidates for county offices, for which offices the voters fail to nominate a candidate at the primary election, "by reason of the failure of the candidate for such office to receive thirty-five percentum of all votes cast by such party therefor," this department is of the opinion that the county convention is not limited to the candidates whose names were printed on the ballots or who were voted for at the primary election.

We are aware of no decision wherein it is held that the convention must decide among the candidates whose names were submitted to the voters at the primary election and cannot con-

sider new candidates, except when legislature by express legislation so provides.

We therefore hold that new candidates have a right to enter a county convention under the conditions represented in your letter.

W. R. C. KENDRICK,
Assistant Attorney General.

RESIDENCE OF VOTERS.

Place of residence for voting purposes is largely determined by the intention of the voter.

July 9, 1917.

M. Dean Roller, County Attorney, Marengo, Iowa.

Dear Sir: In the absence of Attorney General Havner, yours of the 7th inst., addressed to him has been referred to me for reply.

Your question briefly stated is whether or not a person who has lived in Des Moines a number of years, but who owns a farm in the school district in your county where he has a furnished room and spends a week occasionally, has such a residence in your county as would entitle him to vote at a school election.

Under the holdings of our supreme court where a person has some sort of a residence or home at two or more places, the question of which is his legal domicile for the purpose of voting is determined so largely by the question of his intention with reference to the matter that no definite answer could be given in any particular case without knowing such intention. See Vanderpoel vs. O'Hanlon, 53 Iowa 246, State vs. Savre, 129 Iowa 122, Kelso vs. Wright, 110 Iowa, 560.

If the residence in Des Moines is merely temporary and there is an intention to return to your county to make that his permanent residence, then in my judgment he would have the right to vote there notwithstanding the fact that he may have lived in Des Moines a number of years. In other words, the length of the residence at the temporary domicile is not controlling.

For instance, persons holding a political job at Washington,

D. C., or at the Capitol here might live at such places ten or twenty years and still have the intention to return to their former home when their employment is terminated. All such persons have the right to vote at the place of their former home to which they have an intention to return.

If, on the other hand, there is no intention to return permanently to such former home, I am of the opinion they would have no right to vote there.

The matter of challenging the vote and contesting the election is governed by the same rules as those governing such matters in the general election.

C. A. ROBBINS,
Assistant Attorney General.

COUNTING OF ABSENT VOTERS' BALLOT.

A qualified elector who legally obtains an absent voter's ballot and executes and delivers the same is entitled to have such ballot counted even tho such elector is present in his county on election day.

October 10, 1917.

A. G. Rippey, Acting County Attorney, Des Moines, Iowa.

Dear Sir: Your auditor desires to know whether or not an absent voter, who obtains his ballot because he expects to be absent from the county on election day and receives a ballot upon such request, is entitled to have that ballot counted, if in fact, such voter is actually in the county on election day.

We are writing to you in order that you may advise the auditor that it is our opinion that if such ballot were obtained in good faith, the vote should be counted.

Section 1137-b of the Supplemental Supplement of 1915 provides that the voter, if he expects in the course of business, to be absent from the county, may vote as provided in Chapter 3-B of said supplement at any general, special, primary, county, city or town election.

Section 1137-c provides that any elector, as defined in the foregoing section, expecting to be absent from the county of his residence on the day of any such election may make application to the county auditor of such county for an official ballot.

The following sections in said chapter provide the method of handling that ballot until it is finally counted by the judges of election.

Secton 1137-j of the said supplement provides that such absent voter's ballot shall not be counted if in fact the voter is present and votes in person, but this does not require him to vote in person, although he may be in the county.

It is, therefore, our opinion if the qualified elector honestly, and in good faith, expects to be out of the county in the course of his business on election day and received an absent voters' ballot upon application properly made, his ballot, if properly executed and delivered, should be counted, although for any just and honest reason the said elector expecting to be absent was in fact present in the county on the day of such election.

J. W. KINDIG,
Assistant Attorney General.

ELECTION PRECINCTS.

The extension of the limits of an incorporated town so as to include a part of another township or voting precinct does not give the inhabitants thereof the right to vote in the election precinct in which the incorporated town is located at general elections, until the board of supervisors by proper action have changed the boundaries and placed such extended corporate limits or boundaries of the voting precinct in which such corporate town is located.

May 14, 1918.

H. J. Ferguson, County Attorney, Tama, Iowa.

Dear Sir: Your request for the opinion of this department on the following question has been referred to me for attention.

You state:

> A short time ago the town of Garwin, Iowa, enlarged its corporate limits so as to take into its limits part of an adjoining township so that the town now is located in two townships, to-wit: Carlton and Howard.
>
> At a general election (including the primary election) where do the residents of Garwin vote?

Under the provisions of Section 1090, Supplement of 1913, as amended by Chapter 66, Acts of the 37th General Assembly, the board of supervisors are authorized to fix and determine the

boundaries of the various voting precincts within the county. In the instance to which you refer, if there has been no action of the board of supervisors fixing the boundaries of the town of Garwin or the township of Carlton in which the town of Garwin was originally located so as to include that portion of Howard township, which has lately been included in the corporate limits of Garwin, then the voters of that part of Garwin must vote at all general elections at the voting place fixed and designated for the voters of Howard township.

J. W. SANDUSKY,
Assistant Attorney General.

SPECIAL ELECTIONS.

The board of county canvassers in counties where voting machines are used should open the counting compartments of the voting machines and canvass the votes in the same manner as the precinct canvassers are required to canvass the votes at a general election.

October 27, 1917.

Executive Council, State House.

Gentlemen: In response to your oral request for an opinion from this department upon the propositions hereinafter stated, I submit the following:

> First: Should the state board of canvassers begin their canvass of the returns of the special election held October 15, 1917, until the returns are all received by the secretary of state?

Section 1161 of the Code of 1897 provides:

> On the twentieth day after the day of election, the board of state canvassers shall open and examine all of the returns. If they are not received from all the counties, it may adjourn, not exceeding twenty days, for the purpose of obtaining them, and, when received, shall proceed with the canvass. Returns of elections to fill vacancies in office shall be canvassed as soon as received.

Section 1158 of the Code of 1897 provides:

> If the abstracts from any county are not received at the office of the secretary of state within fifteen days after the day of election, he shall send a messenger to the auditor of such county, who shall furnish him with them, or, if they have been sent, with a copy thereof, and he shall return them to the secretary without delay.

Section 1159 of the Code of 1897 provides:

> The abstracts received by the secretary of state shall be kept by him until the day fixed for their opening, and shall then be opened only in the presence of the state board of canvassers.

We are of the opinion that the state board of canvassers might commence the canvass, and, if in the progress of the canvass, it is discovered that all of the returns from the various counties are not in, under Section 1161 of the Code they may adjourn for a period not exceeding twenty days, for the purpose of obtaining the returns, and if it is ascertained during the progress of the canvass, that the returns have not been sent in in accordance with Section 1158 of the Code, a messenger should be sent to the auditors of the various counties that are delinquent, as provided by said Section 1158.

I think, however, the better practice would be to try and secure all of the returns before the canvass is commenced, but I do not believe it would invalidate the canvass if it should be commenced before all of the returns are in.

> Second: Under Section 1137-a25 of the Supplement to the Code of 1913, can the votes voted by the voting machines be canvassed before thirty days?

In this connection, I call your attention to Section 1137-a24 of the Supplement to the Code of 1913, which provides:

> As soon as the polls of the election are closed, the judges of the election thereat shall immediately lock the voting machine against voting and open the counting compartments in the presence of all persons who may be lawfully within the polling place, and proceed to canvass the vote.

Section 1137-a25 of the Supplement to the Code of 1913 provides that the judges of election shall, as soon as the count is completed and fully ascertained, lock the machine against voting, and it shall so remain for a period of thirty days; but locking the machine against voting does not lock the counting apartments so that the votes cannot be canvassed as required by Section 1171 of the Code.

If you will observe, Section 1137-a24 of the Supplement to the Code of 1913 provides, that as soon as the polls are closed, "the judges of election thereat shall immediately lock the voting

machine against voting and open the counting compartments in the presence of all persons," etc., and it is by the opening of these counting compartments that the vote registered on the voting machines should be canvassed.

I desire also to call your attention to the fact that Section 1137-a25, supplement to the code of 1913, contains the following provision:

> Whenever independent ballots have been voted, the judges shall return all of such ballots properly secured in a sealed package as prescribed by section eleven hundred forty-two of the code.

Section 1137-a26, supplement to the code of 1913, provides:

> After the total vote for each candidate has been ascertained, and before leaving the room or voting place, the judges shall make and sign written statements of election, as required by the election laws now in force, except that such statements of the canvass need not contain any ballots except the independent ballots as herein provided.

I call your attention especially to that part of section 1137-a26, which says:

> except that such statements of the canvass need not contain any ballots except the independent ballots as herein providede.

Section 1137-a27, supplement to the code of 1913, provides:

> 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. Nothing in this act shall be construed as prohibiting the use of a separate ballot for constitutional amendments and other public measures.

There is no provision for the voting on the machines of any absent voters' ballots which are deposited with the officers under the absent voters' act. These are the separate ballots which are referred to in section 1137-a27, supplement to the code of 1913, and the sections following.

The provisions of section 1137-a27, which provide that "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", makes all of the provisions with reference to the ballots and the recounting of the same applicable to the voting machine precincts the same as to those that do not have such machines.

We therefore hold that there is nothing contained in section 1137-a25, supplement to the code of 1913, which is inconsistent with our construction of the provisions of section 1171 of the code of 1897 in connection with the ascertainment of the vote as made by the voting machines, and the board of county canvassers where there are voting machines in the various places in the state, should open the counting compartments of these voting machines and proceed to a canvass of the votes in the same manner and in the same way the precinct canvassers are required to canvass at a general election, and the fact that the machine is locked against voting would in no wise interfere with or prevent the board of county canvassers from making such canvass.

H. M. HAVNER,
Attorney General.

TIME FOR FILING OF CERTIFICATES OF NOMINATION.

Discussion as to how many days before election certificates of nomination for county officers must be filed; also auditors duty in first instances.

October 25, 1918.

Rees B. Ellis, County Auditor, Sidney, Iowa.

Dear Sir: At the request of Vernon Johnson, your county attorney, I am writing you this letter.

Mr. Johnson requested this department to furnish you our opinion on the following matters:

First—How many days before election should certificates of nomination be filed with the county auditor?

Second—Does the county auditor have the right to determine in the first instance the sufficiency of such certificates?

Section 1104 of the supplemental supplement requires that certificates of nomination of candidates for county offices be filed with the county auditor not less than thirty days before

the day fixed by law for the holding of the election. This applies to a general election. Then further on in said section provision is made for special elections, wherein certificates of nomination shall be filed not less than twelve days before election.

Therefore, in answer to your first inquiry we hold that in general elections certificates of nomination shall be filed with the county auditor thirty days before election, and for special elections certificates of nomination shall be filed at least twelve days before election.

As to your second inquiry, section 1107 of the supplemental supplement declares that the county auditor shall have charge of the printing of the ballots, and shall place thereon the names of all candidates which have been properly certified to him. The auditor will determine in the first instance whose names shall go on the ballot, and in determining that question he should be controlled by the certificates of nomination. In the event any person interested desires to question any certificates of nomination, then section 1103 of the code of 1897 provides a method and creates a tribunal to hear and determine such objections, whose decision shall be final. So that in answer to your second question, unless objection is made, the auditor determines in the first instance the names of the candidates who shall be printed on the ballot to be voted for at the general or special election as the case may be.

W. R. C. KENDRICK,
Assistant Attorney General.

ABSENT VOTERS' LAW.

The absent voters' law enables soldiers or others absent from the county to vote by mail.

October 2, 1917.

To All County Auditors:

Dear Sirs:—Preparation for holding the coming special election for the adoption of the constitutional amendment has caused many applications to be made to this department for construction of the various phases of the registration laws of Iowa required for said election, and in order that there may be uniformity of action among the election officials of the state we are send-

ing this letter to each county attorney and county auditor with the request that they make known its contents to the proper officials of their county and give publicity in papers.

1. Section 1076 of the supplemental supplement of 1915, and the following sections, as amended by section 1 of chapter 41 of the acts of the 37th General Assembly, require registration in cities having a population of six thousand or more for any general, city or special election. This is true in cities under special charter, according to section 1076-a of the statute. In cities under six thousand no registration is required.

Chapter 321 of the acts of the 37th General Assembly provides that the election in question is a special election to be held in the manner provided for holding general elections, and, therefore, registration is required for this election.

2. Those who are required to register may for convenience be divided into three general classes. Qualified electors present in the county who are not disabled, as specified in section 3 of chapter 419 of the acts of the 37th General Assembly, will be designated Class One. Qualified electors in the county who are thus disabled will be designated Class Two, and qualified electors who are absent from the county, without respect to disability, will be designated Class Three.

Class One.

Class One is required to appear for registration before the proper registration officials as provided by section 1077 of the code of 1897 and be registered in each year of a presidential election. (See code section 1085). Between such registrations in the presidential year and the next general registration intervening registrations are required to be made in the following manner:

(a) By copying from the poll books of the previous general election into the new alphabetical list of voters all the names found therein.

(b) By adding thereto all additional names found on all poll books of all subsequent elections.

(c) By adding to those poll book lists the new names of all persons who are required to personally appear before the regis-

tration officials of the proper precinct for registration, especially for the prohibitory amendment election. Those who are thus required to personally appear for such registrations are:

1. Electors who are qualified, but did not vote at the last general or subsequent election.

2. Electors who since said preceding election became of age.

3. Electors who since said preceding election became naturalized citizens.

4. Electors who since voting at the last general or subsequent election have changed precincts.

Class Two.

Class Two consists of all disabled electors in the county and they need not appear before the registration officials to register. They may vote under the absent voters' law. In such case the affidavit upon the ballot envelop shall constitute a sufficient registration for them, under authority of Section 2 of Chapter 419 of the Acts of the 37th General Assembly.

Class Three.

Class Three consists of all voters absent from the county of their residence, and they need not personally appear before the registration officials of their precinct for registration. As provided for the disabled voters, the affidavit upon the ballot envelop shall constitute a sufficient registration for them.

Included in this class is the soldier away from home in the army or navy of the United States. Any soldier or sailor absent from the county of his residence may at once make application to the auditor of his county for an official ballot to be voted at the coming election. This application shall be made upon a blank to be furnished by the said auditor as provided by Section 1137-d of the Supplemental Supplement of 1915. The application must be made not less than three days prior to the date of said special election.

In order that time may be saved, it is suggested that the auditor of each county furnish said official application to each elector of his county in the military service of the United States by sending the same to the regimental commander under whom

such elector serves so that delivery thereof may be made without delay.

H. M. HAVNER,
Attorney General.

TIME OF ELECTIONS IN SPECIAL CHARTER CITIES.

The provisions contained in the charter of a special charter city, and not the general statutory provisions, unless the two conflict, govern as to the time of holding city elections.

January 29, 1918.

A. E. Cook, County Attorney, Malvern, Iowa.

Dear Sir: Your letter of January 26th, addressed to Attorney General Havner, has been given me for answer.

You ask:

> Is the time for the election of Aldermen in the city of Glenwood fixed by the statutes of the state of Iowa, or is such election fixed by the charter of the city?

The charter of the city of Glenwood, Iowa, (which is a special charter city) was not repealed by the Code of 1897, but continued in force and effect, except as modified by the chapter relating to special charter cities, Section 1055 of the Code of 1897. It is manifest, therefore, that if the legislature has enacted any laws relating to the time of holding such elections, such enactment supersedes or modifies the power granted to cities by its charter. Sterne vs. Off, 149 Ia., 96.

The only remaining question is: Does the chapter relating to special charter cities fix the time of holding such elections? In our opinion it does not. Section 936 of the Code provides:

> All elections held in such cities (Special charter cities) shall be governed by the general election laws.

The general election laws, however, are contained in Chapter 1, Title VI of the Code, and do not fix the time of holding the election, but relate rather to the method of holding the same.

Section 937 of the Code of 1897, as amended, we believe does not apply to the city of Glenwood for the reason that Glenwood has a population of less than 20,000.

Section 940 provides that "all elective officers hereafter elected

shall hold office for the term of two years * * *." This, however, does not fix the time of holding the election, but rather provides that after the official is elected he shall hold for two years. There is nothing contained in this provision which would prevent the city under its charter from selecting part of the officials one year and part next. The requirements of the statute would be made if the official when elected should hold for two years.

Then in view of the fact that the charter of the city of Glenwood provides that the election shall be held annually and did so provide at the time of the adoption of the Code of 1897 and as the said code did not alter, change or modify the provisions of the charter in that respect, the charter of the city of Glenwood still controls so far as the time of holding such elections is concerned.

J. W. KINDIG,
Assistant Attorney General.

PRIMARY LAW.

Conditions under which county conventions can nominate candidates for county offices.

June 14, 1918.

C. H. Cook, Assistant County Attorney, Glenwood, Iowa.

Dear Sir: We are in receipt of your favor of the 5th inst., in which you submit the following inquiry:

> I want to ask you to give me what you believe to be the proper construction on Sections 1087-a19 and 1037-a25, of the Code with reference to the primary law and especially do I want this for use here.
>
> The democrats of this county failed or neglected to make any party nominations for the several county offices to be filled at the coming general election and of course the blank spaces on the ballots in order to vote for any such candidates had to be filled by the voter writing in the name of some one who might be his choice for that office, which was done at the different precincts, but none of such persons whose names were written in on the ballot for any of such offices received the required number of votes as provided by statute so that such person could be declared to be a candidate duly nominated at the primary to be voted for at the general election.

> To make myself plain, understand, that no nomination papers were filed with the county auditor and no names for any of the county offices appeared on the printed ballot. I presume that when the time comes for the county convention to meet that some of the precincts will be represented by delegates for such offices, claiming that the people failed to make the nomination. I believe the law will not allow this to be done, for if this can be done legally then there is no use of the primary. It seems to me that the law is plain and the provisions of the statute must be substantially complied with and where, as in the case I have cited, no nomination whatever was made and no names appeared on the official ballot, I do not see how it is possible for the delegates, if they should so decide, to make legal nominations. Wish that you would give me your opinion on this matter.

The statutes on this subject are somewhat confusing, especially if read without looking into the history of the primary law and without examining the reasons which must have prompted the various enactments. Examined, however, in the light of the history of the law, and of these various reasons which appear to have actuated the legislature from time to time, this confusion, we think, largely disappears.

It was, undoubtedly, the intention of the 32nd General Assembly to enact a primary law which would dispense with nominations by conventions, or by other machinery of the political parties of the state, except in cases of vacancies occurring either before or after the primary, and except in those cases where there was a failure on the part of a candidate for an office to receive thirty-five per cent of the votes cast by the members of his party for that office.

The first section of the law, being Section 1087-a1, Supplement Code, 1913, provides:

> 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), 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 a primary election, and delegates to the county conventions of said political parties or organizations and party county committeemen shall be elected at said primary election, at the times and in the manner hereinafter provided.

It was even provided that in case of a tie vote, that the tie should be determined by the board of canvassers instead of submitting the matter to a party convention. Section 1087-a24, Supplement to the Code, 1913.

Passing upon the law as it then stood, the case of Pratt vs. Secretary of State, 141 Iowa, 196, provides that:

> The first requirement of the primary law is that 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 shall be nominated by a primary election. This requirement is mandatory, and the method of nomination provided for in the primary statute is exclusive. It follows that the provisions of chapters 3 and 4, title 6, code, so far as they provided methods of nomination inconsistent with the provisions of the primary enactment, were by that enactment repealed by implication, and later on in the same opinion:
>
> Section 1087-a26 provides for nominations by convention when there has been a failure for any reason to nominate a senator at the primary election.
>
> This opinion appeared in February, 1909, and immediately afterward the 33d General Assembly amended the law, with the evident intention of making it clear that a convention should not nominate because "of a failure for any reason to nominate a senator (or other officer) at the primary election;" and for the purpose of further curbing the power of the convention so that it should not act in any case, except where there was a vacancy or where there was a failure of a candidate for any office at the primary to receive thirty-five per centum of all votes cast by such party therefor. And an amendment expressly limiting the action of the convention to such cases was inserted in Sections 1087-a25, 1087-a26 and 1087-a27; the only exception being cases of the nomination of judges of the district or supreme court.

The same legislature added at the close of Section 1087-a25, the following:

> 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;

and a similar provision was inserted in Section 1087-a26 and Section 1087-a27 referring to the district convention and the state convention.

At first blush it might seem that the legislature had intended that these conventions might make nominations in case any person had been voted for for any office, no matter how few votes had been cast by the electors for such office; but we are convinced that such could not have been the intention. As the law stood with the amendments made by the 33d General Assembly, a nomination was bound to result at the primary whether the person voted for was named on the ticket or not, provided he received the highest number of votes cast for a particular office, unless he failed to receive thirty-five per centum of all the votes for that office whether the person so voted for had his name printed upon the ballot as a candidate, or whether his name was written in by the voters.

To suppose a case, we will assume that A received three votes, B three votes, C one vote and D one vote, all of these persons having their names written in by the voters. The nomination in such case would be made under Section 1087-a24 as between A and B because of the tie, and there would be no occasion for the convention to act, and under the law as it then stood, it would be immaterial how few votes were received by the winning candidate, provided, he, in fact, received not less than thirty-five per centum of the votes cast for a particular office. In other words, the convention could not merely act because names were written in, but in such a case a nomination by the primary was bound to result.

We think the plain intention of the legislature in the addition of this sentence to Sections a-25, a-26 and a-27 was simply to make it clear that the failure of a party to nominate a candidate at the primary should not be regarded as creating a vacancy in the case of an office for which no votes had been cast. They did not intend to leave the matter open to doubt, and they did intend to remove the possibility of a judicial interpretation, such as seemed to be indicated by the sentence last quoted from the Pratt case, supra.

To give any other construction to the act passed by the 33d General Assembly would be to show a repugnancy between the two clauses which were made to amend Sections a-25, a-26 and a-27; thus a portion of Section a-25 as amended by the 33d General Assembly, the amendments being indicated by *underscoring* as follows:

> 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 convention shall be called to order by the chairman of the county central committee, who shall present the certified list of delegates and members of the county central committee, and a list of the offices for which no nomination was made at the 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.* If any precinct shall not be fully represented the delegates present from such precinct shall cast the full vote thereof, but there shall be no proxies. 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 for such party therefor,* as shown by the canvass of the returns provided for in Section Nineteen of this act. *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.*

The 34th General Assembly enacted Chapter 59 which repealed Section 1087-a19 of the Supplement to the Code of 1907, and enacted a substitute therefor, which now appears as Section 1087-a19, Supplement Code 1913. This section provides in substance that the board of supervisors on the second Tuesday following the primary election shall canvass the returns of the primary and make abstracts thereof, stating:

> * * * the number of ballots cast in the county by each political party, separately, for each office, the name of each person voted for and the number of votes given to each person for each different office and shall sign and certify thereto and file the same with the county auditor.

It was also provided by that section with reference to candidates for county offices, as follows:

> * * * 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. Provided, however, 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 of the party ticket with which he affiliates, at the last general election, shall be declared to have been nominated to any such office; and each candidate so nominated shall be entitled to have his name printed on the official ballot to be voted for at the general election without other certificate, and the board shall prepare and certify a list of the candidates of each party so nominated, separately, and deliver to the chairman of each party central committee for the county a copy of the list of candidates nominated by the party he represents; and shall also prepare, certify and deliver to such chairman a list of the offices to be filled by the voters of a county for which no candidate of his party was nominated, together with the names of the candidates for each of such offices voted for at the primary election and the number of votes received by each of such candidates.

The obvious purpose of this act was to prevent the nomination of a person to an office who had not filed nomination papers and whose name did not appear upon the printed ballot, because of the writing in the name of such person by a few voters. Such a nomination made by the writing in of a name of a person would not be representative of the wishes of the members of the political party, unless such action was taken by a respectable number of the voters of such party, and in its wisdom the legislature decided that such number should be at least ten per centum of the number of votes cast in the county at the last preceding election by such party for the office of governor. The purpose, certainly, was not to enlarge the powers of the convention by providing that because a person had received a few votes, but less than the ten per centum so required, that a political party might on this account take advantage of that situation and make a nomination where it would not have been entitled to do so under the law as it had stood before. The very fact that the 34th General Assembly did not amend Section 1087-a25, indicates that they had no thought of enlarging the power of the convention. It might be contended that because the board of supervisors is required to certify and deliver to the chairman of each political party "a list of the offices to be filled by the voters of a county for which no candidate of his party was nominated, together with the names of the candidates for each of such offices voted for at the primary election, and the number of votes received by each of said candidates," that it was the intention to permit the convention to

make nominations because of the making of this certificate with reference to the number of votes cast for each candidate, etc., but it is to be noted that the board also certifies to the chairman of each political party "a list of the candidates of each party so nominated," showing that the real purpose of this act is to fully advise the official heads of each political party regarding the result of the primary, and to furnish to these political parties the same information that is required to be filed in the form of an abstract with the county auditor showing the result of the canvass of the vote.

Section 19 of the primary law as now enacted, does not require the board to determine in the case of any office whether a candidate has received less than thirty-five per cent of the total vote cast by his party for that office. Consequently, it is necessary that the certificate be made to the chairman of the respective political parties in order that they may determine whether a condition entitling the convention to act, exists, to-wit, whether there has been a failure of a candidate for an office to receive thirty-five per cent of the votes cast by his party for that office, thereby rendering necessary the action of the county convention.

In the re-enactment of Section 19 by the 34th General Assembly the expression that had been inserted by the 33d General Assembly in that section, to-wit, "by reason of the failure of any candidate for any such office to receive thirty-five per centum of all the votes cast by such party for such office," is omitted, leaving it to the board to certify all the returns to the respective county chairman of each political party, and leaving it to the political parties themselves to determine whether a condition exists which requires the naming of a candidate because of the failure of any one person to receive thirty-five per centum of the vote cast by the party for a particular office.

The certificate by the board to the county chairman is not the same as the "list of offices for which no nomination was made at the primary election by reason of the failure of any candidate to receive thirty-five per centum of all the votes cast by such party therefor," which the chairmen present to the conventions, but their list can be made up from that certified by the board. It should not include the name of any person whose name was not printed on the ballot, but who may have received a few votes for an office, unless the number of votes so received amount to

ten per centum of the vote of that party for governor at the last preceding election.

Some assistance in reaching these conclusions have been afforded by the following cases:

Reese vs. Hogan, 117 Iowa, 603.
Pratt vs. Secretary of State, 141 Iowa, 196.
State vs. Parker, 147 Iowa, 69.
Healy vs. Ripf, (S. D.) 117 N. W. 521.
Corser vs. Scott, (Minn.) 91 N. W. 1102.
Stewart vs. Polley, (S. D.) 137 N. W. 565.

In the last cited case a convention attempted to nominate a candidate for judge of the superior court of South Dakota, because the democratic ticket for that office had been left blank at the primary election. The supreme court of that state followed its decision in the Healy case, supra, and also used this language:

> If this court should adopt the construction of the primary law contended for by plaintiff, it would, in effect, leave the making of party nominations entirely optional with political parties or their individual members. Under this construction, the refusal or failure of all political parties to make party nominations at the primary election would create vacancies as to all nominations which might be filled by party conventions or state central committees, and the object of primary elections under the law would be defeated and the holding of such elections become an idle act. It is clear to our minds that the main purpose of the legislature in enacting the primary law was to take the making of all nominations out of the hands of conventions and political central committees, and to require that the people themselves, by their direct votes, should name party nominees; and that the only vacancies contemplated by the legislature, to be filled by conventions or central committees, are such as may occur after the people themselves have made nominations, and vacancies therein have occurred by death, resignation, or otherwise.

It follows that we think your conclusion is correct, but we have elaborated the reasons so holding because of the importance of the question.

C. G. WATKINS,
Special Counsel.

SPECIAL ELECTION TO FILL VACANCY.

A vacancy in the office of the state senator shall be filled by a special election called by the governor and nominations of candidates therefor are to be made under section 1098 of the code.

December 27, 1917.

Walter Anderson, Scranton, Iowa.

Dear Sir: Your inquiry addressed to the attorney general as to how to fill a vacancy in the office of state senator has been directed to me for answer.

The Constitution of Iowa, Article 3, Section 12, provides:

> When vacancies occur in either house, the governor, or the person exercising the functions of governor, shall issue writs of election to fill such vacancies.

Section 1279 of the code provides:

> A special election to fill a vacancy shall be held for a representative in congress, or senator or representative in the general assembly, when the body in which such vacancy exists is in session, or will convene prior to the next general election, and the governor shall order such special election at the earliest practicable time, giving ten days' notice thereof.

It seems plain therefore that because of the constitutional and statutory provisions above quoted that in order to hold a special election for the purpose of filling a vacancy in the office of state senator in your district it will be necessary for the governor to issue a writ of election and cause notice thereof to be given for the time described in the section quoted.

The nomination of a candidate to fill such vacancy we believe is made by the methods provided by Section 1098 of the Code.

Section 1087a30 of the 1913 Supplement to the Code provides that the act relating to primary elections does not apply to special elections to fill vacancies. The law then, so far as nominations to fill vacancies is concerned, must be the same as before the enactment of the primary law.

Section 1088 of the Code provides that the provisions of Chapter 3 of Title VI applies to all elections known to the laws of the state, except school elections. This, of course, would include

special elections, and as Section 1098 is a part of said chapter, the nomination for the purpose of filling the vacancy in question would be governed by Section 1098.

Section 1104 of the Supplemental Supplement of 1915 provides:

> In case of special election to fill vacancies in office, certificates of nomination or nomination papers, for nomination of candidates for office to be filled by the electors of a larger district than a county, may be filed with the secretary of state, not later than fifteen days before the time of election.

It is our opinion, then, as before stated, that the election should be called by the governor upon the proper notice and that the nomination should be made by convention and a certificate of the nomination filed with the secretary of state, as indicated by the section quoted above.

J. W. KINDIG,
Assistant Attorney General.

ELECTION OF MEMBERS OF BOARD OF SUPERVISORS.

A person cannot legally be a candidate for the office of supervisor who resides in the same township as another member of the board if the term of the office for which he desires to be a candidate will commence before the expiration of the term for which the holding member was elected, except in a township embracing a city of thirty-five thousand or over.

January 3, 1918.

M. R. Hammer, Jr., County Attorney, Newton, Iowa.

Dear Sir: Your request for the opinion of this department on the following question has been referred to me for attention.

You state:

> I have the following questions which I would like to have your opinion upon, "A" is elected as a member of the board of supervisors from Newton township, "B" is elected from Clear Creek township, and moves into Newton township, Jan. 1, 1918, and makes it his home and becomes a resident there.
>
> "A" decides to run for his second term as a member of the board of supervisors for the term commencing Jan. 1919, both "A" and "B" during the year 1918, being residents of Newton township; Query: Under Section 411 and amendments thereto can "A" legally become a candidate for this office?

Section 411 of the Supplemental Supplement to the Code, to which you refer, provides in part as follows:

> At the general election in the year nineteen hundred and six 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 nineteen hundred and six, 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 second secular day in January following said election; there shall also be elected members for a term of three years to succeed those whose terms will expire on the second secular day in January one year later than the aforesaid date. It shall be specified on the ballot when each shall begin his term of office. No member shall be elected who is a resident of the same township with either of the members holding over (but a member-elect may be a resident of the same township as the member he is elected to succeed) * *

As I understand your question, there is a member of the board of supervisors, of your county, who is a resident of Newton township and whose term of office will expire on the second secular day of January, 1919. That he desires to be a candidate to succeed himself, at the election to be held this year, and a doubt arises as to his eligibility for the reason that a member of the board who was elected two years ago, while a resident of another township and who has just entered upon his duties, has moved from the township where he resided, at the time he was elected, into Newton township and is now an actual resident of that township.

The language of the statute is, as I view it, clear and explicit, that no member shall be elected who is a resident of the same township with either of the members holding over, except in a township embracing a city of thirty-five thousand or over, and, as Newton township does not embrace a city of that population another member of the board cannot be elected this year from that township, and, therefore, as the member who desires to be a candidate to succeed himself could not be elected, it necessarily follows that he cannot legally become a candidate for such office.

J. W. SANDUSKY,
Assistant Attorney General.

COMPENSATION OF BOARDS OF REGISTRATION.

The question of the compensation of the members of boards of registration discussed.

November 15, 1918.

Hugh Stuart, County Attorney, Dubuque, Iowa.

Dear Sir: Your letter of the 9th inst. addressed to Attorney General Havner, has been referred to me for reply.

You state:

> I am writing to you at this time to ask for an interpretation of Section 1076 of the Supplemental Supplement pertaining to the board of registers, particularly with reference to the compensation that should be allowed said registers and the basis of reaching the same.
>
> You will note that the statute says that "they shall receive compensation at the rate of $3.00 for each day of eight hours engaged in the discharge of their duties, to be paid by the county, etc." The board of registers contend that they were in continuous session, to-wit: from October 23rd, 1918, until they returned the books on November 8th, to the city recorder. In other words, their claim is that in the event that a sick person, for instance, needs their services, they must during the period above mentioned go to him and register him. All of the registers have filed with the board of supervisors practically the same claim, copy of which I enclose.
>
> The board of supervisors desire to pay for what is honestly due and it has been a mooted question for some time just how to reach a standard of payment. As these bills are being held up by the board of supervisors until your opinion reaches me, I shall appreciate an early answer.

The law governing the question in issue will be found in the following sections of the Iowa statutes:

> Section 1076, S. S., as amended by Chapter 41, Acts of the 37th G. A.; 1077 S., 1079, 1080, 1081, 1082 and 1036 of the Code; Section 2, Chapter 419, Acts of the 37th G. A.

Section 1076 provides for the appointment of registers in the various voting precincts and declares that they shall:

> * * * receive compensation at the rate of three dollars for each day of eight hours engaged in the discharge of their duties, to be paid by the county, except in case of city elections, when they shall be paid by the city.

The former statute, to-wit, Section 1076 of the Supplement of 1913, provided for compensation at the rate of $2.50 for each calendar day they were engaged in the discharge of their duties. It will be seen, therefore, that, under the law in force at the present time, registers are to be paid for the actual time they are engaged in the discharge of their duties, but on the basis of an eight hour day, that is to say, 37½c per hour.

Section 1077, Supplement of 1913, requires the registers to meet on the second Thursday prior to a general election and hold continuous sessions for two consecutive days, commencing at eight o'clock in the morning and closing at nine o'clock at night.

Section 1080 of the Code declares that the registration board meet again on the Saturday preceding the election, and hold a session from eight o'clock in the morning until nine o'clock in the evening, for the purpose of revising and correcting the registry book, adding thereto the names of all applying for registration.

Section 1082 of the Code provides that the board shall also be in session on election day.

Thus, it will be seen the board of registration is required to be in session on only four days for the purpose of registering the voters residing in their precinct; however, provision is made for registering sick and disabled voters, but this must be done at a time other than on the four days above referred to.

Section 1081 of the Code provides that, if an elector is sick and unable to go to the place of registry on any day the registers are in session, the registers can go to the voter's place of residence and register him. However, it is not necessary for the registers to go to the residence of a sick person and register him, provided the sick person desires to vote under the absent or disabled voters law, since Section 2, Chapter 419 of the Acts of the 37th G. A. declares that the affidavit on the ballot envelope shall constitute a sufficient registration.

Then Section 1079 of the Code provides that, within three days after the registration made in the second week preceding the election, the registers shall make up their alphabetical lists,

adding thereto such persons who register on the Saturday preceding the election. The work is done on days other than the regular registration days.

It will therefore be observed that the duties imposed upon the registers are confined to those mentioned in the sections of the statutes above cited. As to whether the character of work performed by your registers could properly be classed as a part of their duties, I have no doubt that it could; but as to whether it required the time claimed to perform that work I have some doubt. The fact that all registers filed a claim for practically the same amount looks suspicious. It does not look reasonable that the registers in each precinct would have the same number of sick voters to register, requiring the same amount of overtime, nor does it seem conceivable that it should require five hours to go up to the office of the city clerk and get the registry book, alphabetical list and poll book, and then take five hours to return them. However, that is a matter to be determined by the registers and board of supervisors, at least in the first instance. So, that, we do not pass upon the reasonableness and fairness of the claim filed by the registers, but only as to the character of the work performed by them. As to the latter, I am of the opinion that in the performance of the same the registers were engaged in the discharge of their duties, and that as compensation for their services said registers are entitled to charge 37½ cents per hour.

W. R. C. KENDRICK,
Assistant Attorney General.

GRANTING OF HUNTING LICENSE TO MINORS.

A boy under 14 years of age cannot be granted a license to hunt with a gun; otherwise, as to trapping, with consent of parent.

December 8, 1917.

H. C. Hinshaw, Fish and Game Warden, Spirit Lake, Iowa.

Dear Sir: Your letter of the 28th ult., addressed to the attorney general, has been referred to me for attention.

You ask in substance:

> First: How can a boy under 14 years of age obtain a license to trap fur bearing animals or game in Iowa?
>
> Second: Would such a license authorize the violation of Chapter 297, Acts of the 35th General Assembly by a boy under 14 years of age?

In reply to your inquiry No. 1, it will be observed by reading Section 2563-a1, Supplemental Supplement of 1915 that it provides two methods by which a person may legally hunt game, in the broad sense, in Iowa, viz., by gun and by trap. Said section reads as follows:

> No person shall hunt, pursue, kill or take any wild animal, bird, or game in this state, with a gun, or trap fur-bearing animals or game without first procuring a license as herein provided.

Then Section 2363-a2, Supplement of 1913, prohibits the issuance of a hunter's license to any person under 18 years of age without the consent of the parent. It reads as follows:

> No license shall be granted any person under eighteen years of age unless the written consent of parents or guardian is attached to the application.

Then Section 1, Chapter 297, Acts of the 35th General Assembly prohibits any person under fourteen years of age carrying fire arms of any description. It reads as follows:

> It shall be unlawful for any person, except as hereinafter provided, to go armed with and have concealed upon his person, a dirk, dagger, sword, pistol, revolver, stiletto,

> metallic knuckles, pocket billy, sand bag, skull cracker, slung-shot, or other offensive and dangerous weapons or instruments concealed upon his person; provided that no person under fourteen years of age shall be allowed to carry fire arms of any description.

The foregoing statutory provisions are the only ones applicable to the subject of your inquiry from which it is manifest that a license to trap may legally be issued to a boy under fourteen years of age, provided the written consent of his parent or guardian is first obtained.

As to your second question, the Iowa statute emphatically prohibits any person under fourteen years of age carrying fire arms of any description. No license can be legally issued to a boy under fourteen years of age to hunt with a gun, and in the event a license should be erroneously issued to such a boy, it would not authorize him to violate the law with reference to carrying firearms as found in Chapter 297, Acts of the 35th General Assembly.

The foregoing opinion does not apply to boys hunting on farm lands owned or occupied by their parents, for the reason that Section 2563-a8, Supplement 1913, exempts that class from the operation of the above statutory provisions.

W. R. C. KENDRICK,
Assistant Attorney General.

BOUNDARIES OF LAKES.

Highwater mark on the shores of meandered lakes determines the boundary line between such lake and the riparian or adjoining land owner and meander lines established by government surveyors does not ordinarily constitute the boundary line between the shores of such lakes and the adjoining land owner.

December 10, 1917.

E. C. Hinshaw, State Fish and Game Warden, Spirit Lake, Iowa.

Dear Sir: Your request for the opinion of this department on the following question has been referred to me for attention.

You state:

> I wish your opinion on the jurisdiction over certain lands surrounding Diamond Lake in Dickinson county. I am enclosing map of this lake which will show the meandered lines—meandered lines being the dotted lines which I have

traced with a pencil. The question at issue is in the circle marked "A." You will notice the meandered line runs around practically all of a swamp on the north end of this lake. At the present time the swamp is not connected with the lake but is connected during times of high water or ordinary high water. The question is have the public the right to use this swamp for hunting, trapping, etc., there being water in it at this time and is it a part of the lake and still remains state property altho at the present time not being connected with the lake property?

Within the circle marked "B" is a knoll or high land which comes within the meandered lines. Would the public have a right to use this land for camping, hunting, trapping, fishing, etc.?

The title to lakes in this state and the shores around them is in the state or the federal government in trust for the free use and enjoyment of the people of the state. Disputes have frequently arisen between the adjoining land owners and the public as to their respective rights to use these properties and a great deal of litigation has resulted therefrom.

Chapter B, Title XIV of the 1913 Supplement is devoted to the subject of meandered lakes and the general thought therein contained, as well as the inference arising therefrom, is that the title to all lands in the meandered lines run by government surveyors belongs to the state, and, consequently, are open to the free use of the public for fishing and recreation purposes. Such, however, does not appear to be entirely correct or, at least, to correspond with the views of our supreme court as expressed in a number of cases. The leading case on the subject wherein the authorities are reviewed at length is Schlosser vs. Cruickshank 96 Iowa, 414, and the principles therein announced are recognized and again asserted in the case of State vs. Jones, 143 Iowa, 398, and I have not been able to find that the doctrine announced in these cases has been limited or modified by any subsequent decisions of the court.

In each of the cases referred to, the titles to lands adjoining the boundaries of meandered lakes were involved and the conclusions arrived at by the court, as I understand them, were to the effect that in the absence of a limitation in the title to land adjoining or bordering on a meandered lake the owners of such land takes title to high water mark on the shores of such lake and that the meander line run by government surveyors does not

ordinarily constitute the boundary lines between the lake and the riparian or adjoining land owners. In other words, where there are lands lying between the shores of a meandered lake and the meander lines, as established by government surveyors, the riparian or adjoining land owners takes title to high water mark on the shores of such lake unless the government by reservation in the patent to said adjoining land reserves the land lying between the meander line and the shores of the lake, or in some other manner indicated the purpose and intention that such meander line should constitute the boundary line between the lands patented and the shores of the lake and that the land so patented and the rights of the owner thereof should be limited thereby.

In the Jones case, it is distinctly ruled that no particular depth of water in the lake is required and it is also ruled that it is not necessary that the land should, at all times, be submerged or covered with water, but that it is sufficient if they are so covered a greater part of the time, and applying the principles established by these cases to the lake in question, I am of the opinion that regardless of the question as to whether or not the meander line forms the boundary line between the lands of the riparian owner and the shores of the lake that the public have the right to use for fishing and recreation purposes, all the lands situated and lying within the radius or limits of high water mark on the shores of Diamond Lake and the marsh connected therewith.

J. W. SANDUSKY,
Assistant Attorney General.

FISHING WITH SPEAR.

The taking of any game fish by the use of a spear is unlawful.

January 18, 1917.

Atherton B. Clark, Assistant County Attorney, Cedar Rapids, Iowa.

Dear Sir: Replying to your letter of the 16th instant, will say that in the third paragraph of Section 2540 Supplemental Supplement to the Code, appears the following:

> The possession of a spear, trap, net or seine, or the taking or killing, or attempting to take or kill any fish by any means other than by rod, line, hook and bait, within three hundred feet of a fishway or dam, shall be unlawful.

This makes the possession of a spear within three hundred feet of a fishway or dam unlawful, and if the defendants in the case to which you refer were found within such limit, with a spear in their possession, although they had not taken any fish, they had violated the law and you should not have dismissed the case; while, on the other hand, if the evidence did not show that they were found within the three hundred foot limit, then your action was clearly right. The taking of any of the species of fish classed as game fish, with a spear, at any time, is unlawful.

J. W. SANDUSKY,
Assistant Attorney General.

OPINIONS RELATING TO LEGISLATIVE AFFAIRS.

ENROLLED BILLS.

Duties of chairman of committee on enrolled bills defined.

April 11, 1917.

Hon. B. J. Gibson, Senate Chamber, State House.

Dear Sir: I am in receipt of your favor of April 11th with reference to your duties as chairman of the committee on enrolled bills, in connection with Senate File No. 474.

In your letter you say:

> I received from the enrolling clerk an unsigned enrollment of senate file No. 474. * * * At once upon receiving the bill, and on the same day in conjunction with the house committee, I examined the bill and the enrollment, and also examined it for the committee of the senate separately. Before the report could be filed, however, of such examination and enrollment, I was directed by the senate to return the bill to that body. This I did, receiving the receipt of the secretary of the senate therefor. * * * I am writing you to find out whether or not any action is necessary on my part to perform my duty.

Section 9 of Article 3, of the Constitution provides:

> Each house shall sit upon its own adjournments, keep a journal of its proceedings and publish the same; determine its rules of proceedings, punish the members for disorderly

behavior, and with the consent of two-thirds, expel a member, but not a second time for the same offense and shall have all other powers necessary for a branch of the general assembly of a free and independent state.

Rule 4 of the joint rules provides:

> When a bill shall have passed both houses it shall be duly enrolled by the enrolling clerk of the house in which it originated, and the fact of its origin shall be certified by the endorsement of the secretary or clerk thereof.

Rule 5 of the joint rules provides:

> When the bills are enrolled they shall be examined by a joint committee of two from the senate and two from the house of representatives, who shall be a standing committee for that purpose, and who shall carefully compare the enrollment with the engrossed bills, as passed in the house, correct any errors therein, and make report thereof forthwith to their respective houses.

Rule 6 of the joint rules provides:

> After the report, each bill shall be signed, first by the speaker of the house of representatives, and then by the president of the senate, in the presence of their respective houses.

Under the state of facts which you have given to me, you say you received from the enrolling clerk an unsigned enrollment of senate file 474, and before the joint committee had had an opportunity to prepare and file the report, you were directed by the senate to return the bill to that body.

Under the provision of the constitution above quoted, the senate had the power at any time to recall this bill before it was passed upon by your committee, and you would have been subject to contempt, after the senate itself had issued this order, if you had failed to obey it. After you returned the bill to the senate as directed and took the receipt of the secretary of the senate, you have nothing further to do with this bill until it is returned to you in the regular course of business, as provided by joint rules 4 and 5, as above quoted, or until it is returned to you by a resolution of the senate regularly passed by that body.

This department therefore holds that you have no further

duty in connection with this matter until the bill is returned to you by one or the other of the methods above described.

H. M. HAVNER,
Attorney General.

MEMBERSHIP OF THE GENERAL ASSEMBLY.

Secs. 35 and 36, Art. III, Const. of Iowa, fix the ratio of representation in the House, leaving it to the G. A. to determine the ratio, by the manner so fixed, after the taking of the state or national census.

Any objections to certificate of nomination or nomination papers are to be determined as provided in sec. 1103, code of 1897.

April 2, 1918.

Hon. C. V. Findlay, Fort Dodge, Iowa.

Dear Sir: In your favor of March 2, 1918, you call attention to Article 3, Section 36 of the Constitution of Iowa, as amended, and request our interpretation of said section.

Section 35 should be construed in connection with Section 36, and the two sections, as amended, (supplement of 1913) provide:

> The house of representatives shall consist of not more than one hundred and eight members. The ratio of representation shall be determined by dividing the whole number of the population of the state as shown by the last preceding state or national census, by the whole number of counties then existing or organized, but each county shall constitute one representative district and be entitled to one representative, but each county having a population in excess of the ratio number, as herein provided, of three-fifths or more of such ratio number shall be entitled to one additional representative, but said addition shall extend only to the nine counties having the greatest population. (Section 35).
>
> The general assembly shall, at the first regular session held following the adoption of this amendment, and at each succeeding regular session held next after the taking of such census, fix the ratio of representation, and apportion the additional representatives, as hereinbefore required. (Section 36).

Pursuant to the foregoing constitutional provisions, the manner of fixing the ratio of representation is fixed leaving it to the general assembly to determine the ratio by that express manner at each succeeding regular session held after the taking of the state or national census and apportion the additional representatives accordingly.

But in the event the general assembly fails to fix the new ratio as provided, then and in that event the old ratio will stand and representation will be based upon the old ratio.

You also ask "If two persons should be nominated in this county, would a contest lie to the house ,or would it be unlawful for the secretary of state to prevent two names going on the ticket from Webster county?

Section 1103 of the Code of 1897 creates a tribunal for the determination of all questions arising in relation to certificates of nomination or nomination papers, and makes the decision of that tribunal final.

Section 1103 provides:

> All objections or other questions arising in relation to certificates of nomination or nomination papers shall be filed with the officer with whom the certificate of nomination or nomination papers to which objection is made are filed. Those with the secretary of state shall be filed not less than twenty (20) days * * * before the day of election. * * * Objections filed with the secretary of state shall be considered by the secretary and auditor of state, and attorney general, and a majority decision shall be final.

Under the present ratio, Webster county is entitled to only one representative, and it is practically certain that the canvassing board would certify only one nominee to the secretary of state, in which event the secretary of state would be acting within his rights in certifying to your local county auditor the name of only one nominee to be voted for at the general election.

W. R. C. KENDRICK,
Assistant Attorney General.

THE TIME WHEN AN ACT BECOMES A LAW.

The act creating the office of banking superintendent became a law upon being passed by both houses and signed by the governor.

April 11, 1917.

Hon. Perry C. Holdoegel, Senate Chamber, State House.

Dear Sir: I am in receipt of your favor of the 10th inst., with reference to senate file No. 232 as follows:

> I desire your legal opinion upon the following questions: Is the appointment and confirmation of the banking superintendent, which was made prior to the time that the law providing for such office went into effect, legal and effective?

In order that we may have a proper understanding of this matter, it will be necessary for us to examine the constitution of the state. Section 16 of article 3 of the constitution of the state of Iowa provides:

> Every bill which shall have passed the general assembly, shall, before it becomes a law, be presented to the governor, If he approve he shall sign it, but if not, he shall return it with his objections to the house in which it originated, which shall enter the same upon their journal, and proceed to reconsider it. If after such reconsideration it again pass both houses by yeas and nays, by a majority of two-thirds of the members of each house, it shall become a law notwithstanding the governor's objection.

This section means that an act passed by the legislature becomes a law in one of two ways: either by being signed by the governor, or by being passed over his veto by a two-thirds majority of both houses. But in either event, it becomes the law of the state of Iowa upon the happening of either one of these conditions.

Section 26 of article 3 of the constitution of Iowa provides:

> No law of the general assembly passed at a regular session, of a public nature, shall take effect until the 4th day of July next after the passage thereof.

It is perfectly apparent that there are two distinct things that happen when a law is passed under these conditions. First, it becomes a law when signed by the governor. Second, it becomes effective July 4th following such passage, unless a publication clause is attached as is provided in Section 26 of the constitution.

The law in question has been passed by the general assembly and has been signed by the governor, and under the constitution is now a law, and has been such ever since it was signed by the governor.

We do not believe that any person can successfully contend that senate file No. 232 is not now the law of this state. This

statute could not be recalled, nor could it be changed or in any way modified except by an act of the legislature passed in accordance with the provisions of the constitution and the laws of this state. It is, therefore, at this time the law, but it does not become effective until July 4, 1917.

The statute itself provides in section 2 as follows:

> The governor shall, prior to the adjournment of the 37th General Assembly, nominate and with the consent of two-thirds of the members of the senate in executive session, appoint, to be effective July 4, 1917, a person for superintendent of banking, etc.

By the language of the statute it is provided that the appointment and the statute become effective at the same time.

The case of

People ex rel Graham, vs. Ingalls, 54 NE. 1103 cited by the supreme court of Illinois, is in point upon the proposition involved in your question.

The constitution of the state of Illinois on the point involved is, in effect, the same as the constitution of the state of Iowa. In that case the court said:

> Every bill passed by the general assembly shall, before it becomes a law, be presented to the governor. If he approves it, he shall sign it, and thereupon it shall become a law.

That is, in effect, exactly the provisions of the constitution of the state of Iowa. The court further says:

> Webster defines the word "thereupon" as follows: "Immediately; at once; without delay." Under this clause of the constitution an act of the legislature becomes a law immediately upon receiving the approval of the governor. It does not go into effect until the 1st day of July after its passage, but it is nevertheless a law after it receives the approval of the governor. The existence of a law and the time when it shall take effect are two separate and distinct things. The law exists from the date of approval but its operation is postponed to a future date.

The facts in the above cited case are almost identical with the case under consideration. The question which was being determined by the Illinois court was where the legislature of the state of Illinois had on the 22d of May, 1895, passed an act which

was, on that date, approved by the governor, to establish and maintain a normal school and the act, among other things, provided "for the appointment by the governor by and with the advice of the senate of not more than five trustees, who should be invested with all the powers and by whom should be performed all the duties of such corporation."

On the 15th day of June, 1895, and before the act took effect, the governor nominated and the senate confirmed, the five trustees. The constitution of the state of Illinois provides that the laws should not take effect until July 1st, after the passage of an act, and under our constitution it is provided that the law shall take effect, unless otherwise provided, July 4th after the act is passed.

With the precise situation that we have in connection with the case under consideration, the supreme court of Illinois held that the appointment by the governor and confirmation by the senate of these proceedings before the act became effective, was a valid appointment and a valid confirmation, and they held in the same case, that the statute under which the appointment was made was valid.

Under this decision, and upon principle as well, we believe this to be determinative of the case, and it is the holding of this department that the appointment as made and the confirmation were legal and binding, and that the act as it exists is a valid law.

H. M. HAVNER,
Attorney General.

CONVICT MADE GOODS.

It is unconstitutional to forbid sale of goods made by convicts unless labeled 'Convict Made'.

March 16, 1917.

Hon. Mac J. Randall, House Chamber, State House.

Dear Sir: Replying to yours of the 6th in which you request an opinion on the constitutionality of House File 272, which prohibits the sale within this state of convict made goods unless labeled in the manner specified in the bill, will say that, in my judgment, this bill is of doubtful constitutionality. The

only cases I have been able to find where the exact question has been raised are People vs. Hawkins, 157 N. Y. 1; 42 L. R. A. (N. S.), 490. In that case it was held:

> A regulation of the price of labor by depressing, through the penalties of the criminal law, the market price of goods made by convicts, which it requires to be labeled or marked "convict-made," and thereby correspondingly enhancing the price of goods made by other workmen, is not a valid exercise of the police power of the legislature,—at least as applied to convict-made goods from another state.
>
> A statute forbidding the sale of goods made by convicts without being marked "Convict-made" is unconstitutional as applied to goods made in other states.

To the same effect see the later case of Phillips vs. Raynes, 136 App. Div., 420, 120 N. Y. 1053.

C. A. ROBBINS,
Assistant Attorney General

POWER OF COMMITTEE ON RETRENCHMENT AND REFORM.

The committee on retrenchment and reform cannot delegate to the adjutant general the control and supervisions of state house janitors.

October 29, 1918.

Hon. Clem F. Kimball, Council Bluffs, Iowa.

Dear Sir: I have your esteemed inquiry of the 1st inst., in which you state as follows:

> The retrenchment and reform committee have requested me as chairman, to write you concerning the action of the committee of July 30, 1917. On that day the committee requested the attorney general to give an opinion as to the authority of the committee under senate joint resolution number fifteen, to place all janitors in the employ of the state of Iowa under the control of adjutuant general as custodian of public buildings and give him the authority to arrange the duties of each and every janitor and see that the duties assigned are performed by such janitor omitting from such opinion any reference to the soldier's preference statute.

You then ask for an opinion from this department relative to the above matter.

The portions of said resolution material to the question in issue are as follows:

> All clerks, janitors, and other employees named in this resolution shall be under the control of the head of the department, or deputy acting as such, and may by him be transferred to such work as he shall direct in assisting other clerks or elsewhere in the different branches of the service of the department, and any head of a department may at any time discharge any clerk or other employee in such a department for neglect of duty, insubordination or incapacity.

It will be seen from the portion of said resolution above quoted that all janitors named in said resolution are under the control of the head of the department in which they are employed. Said resolution also provides how the janitors shall be selected, and in practically every instance the heads of the different departments are given the right to select and the power to discharge the janitors employed in their respective departments.

Provision is also made in said resolution for assigning any janitor to additional duties, provided the performance of such additional duties will not conflict with their regular duties, and in the performance of such additional duties they shall be subject to the orders of the adjutant general.

That portion of said resolution reads as follows:

> All janitors employed under the provision of this resolution shall be at all times subject to the orders of the adjutant general as custodian to perform any additional service, by way of rendering assistance to the state house engineers, carpenters, supply department or any other labor that may be necessary about the capitol grounds, at such hours as they are not necessarily employed in their regular janitor work and it shall be the duty of the adjutant general as custodian to assign such janitors to any such extra service and he shall discharge any janitor for incompetency, inability to perform a reasonable amount of service of the character required, neglect of duty or insubordination.

Then provision is further made in said resolution for the employment of additional help when the work in any department demands it, subject to the approval of the committee on retrenchment and reform. As to such additional help the committee on retrenchment and reform has full power to reduce, eliminate or change from one office to another. The portion of said resolution applicable thereto is the following:

> No additional help shall be employed by the head of any department, and no additional pay shall be granted or auth-

orized to any of the employees provided for in this act without first having received the approval of the committee on retrenchment and reform. The employees and extra help provided for the various offices and the additional compensation for service provided in this resolution shall at all times be subject to reduction, limitation or other disposition by the committee on retrenchment and reform, whenever such committee shall find that the number of employees and the amount of additional help and compensation for the purposes named in this resolution should be reduced, eliminated or changed from one office to another and an order made by said committee, and copy thereof filed wth the department whose employees or help or compensation for help shall be reduced or changed and filed with the auditor of state shall be sufficient to prevent further expenditure for such employees, help or service. The retrenchment and reform committee in making an order furnishing any clerical assistance or expending any money for any other state purpose herein provided for, shall enter the same in its records filed in the office of the secretary of state and file a copy of said order with the department affected, and with the auditor of state.

As to the power of the committee on retrenchment and reform to delegate to the adjutant general any of the duties conferred upon said committee by the legislature, it is a well recognized rule of law that a public board, body or public officials, charged with the execution of certain duties requiring the exercise of judgment or discretion, cannot delegate the performance of those duties to another unless expressly or impliedly authorized so to do.

Young vs. County of Black Hawk, 66 Iowa 460.
Kinney vs. Howard, 133 Iowa 94.
Meechem on Public Officials, Sec. 567.

The reason for such prohibition is bottomed upon the presumption that the person selected were chosen because they were deemed fit and competent to exercise that judgment and discretion necessary for the proper performance of such duties. The rule is well stated in Kinney vs. Howard, supra, wherein a school board attempted to confer upon a committee the authority to select a site and contract for the erection of a school house. It is said at page 105:

> Where the act to be done involves judgment or discretion it cannot be delegated to an agent or committee. Meech. on Public Officers, sections 567, 568, 9 Iowa, 87. Thus it has been held that time and manner of constructing

sidewalks, and of constructing or repairing a pier, of deciding upon and purchasing a school or market site, of regulating the bridging of public streams, and other like matters, cannot be delegated. Birdsall vs. Clark, 73 N. Y. 73, (29, Am. Rep. 105); Thomson vs. City, 61 Mo. 282; Matthews vs. City, 68 Mo. 115 (30 Am. Rep. 776); Lord vs. Oconto, 47 Wis. 386, (2 N. W. 785); Lausnstein vs. Fond du Lac. 28 Wis. 336; State vs. Paterson, 34 N. J. Law, 167; Maxwell vs. Bay City Co., 41 Mich. 453 (2 N. W. 639.)

The statute made it the duty of the school board to select the site, adopt the plans for the school house, and award the contract for the building thereof, and these powers it could not delegate. The committee appointed by it had no authority in these premises, and it should have been enjoined from doing these things.

Meechem on Public Officers, section 567, announces the same rule, wherein it is said:

It is a settled rule, in the case of private agents, that where the execution of the trust requires, upon the part of the agent, the exercise of judgment or discretion, its performance can not, in the absence of express or implied authority, be delegated to another. In such cases, it is presumed that the agent was selected because his principal desired and relied upon the agents personal judgment and discretion, and, unless authority to delegate it be expressly or impliedly given, the agent can not entrust the performance to another to whom the principal may be, perhaps, a stranger, and in whom he might not be willing to confide.

This rule applies also to public officers. In those cases in which the proper execution of the office requires, on the the part of the officer, the exercise of judgment or discretion, the presumption is that he was chosen because he was deemed fit and competent to exercise that judgment and discretion, and, unless power to substitute another in his place has been given to him, he cannot delegate his duties to another.

Pursuant to the provisions of said resolution and the authorities above quoted, we are of the opinion that the committee on retrenchment and reform cannot legally confer upon the adjutant general the authority mentioned in your letter of the first instant.

H. M. [illegible]ER,
Attorney General.

CIGARETTE INJUNCTION BILL.

Cigarettes may still be sold in original packages although House File No. 441 should pass.

April 7, 1917.

Hon. Perry C. Holdoegel, Senate Chamber, State House.

Dear Sir: Your favor of April 17th received, and in reply will say that House File No. 441 by Findlay of Webster, providing for injunction against the unlawful sale of cigarettes, if passed, will not enable the legal department of the state to prevent the sale of cigarettes in original packages.

If this bill should pass, it would not absolutely prohibit the sale of cigarettes to minors in the state of Iowa, but it would be a very effective means in curtailing the sale to minors, because of the decision of the supreme court of the United States as to what constitutes an "original package."

The supreme court of the United States in the case of Cook vs. Marshall county, 196 U. S. 261, said:

> The real question in this case is whether the size of the package in which the importation is actually made is to govern; or, the size of the package in which bona fide transactions are carried on between the manufacturer and the wholesale dealer residing in different states. We hold to the latter view. The whole theory of the exemption of the original package from the operation of state laws is based upon the idea that the property is imported in the ordinary form in which, from time to time immemorial, foreign goods have been brought into the country.

The average minor purchases his cigarettes either two or three cigarettes at a time, or else a small box, which does not constitute an "original package" within the meaning of the law.

H. M. HAVNER,
Attorney General.

to

SECOND OFFENSE.

If it is desired to punish for a second offense under sections 2461-m and 2461-n, supplemental supplement 1915, the indictment must allege the fact of the second offense.

January 3, 1918.

C. H. Taylor, County Attorney, Guthrie Center, Iowa.

Dear Sir: I am in receipt of your letter of December 28th with reference to an indictment for a second offense in connection with maintaining a liquor nuisance under Sections 2461-m and 2461-n, Supplemental Supplement, in which you ask whether the second offense should be set out or referred to in the indictment.

I call your attention to Sections 2424 of the Code, which, in part, provides:

> In any prosecution for a second or subsequent offense as provided herein, it shall not be requisite to set forth in the indictment or information the record of a former conviction, but it shall be sufficient briefly to allege such conviction.

Section 2425 of the Code, provides in part:

> The second or subsequent convictions provided for in this chapter shall be convictions on separate informations, or indictments, and unless shown in the information or indictment, the charge shall be held to be for a first offense.

It will therefore be necessary to refer in the indictment to the fact that this is a second offense. It is our opinion, however, that the indictment should charge the crime of a nuisance so that the party may be convicted for the offense of maintaining a nuisance, and, as provided in Section 2424, it shall be sufficient briefly to allege such prior conviction. The crime charged is that of maintaining a nuisance and is not for a second offense, but in order that there may be punishment for a subsequent offense, this must be alleged as provided by statute.

You would be entitled to a conviction for maintaining a nui-

sance even though you should fail to prove that it was a second effense.

State vs. Ensley, 10 Iowa, 149.
State vs. Gaffney, 66 Iowa, 263.

A case which throws some light upon the attitude of the supreme court with reference to the question which you present is found in the case of State vs. Riley, 28 Iowa, 547, but on account of the express provisions of the statute, if you desire to have the greater punishment inflicted, it is necessary to allege and prove the fact that it is a second offense.

We are enclosing herewith skeleton form of indictment for your information and guidance.

H. M. HAVNER,
Attorney General.

FORM OF INDICTMENT.

In the District Court of Iowa, in and for Guthrie County.

State of Iowa, Plaintiff,
vs. } Indictment.
Fred Richards, Defendant.

The grand jury of the county of Guthrie, in the name and by the authority of the state of Iowa, accuse the said Fred Richards of the crime of nuisance, committed as follows:

The said Fred Richards on or about the.....day of ....., 1917 in the said county of Guthrie aforesaid, and on divers other days and times between the said..... day of.....1917 and the finding of this indictment in said county, did erect, establish, continue and use a building, erection and place, with intent and for the purpose then and there and therein, to sell intoxicating liquor contrary to law, and with intent and for the purpose then and there and therein to own, keep and be engaged, concerned and employed in owning and keeping intoxicating liquor with intent unlawfully to sell the same within the said county in the state of Iowa aforesaid, and did then and there and therein sell intoxicating liquor contrary to law and did then and there and therein own and keep

and was then and there and therein concerned, engaged and employed in owning and keeping intoxicating liquor with the intent and purpose unlawfully to sell the same within the said county and state.

The said offense of maintaining the said nuisance herein charged against the said defendant is a subsequent offense; for that said defendant then and there in the district court of Iowa in and for Guthrie County, was convicted of maintaining a liquor nuisance in said county and state on the.....day of....., 19....., and the said defendant then and there in the district Court of Iowa, in and for Guthrie County, was convicted of selling intoxicating liquors in said county and state on the..... day of....., 19.....

.....,

County Attorney in and for Guthrie County, Iowa.

RIGHT OF COMMON CARRIERS.

Common carriers are under the provisions of section 2403, supplement 1913, the same as any other person or corporation.

January 31, 1917.

M. L. Temple, County Attorney, Osceola, Iowa.

Dear Sir: I am in receipt of your letter of the 30th instant, and in reply will say that it is the opinion of this department that any railway or express company, or any common carrier,

> who shall in any manner procure for, or sell, or give any intoxicating liquors to any minor for any purpose, except upon the written order of his parent, guardian or family physician, or give to, or in any manner procure for, or sell the same to any intoxicated person, or to one in the habit of becoming intoxicated,

is violating the laws of the state of Iowa, and should be prosecuted.

This does not come within the exception of the agreement as to any bona fide deliveries to persons for their own personal use, which was entered into between this department and the common carriers.

I have no doubt that under the case of James Clark Distilling Company vs. American Express Co., recently decided by the

supreme court of the United States, Section 2403 of the Supplement to the Code of Iowa 1913, becomes effective, and any liquors which are delivered by any express company or any common carrier to any of the persons forbidden in Section 2403, is a violation of the law for which they can be punished.

I call your attention in this connection to page 8 of the decision in the above case, in which the court says:

> In this light it is clear that the Webb-Kenyon act, if effect is to be given to its text, but operated so as to cause the prohibitions of the West Virginia law against shipment, receipt and possession to be applicable and controlling irrespective of whether the state law did or did not prohibit the individual use of liquor.

This gives to all of the state laws of our state, which refer to intoxicating liquors, the same operation as though the liquor were produced and shipped and kept without regard to Interstate Commerce.

We therefore hold that Section 2403 applies to liquor in the hands of a common carrier, the same as it would to any other person or corporation.

H. M. HAVNER,
Attorney General.

PERMIT HOLDERS.

In order for a University to obtain a permit under chapter 133, acts of Thirty-seventh General Assembly, it must show itself to be engaged in manufacturing patent and proprietary medicines, tinctures, extracts or other commodities.

January 5, 1918.

James D. Cooney, County Attorney, West Union, Iowa.

Dear Sir: Your letter of January 3rd, addressed to the attorney general has been handed me for answer.

You ask whether Upper Iowa University can obtain a permit to purchase, receive and possess intoxicating liquors for use in the college, under the provisions of Chapter 133 of the Acts of the 37th General Assembly.

Chapter 133 of the Acts of the 37th General Assembly contemplates that any person, firm or corporation within this state engaged, in good faith, in the business of manufacturing patent

and proprietary medicines, tinctures, extracts, or other commodity not susceptible of use as a beverage but which require as one of their ingredients alcohol, spirituous or vinous liquors, and who desires to purchase and have transported by either intrastate or interstate common carriers and have possession of such liquors shall, before purchasing, transporting or using such liquors, apply for and obtain a permit authorizing such sale, transportation and use as hereinafter provided.

Technically speaking then, in order for the Upper Iowa University to obtain the permit desired, it will be necessary for it to show that it is engaged "in good faith in the business of manufacturing patent and proprietary medicine, tinctures, extracts or other commodities." If such showing cannot be made, then the permit could not be granted.

Section 2385 of the Code will permit this institution to purchase alcohol for chemical purposes from a permit holder.

This department is inclined to be very liberal in the matter of permitting institutions of this kind to obtain the necessary intoxicating liquors for scientific purposes and we have authorized railroad companies to release shipments to state institutions for medical purposes.

The question of course as to whether or not the Upper Iowa University comes within the provisions of Chapter 133 is a question for the judge of your district court to determine and if he finds that the institution is a person, firm or corporation contemplated by said chapter, then of course the permit should be granted.

J. W. KINDIG,
Assistant Attorney General.

RIGHT OF WHOLESALE DRUGGIST.

A wholesale druggist holding permit may sell for specified purposes.

September 21, 1917.

LaMonte Cowles, Burlington, Iowa.

Dear Sir: In your letter of August 30th you ask what is the opinion of this department as to the right of the wholesale druggist under Section 2401-a, Supplement of 1913, as amended by

the Thirty-seventh General Assembly, Chapter 422, on proper application to sell intoxicating liquors to registered pharmacists not holding permits for re-sale for use by them in compounding medicines, tinctures and extracts, none of which can be used as a beverage.

It is our opinion that said Section 2401-a, as thus amended, so far as it applies to registered pharmacists provides for two kinds of sales, first: To registered pharmacists in the state holding pharmacists' permit from the state of Iowa without any liquor permit, for the purpose of compounding medicines, tinctures and extracts, none of which can be used as a beverage, and, second: For re-sale to registered pharmacists in the state of Iowa holding permits to sell intoxicating liquors under the laws of the state of Iowa.

Therefore, if the wholesale druggist fully meets the requirements made under Section 2401-a, as amended, and the following sections relating thereto, sales of intoxicating liquors therein permitted may be made to registered pharmacists who do not hold a permit, to re-sell the same. Such sales, however, must be limited to the purpose of compounding medicines, tinctures and extracts, none of which can be used as a beverage and sold to pharmacists in the state of Iowa holding permits as such pharmacists from this state.

J. W. KINDIG,
Assistant Attorney General.

REGISTERED PHARMACIST TO KEEP INTOXICATING LIQUOR.

A registered pharmacist or physician may receive and keep intoxicating liquor, except malt, for the purpose of compounding medicine, etc., without taking out a permit under chapter 133, acts of the Thirty-seventh General Assembly.

January 31, 1918.

H. E. Eaton, Secretary Commission of Pharmacy, State House.

Dear Sir: I am in receipt of your letter of the 3rd of January, asking for an opinion from this department upon the following question:

> Does Chapter 133, Acts of the 37th General Assembly intend that registered pharmacists engaged in their legal profession of compounding drugs, medicines, chemicals, etc., including tinctures for strictly medicinal purposes, or for

physician's prescriptions, have to procure a permit as provided in such chapter?

Section 2401a, 1913 Supplement to the Code, provides:

> Any corporation doing a general wholesale drug business within the state and having a registered pharmacist who holds a permit to sell intoxicating liquors, and is financially interested in and actually engaged in the conduct of said business, may sell and dispense intoxicating liquors, not including malt liquors, for the purpose of compounding medicines, tinctures, and extracts, none of which can be used as a beverage, *to any registered pharmacist, conducting a general drug business within the state, or to any firm or corporation, having a registered pharmacist financially interested therein and doing a general drug business within the state, and to physicians duly licensed under the laws of the state.* * * *

We have underlined the part of the quote which is important so far as your question is concerned. Under the provisions of section 2401-a, there can be no question that a wholesale druggist in the state of Iowa has a right to ship to a registered pharmacist, and the registered pharmaist has a right to receive intoxicating liquors, not including malt liquors, for the purpose of compounding medicines, tinctures, and extracts, none of which can be used as a beverage.

The right to ship to registered pharmacists and physicians and the right of registered pharmacists and physicians to receive intoxicating liquors prior to the enactment of chapter 133, acts of the 37th General Assembly, was without question authorized, and chapter 133 of the acts of the 37th General Assembly in no wise repeals or conflicts with section 2401-a, 1913 Code Supplement 1913.

We therefore hold that it is not necessary for a registered pharmacist or physician to take out a permit under Chapter 133, acts of the 37th General Assembly in order to receive or keep intoxicating liquors, not including malt liquors, "for the purpose of compounding medicines, tinctures, and extracts, none of which can be used as a beverage."

H. M. HAVNER,
Attorney General.

RIGHT OF REGISTERED PHARMACIST TO PROCURE INTOXICATING LIQUOR.

Registered pharmacist may secure permit to purchase alcohol, spirituous and vinous liquors outside the state under Senate File 100, Thirty-seventh General Assembly, for compounding medicines. It is not necessary that he have permit to sell same.

April 27, 117.

H. E. Eaton, Secretary Commission of Pharmacy, State House.

Dear Sir: I am in receipt of the following inquiries from your department with reference to our construction of the substitute for senate file 100, namely:

> First: Can a registered pharmacist secure a permit under substitute for senate file 100, and under such permit be authorized to keep alcohol, spirituous or vinous liquors for the purpose of compounding medicines?
>
> Second: Will it be necessary for a druggist who desires to compound medicines to have a permit to sell intoxicating liquors at retail?

In answer to your first question, it is the holding of this department that a permit can be granted under subtsitute for senate file 100, enacted by the 37th General Assembly to a registered pharmacist who is not now a permit holder, and the same, when granted, will be sufficient to protect such registered pharmacist who desires to purchase from outside the state of Iowa alcohol, spirituous and vinous liquors for the purpose of compounding medicines.

In answer to your second question, it is the holding of this department that it will not be necessary for a registered pharmacist, who desires to compound medicines, to have a permit to sell intoxicating liquors at retail. The only permit it is necessary for him to have is the permit which is authorized in senate file 100, acts of the 37th General Assembly, and he does not need that permit unless he desires to purchase his alcohol, spirituous or vinous liquors, from some place outside the state of Iowa, but by having such permit he will be authorized to purchase alcohol, spirituous or vinuous liquors for the purpose of compounding medicines from any place outside of the state he may desire. It will always be necessary, however, for any such pharmacist or druggist, whenever compounding the medicines to prepare the commodity so it will not be susceptible of use as a beverage.

H. M. HAVNER,
Attorney General.

EFFECT OF PROPOSED CONSTITUTIONAL AMENDMENT.

The proposed constitutional amendment if adopted will not prevent the sale of intoxicating liquors for sacramental purposes.

September 27, 1917.

Senator P. C. Holdoegel, Rockwell City, Iowa.

Dear Sir: Replying to your inquiry as to whether or not the proposed constitutional amendment, if carried, would in any manner hinder or prevent the procurement of wine for sacramental purposes, will say that in my judgment your question must be answered in the negative. The proposed amendment insofar as the same is material to your question, reads as follows:

> The manufacture, sale, or keeping for sale, as a beverage, of intoxicating liquors, including ale, wine and beer, shall be forever prohibited within this state. The general assembly shall by law prescribe regulations for the enforcement of the prohibition herein contained, and shall provide suitable penalties for the violation of the provisions hereof.

It follows that the only manufacture, sale or keeping for sale sought to be prohibited by the proposed amendment is where the intoxicating liquors are for use as a beverage and certainly no court would hold that wine administered for sacramental purposes is in any sense made use of as a beverage.

H. M. HAVNER,
Attorney General.

RIGHT OF INDIVIDUAL TO PROCURE LIQUOR FOR PERSONAL USE.

Individuals may go into other states and bring back liquor for personal use provided it is properly labeled. Bootleggers may be prosecuted under sections 2419, 2420, 2421, 2461-a and 2461-b.

April 28, 1917.

R. C. Leggett, County Attorney, Fairfield, Iowa.

Dear Sir: In reply to your letter of April 23rd will say, as to your first question that there is no statute of which I know which prevents an individual from going to the state of Illinois, or Missouri, to secure liquor for his own personal use and transporting it into Iowa, providing he has it properly labeled when he brings it into the state or transports it into the state.

In answer to your second question, will say that I think there are several statutes under which you can reach such violators.

Section 2491 of the Code 1897 provides:

> It shall be unlawful for any common carrier or other person to transport or convey by any means, within this state, any intoxicating liquors, unless the vessel or other package containing such liquors shall be plainly and correctly labeled or marked, showing the quantity and kind of liquor contained therein, as well as the name of the party to whom they are to be delivered. And no person shall be authorized to receive or keep such liquor unless the same be marked or labeled as herein required. The violation of any provision of this section by any common carrier, or any agent or employe of such carrier, or by any other person, shall be punished the same as provided in the second preceding section * * *.

The second preceding section is 2419, which makes the punishment $100 fine and reasonable attorney's fees for each offense. Section 2420 of the Code of 1897 gives all the authority to a peace officer to investigate in regard to any vessel or package that he has reason to believe contains intoxicating liquor.

Section 2461-a Supplemental Supplement 1915, would make a person a bootlegger and punishable for a misdemeanor.

Section 2461-b Supplement 1913, makes the remedy of injunction applicable to such bootlegger.

With reference to your third question. I am enclosing herewith copy of substitute for senate file 100 which is self-explanatory.

We have given an opinion, however, which has been forwarded to you with reference to the conflict which appears in Section 4 and 5 of substitute for senate file 100.

Your duties are fully and clearly defined in the act above referred to and are the same as where an application for a permit is made to retail intoxicating liquor.

Any registered pharmacist who desires to simply compound his medicines and who does not desire to retail intoxicating liquors is, in our judgment, entitled to a permit under substitute for senate file 100.

H. M. HAVNER,
Attorney General.

LABELING OF INTOXICATING LIQUORS.

Intoxicating liquors should be labeled and marked in order to be lawfully transported.

May 9, 1917.

Lew McDonald, County Attorney, Cherokee, Iowa.

Dear Sir: In accordance with your request as to whether it is unlawful to convey into this state intoxicating liquor in a suit-case without the suit-case being labeled as to its contents where the person is bringing the liquor for his own personal use, will say that under Section 2421 of the Code of 1897, it is the opinion of this department that the suit-case must be so labeled in order to avoid the penalty of Section 2421, which provides as follows:

> It shall be unlawful for any common carrier or other person to transport or convey by any means within this state any intoxicating liquor unless the vessel or other package containing such liquor shall be plainly and correctly labeled or marked, showing the quantity and kinds of liquors contained therein as well as the name of the party to whom they are to be delivered, and no person shall be authorized to receive or keep such liquors unless the same be marked or labeled as herein required.

It is the opinion of this department that if a man is conveying intoxicating liquors in a suit-case or has intoxicating liquors in any sort of a receptacle in his possession which have been conveyed into the state, without the receptacle in which they are or were contained being marked in accordance with Section 2421 of the Code, that it is a violation and should be punished.

I have also your request as to whether in the opinion of this department an injunction should in all cases possible be obtained against an offender under the liquor laws, and in reply will say that inasmuch as the statute makes an injunction state wide and makes it possible to punish one for contempt anywhere within the boundaries of the state if he again violates the law, we believe it to be in the interest of law enforcement to secure an injunction whenever possible.

We have also your request with reference to whether a registered pharmacist may purchase intoxicating liquors or have the same in his possession without having a permit and in reply will say that Section 2401-a, Supplement to the Code, 1913, provides:

Any corporation doing a general wholesale drug business within the state having a registered pharmacist who holds a permit to sell intoxicating liquors, and is financially interested in and actually engaged in the conduct of said business, may sell and dispense intoxicating liquors, not including malt liquors, for the purpose of compounding medicines, tinctures, and extracts, none of which can be used as a beverage, to any registered pharmacist conducting a general drug business, "within the state."

The registered pharmacist may purchase intoxicating liquors from a wholesale druggist within this state for the purposes above enumerated without a permit, but if he attempts to purchase or have transported to him intoxicating liquor from without the state without having a permit he would be liable to all the penalties of the law and should not be authorized to have liquor transported to him by a common carrier.

Senate file 100 provides for what is known as a manufacturer's permit and this department holds that "other commodities not susceptible of use as a beverage" as used in senate file 100 would apply to a registered pharmacist engaged in the business of compounding medicines, tinctures, and that such registered pharmacist would have the right to secure such a permit under senate file 100, and have liquors shipped to him from without the state under such permit. Where a person desires only to use the intoxicating liquors "for the purpose of compounding medicines, tinctures, and extracts, none of which can be used as a beverage," and the pharmacist is willing to buy his liquors from a wholesale druggist in Iowa, he can do this without any kind of permit.

H. M. HAVNER,
Attorney General.

RECEIPTING FOR LIQUOR.

The express company may deliver intoxicating liquor to a consignee provided the delivery book is signed by the consignee at the time the liquor is received.

February 9, 1917.

C. F. Wennerstrum, Chariton, Iowa.

Dear Sir: It has been the holding of this department that the express company by its authorized deliveryman may make a delivery of a liquor consignment to a consignee, provided that the deliveryman takes with him the liquor delivery book of the

express company and has it signed personally by the original consignee at the time the delivery is made at the home of the consignee.

H. M. HAVNER,
Attorney General.

MANUFACTURERS' PERMIT.

Provisions of the manufacturers' permit law discussed and explained.

April 24, 1917.

To the County Attorneys:

Dear Sirs: I am writing you this letter on account of the apparent conflict that occurs in senate file No. 100, which is an act to authorize the shipment of intoxicating liquors to certain persons within the state of Iowa.

Section 4 sets out the form of the permit, and in the form of the permit as set out, the following language is used:

> * * * That such permit holder is authorized to purchase and have transported to him alcohol, spirituous or vinous liquors of the kinds and amounts specified below, provided one duplicate certificate is firmly pasted or affixed to the extrior of the package and one duplicate hereof is attached to the bill of lading.

Section 5 of the same act provides:

> * * * One copy of this order shall be immediately filed with the clerk of the district court of the county in which the permit is issued, one copy shall be attached to the package in such way that it cannot be removed without showing evidence of the mutilation where the entire order is shipped in one package, and if said order shall be contained and shipped in more than one package, then the consignor shall attach the original copy to one of said packages, and a duplicate thereof to each additional package required to ship said order, and the third copy shall be attached at the original point of shipment to the way bill of the common carrier.

It will be the holding of this department that Section 5, being a part of the act, would control over that which purports to set out in substance the form of the receipt or order, and that it will be necessary that the copy be attached to the way bill, instead of to the bill of lading, as stated in the manufacturer's ship-

ping permit, and in order to avoid confusion with the railroads and shippers, we suggest that the manufacturers' permit be in the following form:

MANUFACTURERS' SHIPPING PERMIT.

This is to certify that.....of....., county of....., Permit No....., which will expire on the.....day of....., 19....., and that such permit holder is authorized to purchase and have transported to him alcohol, spirituous or vinous liquor of the kinds and amounts specified below, provided one duplicate of this certificate is firmly pasted or affixed to the exterior of the package and one duplicate thereof is attached to the way bill, and after the delivery of such liquors to such permit holder, said duplicate with date of delivery endorsed or stamped thereon shall be by the delivering carrier promptly mailed to the undersigned:

Kinds of Liquors	Amount	Purpose for which to be used.
.....	.....	.....
.....	.....	.....
		.....

.....County, Iowa.

There is, as noted above, a direct conflict between sections four and five, and in our opinion, the body of the act must govern. To hold otherwise would practically defeat the object and purpose of the act itself, for the attachment of the receipt to the bill of lading would permit the persons making the shipment to send the bill of lading to any person, while the way bill is in the hands of the carrier at all times and remains a part of his permanent records where it is accessible in case any man is sought to be punished for a violation of this law.

We have written all of the county attorneys of the state along this same line and have also written a letter to the clerk of the court of each county of the state directing them to call upon you for an opinion in connection with this matter. We are doing this in order to avoid the confusion that might occur unless there were some uniformity of action.

H. M. HAVNER,
Attorney General.

APPEAL IN CONDEMNATION PROCEEDINGS.

The provisions of chapter 322, acts of Thirty-seventh General Assembly, granting the state the right of appeal in liquor condemnation proceedings is not unconstitutional as the proceedings are not against owner of the liquor but against the liquor itself.

July 13, 1917.

E. J. Wenner, County Attorney, Waterloo, Iowa.

Dear Sir: Your favor of the 11th instant, asking for an opinion from this department with reference to the constitutionality of Chapter 322, Acts of the Thirty-seventh General Assembly, has been referred to me for answer.

That portion of the act to which you refer reads as follows:

> In any such preceeding where the judgment is against the state, it shall have the same right of appeal to the district court, except that no bond shall be required and if an appeal be taken by the state, the same shall operate as a stay of proceedings and the liquors seized under the warrant shall not be returned to any claimant thereof until, upon the final determination of said appeal, he is found entitled thereto.

Section 12, Article 1 of the constitution of the state of Iowa provides as follows:

> No person, shall, after acquittal, be tried for the same offense. All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, where the proof is evident, or the presumption great.

It is true that the supreme court of this state in passing upon the constitutionality of a law which gave the right of appeal to either party in a case where a defendant was charged with the crime, held that the law was unconstitutional as a violation of the above section.

State vs. Van Horton, 26 Iowa, 402.

It is true, also, that the opinion in the above case was cited with approval in State vs. Ford, 161 Iowa, 323, as suggested by you.

It is true, also, that in State vs. Intoxicating liquors, 40 Iowa, 95, it was held that proceeding by information for the seizure and condemnation of intoxicating liquors kept for illegal sale

was a criminal proceeding, and that this decision is cited with approval in Weir vs. Allen, 47 Iowa, 484, Fries & Company vs. Porch, 49 Iowa, 357, State vs. Arlen, 71 Iowa, 216.

It will be observed, however, that the provision of the constitution which provides that "no person shall, after acquittal, be tried for the same offense" has reference to the individual. The provision of our statute with reference to the condemnation of liquors has reference only to the property. It is true that the section referring to condemnation provides that the proceeding may be the same substantially as in cases of misdemeanor, triable before justices of the peace. Code Section 2415. And this has been held in the cases cited by you to mean a criminal proceeding.

It will be observed, also, that prior to the passage of Chapter 322, Acts of the Thirty-seventh General Assembly, there was no provision by which the state might take an appeal from the justice to the district court in such proceeding, if the decision of the court should be against the state.

It is the view of this department that the provision of Chapter 322, Acts of the Thirty-seventh General Assembly, above referred to, is not a violation of Section 12, Article 1 of the constitution of the state of Iowa for the reason that the only prohibition that the said section contains is that "no person shall, after acquittal, be tried for the same offense." The condemnation proceeding is against the liquor and not against the person, so that it does not come within the provision of the constitution.

It is, therefore, the opinion of this department that the provision of Chapter 322, Acts of the Thirty-seventh General Assembly, is not unconstitutional as being in violation of Section 12, Artitcle 1 of the constitution of the state of Iowa.

But, if an action were brought to condemn liquor under the provision of our statute and the court should hold against the state, it would be your duty to appeal from such decision, if the facts warranted it, and leave the constitutional question to be determined by the court.

H. H. CARTER,
Assistant Attorney General.

OPINIONS RELATING TO TRAFFIC IN CIGARETTES.

WHAT CONSTITUTES ORIGINAL PACKAGE.

A dealer may sell cigarettes in original packages without violation of Iowa statutes.

January 24, 1917.

M. Dean Roller, County Attorney, Marengo, Iowa.

Dear Sir: I am in receipt of your favor of the 17th requesting an opinion as to under just what conditions retailers can sell cigarettes in this state in original packegs.

The state is powerless and cannot prevent a retail dealer from selling cigarettes in original packages, but the dealer must be sure he is selling them in original packages. As to what constitutes original packages, the court in Cook vs. Marshall county, 196 U. S. 261, at page 271, said:

> The real question in this case is whether the size of the package in which the importation is actually made is to govern; or, the size of the package in which bona fide transactions are carried on between the manufacturer and the wholesale dealer residing in different states. We hold to the latter view. The whole theory of the exemption of the original package from the operation of state laws is based upon the idea that the property is imported in the ordinary form in which, from time to time immemorial, foreign goods have been brought into the country.

The application of this rule to the shipment of cigarettes into this state, would mean that cigarettes could be sold in this state in packages of the size in which bona fide transactions are carried on between the manufacturer and the wholesale dealer residing in different states. Any package less than that would be a violation of the law, for which the party making the sale could be punished.

In support of this, we call your attention to Cook vs. Marshall county, 196 U. S. 261; 119 Iowa, 384.

H. M. HAVNER,
Attorney General.

"ORIGINAL PACKAGE" DEFINED.

Five small packages of cigarettes wrapped together and sent to dealer by parcel post do not constitute an original package when intended for retail trade.

June 4, 1917.

R. P. Scott, County Attorney, Marshalltown, Iowa.

Dear Sir: Your favor of the 24th ult., addressed to the attorney general, has been referred to me for reply.

You asked:

> The question has arisen concerning the selling of cigarettes in the original package. It appears now that tobacco dealers put up cigarettes in small parcel post packages, which packages consist from three to five of the ordinary small packages. I am informed that these sales are made over the state and under the decision of the court it would seem the sale in the original package would be legal. However, I have refused to give such an opinion as that, pending having a ruling from you in that regard.

Your inquiry is whether or not the state has power to prohibit the sale of cigarettes within its boundaries, provided the cigarettes when sold are in the same form or package as when received by the dealer, that is, if the cigarettes are in what is commonly termed the original package.

At the threshold we are met with the question, what is an original package within the meaning of the commerce clause of the federal constitution? If the merchandise shipped is in fact an original package within the contemplation of that clause of the constitution then there is no question that the state is powerless to prohibit the sale of said article.

But what is an original package? In determining what is an original package within the meaning of the law, at least two features of the transaction must be continually kept in mind, namely, first, the good faith of the transaction between the shipper and the dealer; and, second, whether the article shipped is a package of retail or a package of importation.

Now, on the proposition first above stated the authorities hold that is it not the size of the package in which the transportation is made that is to govern but the size of the package in which

bona fide transactions are carried on between the manufacturer and dealer residing in different states.

In Austin vs. Tennessee, 179 U. S. 343, it is said:

> With the undertaking to determine what is the proper size of an original package in each case, evidently the doctrine has no application where the manufacturer puts up the package with the express intent of evading the laws of another state, and is enabled to carry out his purpose by the facile agency of an express company and the connivance of his consignee.

To the same effect see Cook vs. Marshall County, 196 U. S. 261.

As to the other propositions, namely, whether the article shipped is a package of retail or a package of importation, it has been repeatedly held that goods and merchandise transported from one state to another may become commingled with property of the state upon arrival at its destination, by treating it as other property for sale to customers in a retail business.

In Armour & Company vs. North Dakota, 240 U. S. 510-517, it is said:

> It is objected that the law violates the commerce clause of the constitution. This is certainly not true of the sale to Ladd. It was distinctly by retail and in the package of retail, not in the package of importation and it is to such retail sales the statute is directed. It does not attempt to regulate the transportation to the state.

The supreme court of the United States has repeatedly held that the individual states have the power to reserve to themselves the right to either tax or prohibit the sale of cigarettes. Austin vs. Tennessee, 179 U. S. 343; Hodge vs. Muscatine County, 196 U. S. 276;Cook vs. Marshall County, 196 U. S. 261. And said court has also universally held that importation, as used in the federal constitution, embraces only goods brought from foreign countries, and do not include merchandise shipped from one state to another. Brown vs. Houston, 114 U. S. 622; American Steel & Wire Co., vs. Speed, 192 U. S. 500.

Pursuant to the foregoing authorities it is evident that the manner in which the cigarettes were shipped, as set out in your statement, was not a bona fide transaction between the shipper

and the dealer, but merely for the purpose of evading the Iowa law prohibiting the sale of cigarettes.

It is, therefore, the holding of this department that cigarettes sold in the small package, or packages, at retail are not sold in the original package within the legal meaning of that term, but such sale is a clear infraction of the Iowa law.

W. R. C. KENDRICK,
Assistant Attorney General.

SALE OF CIGARETTES IN ORIGINAL PACKAGES.

Cigarettes may be sold by the importer in the "original packages."

September 14, 1917.

A. T. Wallace, Acting County Attorney, Des Moines, Iowa.

Dear Sir: Yours of the 24th ult, at hand. You call our attention to the fact that you have had a conference with the representatives of the Des Moines jobbers of cigarettes relative to the handling by them of cigarettes in the original packages, especially in supplying the demand at Camp Dodge, and that

> The jobbers of tobacco in Des Moines have ordered a large quantity of cigarettes from points out of the state and contemplate handling them in the original package. I am advised that they will be received by the jobbers in the bona fide original package, and sold by them in the identical package in which they were received, without same having been broken or the contents thereof having been mingled with the common property of the state. That said packages will absolutely maintain their character as original packages and interstate shipments from the time they are received by the jobbers until they will leave their hands in the regular course of trade. That said business will be transacted in good faith by the Des Moines jobbers, with no intention of violating the state or federal law and only by virtue of the law pertaining to goods bought and sold in the original package in interstate commerce.

You then say:

> I am of the opinion that this would be a legitimate enterprise and would be conducted in a bona fide way. I would, however, appreciate having your sanction or opinion in relation to the matter.

Assuming that all sales are to be made in the original package (which I understand to be a package containing five thousand or more cigarettes enclosed in a box or other carton or container, usually made use of by the shipper in shipping cigarettes to the trade) I am inclined to concur in the opinion which you have expressed above. While such sales would be contrary to the letter and spirit of section 5006 of the code, which in terms prohibits absolutely the sale of cigarettes within the state, yet under the holding of the supreme court of the United States and this state such statute is ineffective for the purpose of preventing sales made in interstate commerce, and in the original package, and until congress of the United States shall see fit to enact some law similar to the Webb-Kenyon law withdrawing the protection of interstate commerce from cigarettes, the state is powerless to prevent sales thereof in such original packages. That such is the state of the law seems to be fully established by the following cases:

Austin vs. State of Tennessee, 179 U. S. 343.
Cook vs. Marshall County, 196 U. S. 261.
McGregor vs. Cone, 104 Iowa, 465.

In the first mentioned case, after citing the holding of the supreme court of Tennessee to the effect that cigarettes were not legitimate articles of commerce within the protection of the United States Constitution because they possess no virtue but were inherently bad, the supreme court of the United States said:

> We are not prepared to fully indorse the opinion of that court upon the first point. Whatever product has from time immemorial been recognized by custom or law as a fit subject for barter or sale, particularly if its manufacture has been made the subject of federal regulation and taxation, must, we think, be recognized as a legitimate article of commerce, although it may to a certain extent be within the police power of the states. Of this class of products is tobacco. From the first settlement of the colony of Virginia to the present day tobacco has been one of the most profitable and important products of agriculture and commerce, and while its effects may be injurious to some, its extensive use over practically the entire globe is a remarkable tribute to its popularity and value. We are clearly of the opinion that it cannot be classed with diseased cattle or meats, decayed fruit, or other articles, the use of which is a menace to the health of the entire community.

Congress, too, has recognized tobacco in its various forms as a legitimate article of commerce by requiring licenses to be taken for its manufacture and sale, imposing a revenue tax upon each package of cigarettes put upon the market, and by making express regulations for their manufacture and sale, their exportation and importation. Cigarettes are but one of the numerous manufactures of tobacco, and we cannot take judicial notice of the fact that it is more noxious in this form than in any other. Whatever might be our individual views as to its deleterious tendencies, we cannot hold that any article which congress recognizes in so many ways is not a legitimate article of commerce. Cigarettes do not seem until recently to have attracted the attention of the public as more injurious than other forms of tobacco; nor are we now prepared to take judicial notice of any special injury resulting from their use or to indorse the opinion of the supreme court of Tennessee that "they are inherently bad and bad only." At the same time we should be shutting our eyes to what is constantly passing before them were we to affect an ignorance of the fact that a belief in their deleterious effects, particularly upon young people has become very general, and that communications were and are constantly finding their way into the public press denouncing their use as fraught with great danger to the youth of both sexes. Without undertaking to affirm or deny their evil effects, we think it within the province of the legislature to say how far they may be sold, * * * or to prohibit their sale entirely, after they have been taken from the original packages or have left the hands of the importer, provided no discrimination be used as against such as are imported from other states, and there be no reason to doubt that the act in question is designed for the protection of the public health.

In the case of Cook vs. Marshal County, supra, the small boxes of cigarettes, containing ten each, were shipped loosely in the car and delivered without being contained in any other box and without in any way being bailed or fastened together and while such shipments were by the court held not to be original packages within the meaning of the law, yet, the doctrine of the first cited case and the other cases arising on account of the transportation and sale of liquor in the original packages was clearly recognized. In the case of McGregor vs. Cone, supra, our own supreme court after defining original packages, thus:

> An original package is that which is delivered by the importer to the carrier at the initial point of shipment in the exact condition in which is was shipped,

further said:

> It seems to be well settled by the later decisions of the United States court that, while the states have the undoubted right to control their purely internal affairs, yet whenever the law enacted in the exercise of this power amounts to a regulation of commerce among the states, as it does when it directly or indirectly inhibits the receipt of an imported commodity, or its disposition, before it has ceased to become an article of trade between one state and another, it becomes in conflict with a power which has been invested in the general government, and is therefore void. That the use of the article is deleterious to the inhabitants of the state is not regarded as material, so long as it is recognized by the commercial world, by the laws of congress, and by the decisions of the courts as a commodity in which a right of traffic exists. Brown vs. Maryland, 12 Wheat. 419; Leisy vs. Hardin, 135 U. S. 100. That cigarettes are recognized commercial commodity must be conceded, and it follows that, in so far as the law in question amounts to a regulation of commerce, it is unconstitutional and void. There must of necessity be a time, however, when an article which is the subject of interstate commerce becomes subject to the taxing power and police regulations of the state; a time when the article loses its character as an import and its owner becomes subject to local regulations. In the case of Brown vs. Maryland it is said that the point of time when the prohibition ceases, and the power of the state to tax commences, is not the instant when the article enters the country, but when the importer has so acted upon it that it has become incorporated and mixed up with the mass of property in the country, which happens when the original package is no longer such in his hands; that the distinction is obvious between a tax which intercepts the import as an import on its way to become incorporated with the general mass of property, and a tax which finds the article already incorporated with that mass by the act of the importer; and that the right to sell any imported article is an inseparable incident to the right to import it.

H. M. HAVNER,
Attorney General.

"ORIGINAL PACKAGE" DEFINED.

"Original packages" of cigarettes and other articles defined.

September 13, 1917.

C. O. Gunderson, County Attorney, Northwood, Iowa.

Dear Sir: Your favor of the 12th inst., addressed to the attorney general has been referred to me for reply.

You ask:

> The question has been raised whether the tax on the sale of cigarettes as provided in Section 5007 of the Code applies to the sale of cigarettes in the original package, and I should appreciate your opinion on this question.

At the threshold we are met with the question, "What is an original package" within the meaning of the commerce clause of the federal constitution. If the merchandise shipped is in fact an original package within the contemplation of that clause of the constitution, then there is no question that the state is powerless to tax the sale of said article.

What is an original package. In determining what is an original package within the meaning of the law, at least two views of the transaction must be continually kept in mind, viz., first, the good faith of the transaction between the shipper and the dealer; and second, whether the article shipped is a package of retail or a package of importation.

Now on the proposition first above stated, the authorities hold that it is not the size of the package in which the transportation is made that is to govern, but the size of the package in which bona fide transactions are carried on between the manufacturer and dealer residing in different states.

In Austin vs. Tenn., 179 U. S. 343, is it said:

> With the undertaking to determine what is the proper size of an original package in each case, evidently the doctrine has no application where the manufacturer puts up the package with the express intent of evading the laws of another state and is enabled to carry out his purpose by the facile agency of an express company and the connivance of his consignee.

To the same effect see Cook vs. Marshall County, 196 U. S. 261.

As to the other propositions, viz., whether the article shipped is a package of retail or a package of importation, it has been repeatedly held that goods and merchandise transported from one state to another may become commingled with the property of the state upon its arrival at destination, by treating it as other property for sale to customers in a retail business.

In Armour & Co. vs. North Dakota, 240 U. S. 510-517, it is said:

> It is objected that the law violates the commerce clause of the constitution. It was distinctly by retail and in the package of retail, not in the package of importation and it is to such retail sales the statute is directed. It does not attempt to regulate the transportation to the state.

The supreme court of the United States has repeatedly held that the individual states have the power to reserve to themselves the right to either tax or prohibit the sale of cigarettes, (Austin vs. Tenn., 179 U. S. 343; Hodges vs. Muscatine County, 196 U. S. 276; Cook vs. Marshall County, 196 U. S. 261) and said court has also universally held that importation, as used in the federal constitution, embraces only goods brought from foreign countries and does not include merchandise shipped from one state to another. Brown vs. Houston, 114 U. S. 622; American Steel & Wire Company vs. Speed, 192 U. S. 500.

Pursuant to the foregoing authorities, it is evident that cigarettes shipped into Iowa in a form contemplated to evade the Iowa law prohibiting the sale of cigarettes, do not come under the protection of the so-called "original package" doctrine.

It is therefore the holding of this department that cigarettes sold in the small package or packages at retail are not sold in the original package within the legal meaning of that term, but such sale is a clear infraction of the Iowa law and subject to the tax provided for in Section 5007 of the Code.

W. R. C. KENDRICK,
Assistant Attorney General.

CIGARETTE LAWS HAVE BEEN CONSTRUED AND UPHELD.

The laws pertaining to sale of cigarettes in this state have been upheld by the supreme court of the state and by the supreme court of the United States.

February 20, 1918.

A. E. Brown, County Attorney, Osage, Iowa.

Dear Sir: I have your letter of the 15th inst., wherein you request the opinion of this department on the following questions:

> Is there any supreme court decision showing a construction of the statutes, being Sections 5006 and 5007-a, modifying at any time the provisions of said sections? And in your opinion, are said sections strictly enforcable with reference to cigarettes found in any store, no matter in what sizes the packages may be; and no matter whether or not they are in what might be termed an original package.
>
> I also presumed a user of cigarettes could order in any quantity for his own use through some near wholesale dealer or jobber doing business in and out of the state. Is this correct?

The case of Cook vs. Marshall County, 119 Iowa 384, and Hodge vs. Muscatine County, 121 Iowa 483, each construe the sections of the statute relating to the sale of cigarettes, and as I understand it, each sustained the law in its fullest scope. These cases were appealed to the United States supreme court and affirmed by it, and are reported in the case of Cook vs. Marshall County, 196 U. S. 261, and Hodge vs. Muscatine County, 196 U. S. 276.

Our own supreme court and the federal supreme court in deciding those cases, discuss the question of an original package and lay down pretty clear rules for determining what constitutes such a package. Under the rule there announced, the only shipments that may be lawfully made would be in the original package, by which is meant that size and kind of a package which is ordinarily used in shipping that particular commodity from the manufacturer or jobber to the trade, and while no particular limit is fixed as to the number of packages of cigarettes that should be contained in a so-called "original package" it is believed by those who are informed on the subject that it requires a package containing five (5000) thousand.

There could be no shipment whatever of cigarettes from one point within the state to any other point in the state for the question of the right claimed under the so-called "original package" theory is that the shipment must be in interstate commerce and not intrastate commerce.

Another thought should be borne in mind, and that is that no package will be held to be an "original package" within the meaning of the term as here used which is made for the purpose of evading any state law, or which contemplates shipments into any particular state or territory for the original package, as before stated, means the box or package marked to the consignee and delivered to the carrier for shipment.

J. W. SANDUSKY,
Assistant Attorney General.

CIGARETTE MULCT TAX.

Section 5007-b, supplement 1913, providing for certification of tax by justice of peace to county treasurer is directory and not mandatory, and failure to certify within the ten day limitation is not fatal.

August 10, 1917.

Walter R. French, Assistant County Attorney, Waterloo, Iowa.

Dear Sir: Your favor of the 7th instant, in relation to the mulct tax certified from one of your local justices to your county treasurer against R. N. Cowin, has been referred to me for attention.

From the date furnished this department, I find that the above tax was certified a year subsequent to the rendition of judgment and the parties affected by the tax have filed a petition with the board of supervisors asking a remission of the tax on the ground that the certification of the tax, one year after the rendition of judgment, was illegal, the statute providing that the certification shall be within ten days after the order to destroy has been issued.

I do not believe that it makes any difference legally whether the justice certifies the tax within ten days or not, for the reason that Section 5007-b, Supplement of 1913, is directory and not mandatory.

It is the generally recognized doctrine that "statutes which are for the guidance of officers in the conduct of business de-

volving upon them designed to secure order, system and despatch, in the preceeding and in the disregard of which the rights of persons interested cannot be injuriously affected, are held to be directory. If, however, the language of such a statute is accompanied by negative words importing that the act or acts required shall not be done in a manner or at a time other than that prescribed it must be construed as mandatory."

Lumber Company vs. Board of Review, 161 Iowa, 504.

Section 5007 b, supra, does not expressly prohibit the certification at any other time, nor does said section contain any words which imply that the tax can not be certified at any time other than within the ten day period. If a person is found guilty of selling cigarettes in Iowa he is liable for the tax, so how can he consistently claim to be prejudiced by not having to pay the tax for a year—in other words, for a year's respite? The party against whom the tax is certified still has the right to appeal to the board of supervisors for remission, and is still entitled to the thirty days notice of assessment. So that as stated in Sunderland (2nd ed.) on statutory construction, Section 611:

> If the act 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 purpose of the statute.

In 29 Cyc. 1432, it is said:

> Statutes, unless clearly mandatory, are regarded as directory, where the purpose of their passage is merely to secure regularity in official procedure. Particularly are statutes constructed as directory in character which provide that official acts shall be done within a given time.

Also, in the question as to when a statute is directory and when mandatory, see

Abney vs. Clark, 87 Iowa, 727.

However, in the event the board of supervisors remit the tax, we would suggest that you have three citizens of the county procure a listing of Mr. Cowin, the United Cigar Stores, and the property owner as provided for in Section 2435, Supplemental Supplement 1915. In this manner, the citizens can procure a listing for the entire period the parties have been engaged in the

illegal sale of cigarettes and are not limited to the current quarter. For authority for such procedure, see

Loan Company vs. Board of Supervisors, 138 Iowa, 11.

W. R. C. KENDRICK,
Assistant Attorney General.

ASSESSING OF CIGARETTE MULCT TAX.

Cigarette mulct tax law explained and time of payment of tax discussed.

July 13, 1917.

Harry Langland, County Attorney, Nevada, Iowa.

Dear Sir: Your inquiry of the 11th inst., addressed to the attorney general, has been referred to me for attention during his absence from the city.

You ask:

> Will you kindly give me the opinion of your office as to when the cigarette mulct tax for the second quarter of the year, beginning April 1, 1917, statement for which was filed by three citizens on July 9th with the county auditor and by him certified to the county treasurer on July 10th, is due and payable? Our treasurer has no mulct tax book. Would it be all right for him to enter the tax in some other book in this office? Was auditor right in certifying at this time?

Section 2433, Supplement 1913, provides:

> In the months of December, March, June and September of each year and before the 20th day of each of said months, the assessor shall return to the county auditor a list of persons engaged in the business; also description of property, together with name of occupant or tenant and owner or agent. Five days' notice of listing shall be given to persons found in possession, occupants, owner or tenants, etc.

Section 2435, Supplemental Supplement of 1915, provides:

> Should the assessor fail to perform his duty for any reason, any three citizens of the county can, under oath, addressed to the county auditor, procure the listing of names and places, upon giving said five days' notice, etc.

Section 2437, Supplement of 1913, provides:

> On the last day of December, March, June and September of each year the county auditor shall certify to the county

treasurer a complete list of the names returned to him by the assessor or citizens' statement, with a description of the real estate and the name of the occupant and that of the owner or agent of such property.

Section 2438, Supplement of 1913,, provides:

The county treasurer shall thereupon enter a quarterly installment as due and payable, etc.

Section 2436 of the Code provides:

That the quarterly installments shall become due and payable on the first day of the month following the quarter year for which the listing is returned.

Section 5007 of the Code provides:

Such tax * * * shall be assessed, collected and distributed in the same manner as the mulct liquor tax.

In Loan Company vs. Supervisors, 138 Ia., 11, it is said:

The duty rests upon every person having property or having engaged in business, coming plainly within the provisions of the tax law, to report the same for assessment and taxation.

Further in the opinion it is said:

The time within which the assessor is required to act is fixed, but there is no time restriction on the action of the citizens, save that they shall act only on the failure of the assessor to list the persons and places subject to tax within the time allowed him therefor.

Pursuant to the foregoing statutory provisions and court decisions it is evident:

First, in the event the assessor fails to list with the county auditor the persons and places subject to tax within the time allowed him therefor, then three citizens of the county can procure the listing.

Second, that the county auditor is limited to a certain period in which to certify to the county treasurer the list returned by either the assessor or the citizens.

Third, that when the list is returned by the citizens the persons listed are required to pay a tax for the length of time they have been in the legal business, as shown by the return, and the entire tax becomes due and payable on the first day

of the month following the proper certification to the treasurer by the auditor. In your specific case the auditor should not have certified the list until the last day of September.

As to that portion of your question, whether it would be proper for the county treasurer to enter the tax in some other book in his office, there being no "mulct tax" book available, beg to refer you to Section 2438 o fthe Code, which reads as follows:

> The county treasurer shall thereupon enter upon a book known as the "mulct tax book" a quarterly installment of the mulct tax, as due and payable by the person carrying on such business or keeping such place, and as a lien and charge upon and against the real property wherein or whereon such business is carried on or such place maintained.

It would therefore seem that the provisions of Section 2438 of the Code are mandatory and requires the tax to be entered in the book known as the "mulct tax book." If your treasurer has no such book in his office we would suggest that you request him to obtain one at once.

W. R. C. KENDRICK,
Assistant Attorney General.

HOME GUARDS.

The former laws authorizing raising of forces to protect border counties have been repealed. There is no provision for payment of expense of a home guard organization.

March 19, 1918.

Hon. Guy E. Logan, Adjutant General, State House.

Dear Sir: Your inquiry bearing date of March 6th, addressed to the attorney general, has been referred to me for attention.

You enclose a letter from R. H. Faxon, General Secretary of the Des Moines Chamber of Commerce, addressed to you, of date February 21st, 1918, asking, in substance, for information concerning the organization of military companies in local communities, to be used as home guards and whether the statute makes any provision for their being uniformed, armed and equipped at the expense of the state.

You also enclose a list of military laws enacted by former legislatures, concerning the organizing of military forces for special purposes, such as guarding the northwest border of the state against marauding bands of Indians, and also the raising of troops to guard the southern border of the state. You then ask if those laws have been repealed, and if not are they effective at the present time for organizing military companies for home protection; and if such companies can be legally organized under those laws, what funds could be used for the purpose of furnishing arms, uniforms, equipment, pay, transportation and subsistence when on duty.

The laws relating to the protection of the northwest border, to which you refer, were enacted by the 8th General Assembly, being found in Chapter 107, Acts of the 8th General Assembly. By the provisions of said chapter the governor was authorized to furnish the settlers in the northwestern portion of the state with arms and ammunition to defend themselves against marauding bands of Indians; also to enroll a company of minute men, not exceeding twelve in number, to hold themselves in

readiness to meet any threatened invasion of such hostile Indians; and he was further authorized to select four of such minute men to act as an active police.

Without attempting to expressly amend or repeal Chapter 107, additional provisions were enacted at the extra session of the 9th General Assembly with reference to protecting the northwestern frontier from hostile Indians, and by this legislation the governor was authorized to raise a volunteer force of 500 mounted men, who were to furnish their own arms, horses and subsistence, but were to be paid for their services out of the war and defense fund. The governor was required to raise said force only when in his judgment the danger to the frontier settlers required such action.

The northwest border laws aforesaid were never expressly repealed, but they were repealed by implication. Chapter 74 of the Acts of the 18th General Assembly provided a military code for the state, and for the organization, government and support of the state militia, repealing all acts in conflict therewith. None of the northwest border laws were ever carried in any of the codes since the enactment of such laws.

It is provided in the Code of 1897 that all public and general statutes adopted prior to the extra session of the 26th General Assembly, and all public and special acts, the subjects whereof were therein revised or which are repugnant thereto, were repealed. (Section 49 of the Code of 1897.)

There is no doubt in my mind that the northwest border laws are not only public and special acts, but also are repugnant to the military laws found in the Code of 1897. In any event, those laws would not authorize the governor to organize companies of home guards for home protection, nor authorize the expenditures of public funds for furnishing such organization with arms, uniforms and equipment, nor provide funds for the pay, transportation or subsistence when on duty.

The southern border laws, referred to in your list, were expressly repealed by Chapter 3, Acts of the 10th General Assembly.

The laws in force at the present time, relating to the military forces of Iowa, are found in the military code as set out and con-

tained in Chapter 1, Title 11-A of the Supplement of 1913, as amended by Chapter 1, Title 11-A, Supplement of 1915 and Chapter 314 of the Acts of the 37th General Assembly, also Chapter 134, Acts of the 64th congress. All former laws relating to the militia have been repealed, either expressly or by implication.

Pursuant to the chapters above quoted, a military force of the state shall consist of every able-bodied male citizen and those of foreign birth who have declared their intention to become a citizen, between the ages of 18 and 45 years. (Section 2215-f-1 of the Supplement of 1913). But the organized militia shall consist of such organizations as may be specified by the war department, in accordance with Chapter 134, Acts of the 64th Congress, approved June 3, 1916. It is provided, however, that the governor may order into the service of the state such of its military forces as he may think proper in cases of insurrection, invasion, or breaches of the peace, or imminent danger thereof. (Section 2215-f-19, Supplement 1913).

Undoubtedly under this section the governor would be empowered to arm them, but if this section is not broad enough for that purpose, then Section 2215-f-31, Supplement 1913 would be. But it will be observed that the governor is authorized to call such forces for the specific purposes enumerated in said section.

The question whether or not home guard organizations may be formed under the present military code and armed and equipped from state funds is open to serious doubt. Section 2215-f-5, Supplement of 1913 provides that local military companies may be organized with the consent of the governor, but no provision is anywhere made for arming and equipping them at the expense of the state.

We are therefore of the opinion that the military laws now in force do not provide for the organizing, arming and equipping home guard companies, such as you mention in your letter, at the expense of the state.

W. R. C. KENDRICK,
Assistant Attorney General.

COUNTY ATTORNEY MAY ENTER MILITARY SERVICE.

County attorney may accept commission or enlist in army without vacating his office. He is not required to resign, but may appoint assistant.

January 4, 1918.

James D. Cooney, County Attorney, West Union, Iowa.

Dear Sir: Your letter of January 3, addressed to Attorney General Havner, has been given me for answer.

The supreme court of Iowa in the case of Bryan vs. Cattell, 15 Iowa 538, held that a district attorney of the state of Iowa could be captain in the armies of the United States without thereby creating a vacancy in his civil office, it being the opinion of the court that the office of captain is not, within the meaning of the law, incompatible with that of district attorney.

In the Code of 1897, Section 1266, paragraph 7, it was provided that:

> The acceptance by the incumbent of a commission to any military office, either in the militia of this state or in the service of the United States which requires the incumbent in the civil office to exercise his military duties out of the state for a period of not less than sixty days,

would cause a vacancy in the civil office.

The 37th General Assembly of Iowa, by Chapter 12, page 31 of the session laws, repealed said paragraph 7 of said section 1266.

Apparently then, it was the intention of the legislature to remove the hindrance to a civil officer, excepting a military commission, and by the repeal of the said paragraph 7 the rule now must be the same as laid down in the Byran vs. Cattell, supra, case.

It is possible for you, under the circumstances, to conduct your office by an assistant who is to be appointed by you in writing and approved by the board of supervisors of your county. It is not necessary that you resign.

We believe your assistant should qualify by taking the oath of office. We find nothing in the statute to require that he give an official bond.

It is also our opinion that the indictment may be signed by the assistant as such. It is the practice in many instances, however, for the assistant to sign the indictment in the principal's name by the assistant as such. To illustrate:

James D. Cooney, County Attorney.

By.....
Assistant County Attorney.

J. W. KENDIG,
Assistant Attorney General.

G. A. R. ROOMS.

Rooms in capitol provided for the G. A. R. assigned by legislative act may not be re-assigned by the executive council.

May 19, 1917.

R. L. Chase, State House.

Dear Sir: You call attention to the letter of Mr. R. E. Bales, secretary of the executive council, advising that it will be necessary to remove the Grand Army of the Republic from room 4 of the basement of the capitol building and you inquire whether or not it is within the power of the executive council to remove the Grand Army of the Republic from said room 4, under and by virtue of Section 164, Supplement to the Code, 1913, or any other law in view of the fact that the said Grand Army of the Republic was installed in said room under and by virtue of Chapter 120 of the Acts of the 25th General Assembly.

In my judgment, this should be answered in the negative.

Section 1, Chapter 120 of the above section referred to reads as follows:

> That room 4, in the basement story of the capitol building, be and the same is hereby set apart and assigned for the use of the Grand Army if the Republic, Department of Iowa, and that janitor service therefor be provided by the state.

Section 164, so far as material, reads as follows:

> The executive council is empowered to assign apartments in the capitol building to the several state officers, commissions, and boards; and such assignment shall be subject to change by it, from time to time, when required in the interest of the public service.

It will be observed that the power of the council is limited to state officers, commissions, and boards, and does not include the Grand Army of the Republic. Furthermore, this section would not, in my judgment authorize any reassignment by the council of rooms definitely assigned by the legislature itself.

You call attention to the fact that it is claimed that Chapter 120 of the Acts of the 25th General Assembly is repealed by Section 49 of the Code. Whether or not this is true depends on whether or not said Chapter 120 is a public and general statute or a public and special act, I call your attention to the following cases:

State vs. Mullen, 35, Iowa, 199.
Gray vs. Mount, 45 Iowa, 591.

and, as the subject of said Chapter 120 of the Acts of the 25th General Assembly was not revised in the Code of 1897, and is not repugnant thereto, it remains in force.

The same contention was made with reference to the early civil war act authorizing the soldiers to vote in field.

This department held that said act was not a public and general act, but was a public and special act, the subject of which was not repugnant to nor revised by either the Section 47 of the Code of 1873, or the corresponding Section 49 of the Code of 1897, hence it remained in force, and soldiers on the Mexican border were permitted to vote under and by virtue thereof.

H. M. HAVNER,
Attorney General.

REWARD FOR APPREHENDING ESCAPED CONVICT.

Reward for apprehending escaped convict, although already in custody for some other cause, should be given to party apprehending him.

January 16, 1917.

State Board of Parole, State House.

Gentlemen: Referring to the letter of Mr. T. J. Kelly,, Chief of Police of Everett, Washington, wherein he is claiming the reward offered for the apprehension of Robert E. McKenzie who had escaped from the reformatory at Anamosa, this department has given the matter careful attention and has reached the conclusion that the reward has been earned in this case.

The taking into custody and delivering of the convict or fugitive to the proper authorities at Anamosa is admitted in this case and the only doubt which seems to arise as to the right to the reward is the fact that the party was in custody at the time of his discovery and that technical arrest or apprehension was not performed.

It is the opinion of this department that so narrow a construction would hinder and delay and, in a great measure, defeat the object that the state has when making these offers of reward and that the rule we are advising now would facilitate the apprehension and return of escaped prisoners far better.

J. W. SANDUSKY,
Assistant Attorney General.

PAROLED CONVICTS.

A paroled convict who has been indicted for the crime of escape and acquitted of such charge is entitled to have the time he is confined in jail awaiting trial credited on his term of sentence.

January 2, 1918.

C. C. McClaughry, Warden, Anamosa, Iowa.

Dear Sir: Your letter of December 29th pertaining to the matter of a writ of habeas corpus in the case of one Fred Ward, and addressed to the Board of Control, has been referred to this department for answer.

As I gather from your letter, this party had been placed on parole and during such time escaped and was indicted and tried for the crime of escape, of which charge he was acquitted. That during the time intervening between his arrest, trial and acquittal, amounting to forty-four days, he was confined in jail and that it is now sought to deduct such number of days from his "good time" earned, or in other words, that the time spent in jail should not be considered as a part of the time included in or covered by his sentence. If this is correct, and the time of sentence would otherwise have expired, I am constrained to believe that the writ of habeas corpus may be properly invoked and that you should grant the convict his liberty and not contest his right to the writ.

J. W. SANDUSKY,
Assistant Attorney General.

TERMINATION OF SENTENCE OF CONVICTS.

The question of when a prisoner is deemed to have commenced to serve his term and when it is deemed to terminate explained.

July 3, 1917.

George T. Reddick, Chairman Board of Parole, State House.

Dear Sir: In answer to your inquiry of June 27, 1917, we submit the following reply:

First: The general rule is that the term of imprisonment for which the convict is sentenced begins with the first day of actual incarceration in the prison to which his sentence has consigned him.

Miller vs. Evans, 115 Iowa, 101.

Code Section 5468 provides:

> If a defendant imprisoned during the pendency of an appeal, upon a new trial ordered by the supreme court, is again convicted, the period of his former imprisonment shall be deducted from the period of imprisonment to be fixed on the last verdict of the conviction.

This deduction should be by the district court at the time judgment is entered, and is presumed to have been so made unless there is a showing to the contrary.

Travis vs. Hunter, 109 Iowa, 602.
State vs. Hoffman, 67 Iowa, 282.

It seems to be the rule also that if the prisoner submits himself to the penalty of the law, and through no fault of his, but by some delay or fault of the authorities the commencement of his term in the penitentiary is delayed, credit should be given him for the time served in a prison other than that to which he is assigned.

Second: If the execution of sentence is suspended by proceedings in error, the term is to be computed from the time when the defendant is actually incarcerated, after the appeal has been decided.

In Re Morse, 117 Fed. Rep. 763.
McKay vs. Wood, 77 Iowa, 413.

Third: It is our opinion that the provision in the judgment that the period of imprisonment "is to be" * * * "from the date of sentence" is mere surplusage, and of no effect.

In Miller vs. Evans, 115 Iowa, 101, the court quoted from Hollan vs. Hopkins, 21 Kans., 638:

> The time fixed for executing a sentence, or for the commencement of its execution is not one of its essential elements, and, strictly speaking, it is not a part of the sentence at all. The essential portion of the sentence is the punishment, including the kind of punishment, and the amount thereof, without reference to the time when it is to be inflicted.

The court also quotes Dolan's case, 101 Mass. 219, stating:

> The expiration of time without imprisonment is in no case an execution of the sentence.

The time at which sentence is to be carried out is ordinarily directory and forms no part of the judgment of the court.

Fourth: In our opinion the same rule would apply under the indeterminate sentence law as where the court, under a statute so authorizing, had fixed a definite sentence.

J. W. SANDUSKY,
Assistant Attorney General.

HONOR PRISONER MAY FORFEIT "GOOD TIME EARNED."

An honor prisoner who escapes forfeits the good time he has earned on the honor roll system.

Octboer 2, 1918.

State Board of Control, State House.

Gentlemen: Your letter of recent date addressed to this department received, and the same has been referred to me for reply. You asked an opinion upon the following:

> Has the Board of Control authority under the law, to take away the good time earned of an honor prisoner, who violates the terms of the placing of such prisoner on the Honor Roll, by escaping?

It is the opinion of this department that the Board of Control has authority to establish such rules and regulations in granting good time to "trusties" or "honor prisoners" in addition to the good time allowed by law for good behavior, as the Board may see fit.

Section 5718-a11b Supplemental Supplement, 1915, provides:

> Any inmate of the penitentiary, and any inmate of the reformatory, who may hereafter be engaged or employed in any service or labor outside the walls of the institution to which he or she is sentenced, or who may be listed as a "trusty", or "honor" inmate of such institution may, at the discretion of the said board of control, or at the discretion of the warden of such institution acting under authority of the said board of control, be given and allowed a special reduction in term of sentence at the rate of ten days for each and every month so employed or listed; and every month of such employment shall be counted one month and ten days in point of service on the sentence to be served in addition to the "good time" allowed by law for good behavior; and the said board of control is hereby authorized and empowered to grant and allow such extra good time or special commutation of sentence, and to make all rules and regulations in relation thereto.

It seems that under this section the language and intention of the legislature is clear that the Board of Control has full authority to adopt the honor system in the penitentiary and reformatory and to make all rules and regulations in regard thereto.

If it is one of the rules adopted by the Board of Control, or the warden acting under authority of the Board of Control that an inmate escaping from the institution shall forfeit extra good time or special commutation of sentence as provided by Section 5718-a11b, supra, for escaping, and such rule should be violated by the inmate, the Board of Control would have full authority to forfeit the extra good time that the inmate might be entitled to as being a prisoner on the honor roll.

C. G. WATKINS,
Assistant Attorney General.

OPINIONS RELATING TO SCHOOLS AND SCHOOL TEACHERS

EXPENSES OF COUNTY SUPERINTENDENT.

Boards of supervisors have no authority to pay expenses of county superintendent to National Educational Association.

May 29, 1917.

Hon. A. M. Deyoe, Supt. of Public Instruction, State House.

Dear Sir: Your request for the opinion of this department on the following proposition has been assigned to me for attention:

> Will you kindly render us an opinion as to whether or not the county board of supervisors would have authority to pay the expenses, or any part thereof, of the county superintendent while in attendance at the National Educational Association.

Section 2734 b of the Supplemental Supplement, pertaining to the qualifications, duties and expenses of the county superintendent provides as follows:

> The county superintendent shall, under the direction of the superintendent of public instruction, serve as the organ of communication between the department of public instruction and the various officers and instructors in his county, and shall transmit or deliver to them all books, pamphlets, circulars or communications designed for them. He shall visit the different schools in his county at least once during the school year and also when requested by a majority of the directors of any school corporation. He shall, also, at the request of the superintendent of public instruction visit and report upon such schools, as may be designated. He may appoint a deputy, for whose acts he shall be responsible, and who may act in his stead except in visiting schools and trying appeals, the salary of such deputy to be fixed by the representatives in convention assembled. He shall, on the first Monday of each month, file with the county auditor an itemized and verified statement of his actual and necessary expenses incurred during the previous month in the performance of his official duties within his county, and such expenses shall be paid by the county board of supervisors out of the county fund, but the total amount so paid for any one year for such purpose shall not exceed the sum of two hundred fifty dollars.

And section 2742 of the 1913 supplement pertaining to the duties and expenses of the superintendent further provides:

> He shall receive a salary of fifteen hundred dollars a year, the expenses of necessary office stationery, and postage, and those incurred in attendance upon meetings called by the superintendent of public instruction; claims therefor to be made by verified statements filed with the county auditor, who shall draw his warrant upon the county treasurer therefor; and the board of supervisors may allow him such further sum by way of compensation as may be just and proper.

By the provisions of the first section "he shall on the first Monday of each month file with the county auditor an itemized and verified statement of his actual and necessary expenses incurred during the previous month in the performances of his official duties within his county, and such expenses shall be paid by the county board of supervisors out of the county fund."

This section limits the expenses to those incurred in the performance of his official duties within his county.

The other section allows, in addition to office stationery and postage, expenses "incurred in attendance upon meetings called by the superintendent of public instruction, claims therefor to be made by verified statement filed with the county auditor."

My attention has not been called to any other or further provisions for the allowance or payment of expenses incurred by the county superintendent and I am therefore of the opinion that the board of supervisors do not have the authority to pay the expenses, or any part thereof, of the county superintendent while in attendance at the National Educational Association.

J. W. SANDUSKY,
Assistant Attorney General.

TUITION OF CHILDREN RESIDING AT STATE INSTITUTIONS.

Tuition of children residing at a state institution should be paid by the township in which the state institution is located.

July 12, 1917.

Mr. A. M. McColl, Chairman Board of Control, State House.

Dear Sir: Your favor of the 10th inst. addressed to the Attorney General with reference to the schooling of a son of

Dr. Voldeng, Superintendent of the Hospital and Colony for Epileptics at Woodward, Iowa, has been referred to me for answer.

In your letter you say:

> The inclosed letter is one received by us from A. M. Deyoe, Superintendent Public Instruction, Iowa. The letter will explain itself. The situation is this: Dr. Voldeng is living on the land purchased for the Hospital and Colony for Epileptics which is a state institution and is not subject to tax. This land is taken from the district township of Cass in Boone county. The land does not contribute in any way to the support of the district. Dr. Voldeng has a boy who is attending school at Woodward, going to high school. Woodward is in Dallas county and outside of the district in which this land belonged. The question is, who should pay for this young man's tuition? Should the district township of Cass in Boone which receives no tax whatever from the land upon which the young man resides pay this, or should the state pay the tuition? The boy is less than twenty-one years of age and the law provides that the state shall pay the superintendent of the hospital a certain salary and maintenance of his family including all children under the age of twenty-one years. Does this apply in this case or should Dr. Voldeng himself pay for his boy's tuition?

The letter to which you refer having been received from the Superintendent of Public Instruction is as follows:

> Adjoining Woodward in Boone County is the state hospital for epileptics. This state farm is a part of what is the district township of Cass in Boone county. Since the land is not subject to taxation, the question arises as to who is liable for the high school tuition of children of state employees residing on this farm and attending high school at Woodward.
>
> Will you kindly advise this department whether or not there is any law whereby the state would be come responsible for this tuition?

In your letter you ask from this department an opinion upon the following questions:

1. Should the district township of Cass in Boone, which receives no tax from the land upon which the young man resides pay this, or,

2. Should the state pay the tuition?

In answer to the second branch of your question we call attention to Section 2727-a96, paragraph 2, Supplemental Supplement of 1915, which provides:

> The officers and employes of the hospital and colony shall consist of a superintendent and such other officers and employes to be appointed by the superintendent as the board of control of state institutions may deem necessary for the proper operation and management of said institution, the number and compensation of such officers and employes to be fixed by the board of control. The superintendent shall be a well educated physician with at least five years' experience in the actual practice of medicine, and shall be appointed by the board of control for a term of four years, and shall receive such salary as the board may fix not exceeding three thousand dollars per annum, and shall be furnished with a dwelling-house and the necessary household provisions and supplies for himself, wife and minor children.

It is the opinion of this department that the expression "necessary household provisions and supplies" is not broad enough to include the schooling of his children, and therefore, that the state is not liable to the town of Woodward for the tuition of the pupil referred to in your letter.

As to the first branch of your inquiry, we have to say that section 2733-1a, Supplemental Supplement of 1915, among other things provides:

> Any person of school age who is a resident of a school corporation which does not offer a four-year high school course and who has completed the course as approved by the department of public instruction for such public high school or county high school in the state approved in like manner, that will receive him. Any person applying for admission to any high school under the provisions of this act shall present the official of said high school the affidavit of his or her father, mother or guardian that such applicant is of school age and a resident of a school district of this state, specifying the district. He shall also present a certificate signed by the county superintendent showing proficiency in the common school branches, reading, orthography, arithmetic, physiology, grammar, civics of Iowa, geography, United States history, penmanship and music. The school corporation in which such student resides shall pay to the secretary of the 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 attends, not exceeding, however, a total period of four school years; such payment to be made out of the teachers' fund and the contingent fund or out of the general fund of the debtor corporation and such tuition fee as collected shall be turned over by him with an itemized statement, to the treasurer of the school funds on or before February fifteenth and June fifteenth of each year, provided the maximum fee collected from any district for each pupil shall not exceed the sum of three and one-half dollars per month except in high school where free textbooks are provided by the district such additional amount may be charged as will cover the cost of the textbooks furnished to such pupil.

The section makes additional provision with reference to the matter but we believe it is not necessary to quote the same in connection with this matter. It will be observed that in order to come within the provisions of this section certain things are necessary.

In your letter, you do not state whether there is a high school in the township in which this student resides, but we assume there is not, nor is it stated in your letter whether there is what is known as a "County High School" where provisions have been made for attendance at such high school by students from the different townships of the county.

If there is no high school in the township where such student resides, and if such student has complied with the provisions of the section above referred to, then the school corporation in which such student resides shall pay to the school corporation in which such student attends the tuition fee provided for in such section.

We call your attention, however, to Chapter 156 of the Acts of the Thirty-seventh General Assembly, which repeals section 2733-1a, above referred to, and which went into effect by publication on April 16, 1917. We do not believe it is necessary to set out this chapter for the reason that it is quite like section 2733-1a, above quoted from, except in certain respects. We call your attention, however, to the chapter for the reason that after it went into effect the amount of tuition for which the district or Dr. Voldeng might be liable would be somewhat different than it would be under section 2733-1a, above referred to.

It is our opinion, therefore, that in no event would the state be liable for this tuition; that if the provisions of the statute

were followed, and if the township in which the student resides did not offer a four year high school course, then the school corporation in which he resides would be liable for the tuition, as provided by said section to the school corporation in which the student attends, but that after April 16, 1917, the amount of tuition for which it would be liable would be determined by Chapter 156, acts of the Thirty-seventh General Assembly.

If, however, the school corporation in which the student resides offers a four-year high school course, or if the student did not comply with the requirements of section 2733-1a, then it is the opinion of this department that Dr. Voldeng would be liable personally for the tuition of such student in the school corporation which he attended.

H. H. CARTER,
Assistant Attorney General.

CONDEMNATION OF SCHOOL SITE.

Condemnation of part of land used for public purposes may be permitted if original purpose is not thereby defeated.

August 3, 1917.

Hon. A. M. Deyoe, Superintendent of Public Instruction, State House.

Dear Sir: Your favor of the 3rd instant asking an opinion upon the following questions received:

> A portion of ground owned by Polk county and used as a county farm is desired for schoolhouse purposes. Does the board of supervisors have legal authority to sell or lease this ground? In case they cannot sell, would the school board have authority to condem the same?

In answer to the first part of your inquiry we have to say that Boards of Supervisors are creatures of statute, and have only such powers as are expressly granted and such implied powers as are necessary in order to carry the express power into effect. There are no express powers conferred upon Board of Supervisors authorizing them to sell the property of the county without a vote of the people, except in certain instances, to which we shall refer.

The general powers conferred will be found in section 422 of the code and the amendments thereto. Under paragraph 9 there-

of, power is given to purchase for the use of the county any real estate that may be necessary for the erection of buildings for county purposes. Under paragraph 20 thereof, power is given 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.

Under the above section no express power is given Boards of Supervisors to dispose of any real estate belonging to the county except as provided in paragraph 9, Section 422, Supplemental Supplement of 1915, which authorizes Boards of Supervisors to sell any interest the county may have in the real estate and the improvements on an old site where a new site has been selected.

By Chapter 33, Acts of the 37th General Assembly, paragraph 20 of section 422, Supplemental Supplement of 1915, was amended by striking out the comma in the third line after the word "therewith" and inserting a semicolon, and after the semicolon the following words:

> to remove the site of and designate a new site for the erection of any building or buildings for the care and support of the poor, and in case of such removal or change of site or purchase of real estate for buildings and a place to be kept for the care and support of the poor, to sell any interest that the county may have in the real estate or improvements thereon which were theretofore used and occupied for that purpose.

These are the only provisions which we have been able to find that expressly authorize the sale of real estate belonging to the county by the Board of Supervisors without a vote of the people authorizing such sale.

It will be observed also that the authority given is not to sell generally, but under certain conditions, only, and for specific purposes.

It would, therefore, seem that it was the thought of the legislature that the power to sell would not exist unless expressly conferred, and this accords with our view. It is our opinion that the Board of Supervisors would have no authority to sell any part of the poor farm for a school site, except as authorized by a vote of the people.

Nor do we believe that the Board of Supervisors would be authorized to execute a long time lease for school purposes. We have no doubt that the Board of Supervisors might lease a portion of the farm for temporary purposes, but we do not believe that they would have the power to execute a lease for such length of time as would in effect practically amount to a sale.

In answer to the second branch of your inquiry, namely, "would the school board have the authority to condemn the same?" we have to say that it is our understanding that the land sought for a schoolhouse site will in no way interfere with the use of the poor farm as such, and is the only practicable site in that vicinity.

We call your attention to section 2814, Supplement of 1913, which provides:

> Any school corporation may take and hold so much real estate as may be required for schoolhouse sites, for the location or construction thereon of schoolhouses, and the convenient use thereof, but not to exceed one acre, exclusive of public highway, except in a city, town or village it may include one block exclusive of the street or highway as the case may be, and may take and hold such additional real state, not exceeding five acres, as may be required for school playground or other purposes; (provided nothing in this act shall affect pending litigation;) or in districts consolidated under the provisions of section twenty-seven hundred ninety-nine of the code, or chapter one hundred forty-one of the laws of the thirty-first general assembly, or in school townships holding not more than two school sites, may consist of not to exceed four acres, for any one site, unless by the owner's consent, which site, must be upon some public road already established or procured by the board of directors, and shall, except in cities, towns, or villages, be at least thirty rods from the residence of any owner who objects to its being placed nearer, and not in any orchard, garden or public park.

It is also provided by section 2815 of the code that in case any owner of real estate desired for a schoolhouse site or a public road thereto, refuses or neglects to convey the same, or is unknown, or cannot be found, that such site may be condemned by following the provisions of said section.

It will, therefore, be observed that ample provision is made by statute for the condemnation of real estate for schoolhouse

sites, the only question being whether property which has already been devoted for one public use can be taken for another public use. We are quite certain that if the subsequent public use should interfere with the prior public use that it could not be so taken. But it is quite generally held by the courts that the fact that property may be devoted to one public use does not necessarily preclude its being taken for another public use. The test is that the subsequent public use shall not interfere with or defeat the prior public use.

15 *Cyc.* 612, et seq and cases cited.

C. M. & St. P. Railway Co. vs. Starkweather, 97 Iowa, 159.

As we have suggested, it is our understanding that the taking of the land for schoolhouse purposes will in no way interfere with the use of the farm as a poor farm.

It is, therefore, the opinion of this department that such land may be condemned for schoolhouse site purposes by following the provisions of the code with reference to such condemnation.

H. H. CARTER,
Assistant Attorney General.

ELECTION OF COUNTY SUPERINTENDENTS.

The convention which elects a county superintendent is not limited to such candidates as make formal application for the position prior to the meeting of the representatives. It is at liberty to consider other persons for the position also, and elect such person as it may consider the most capable of filling the position.

March 25, 1918.

Hon. A. M. Deyoe, Superintendent of Public Instruction, State House, Des Moines, Iowa.

Dear Sir: Your request for an opinion from this department on the following, has been referred to me for attention:

> In the matter of the selection of a county superintendent of schools on the first Tuesday in April as provided in section 1072, supplement to the Code, 1913, and also in the matter of qualifications, powers and duties of said officers as provided in section 2734-b, supplemental supplement to the code, 1915, would the convention of school officers be limited in making a choice from among those applicants who have filed applications ten days previous to the date of the convention? In other words, is it necessary that an applicant for the office of

county superintendent file an application ten days preceding the date of convention?

Section 1072 of the 1913 supplement to the code to which you refer does not contemplate that application for the position of county superintendent be made or filed prior to the meeting of the convention which shall select such officers, and the representatives are at liberty to consider the names of persons who have not filed applications at all if they desire, to the same extent that they might consider the names of those who had made formal application.

The intention of the statute is to confer upon the convention, or the representatives assembled, the power to select a capable officer for the position, and they are in no manner restricted or limited to a consideration only of the names of those who make formal application.

J. W. SANDUSKY,
Assistant Attorney General.

QUALIFICATION OF COUNTY SUPERINTENDENT OF SCHOOLS.

The county superintendent should be qualified for the office on date of election.

August 8, 1918.

Hon. A. M. Deyoe, Supt. of Public Instruction, State House.

Dear Sir: Your letter of August 7th addressed to this department, received, and the same has been referred to me for reply.

You request an opinion on the following questions:

> Does the law require that the person elected to the office of county superintendent of schools must possess the qualifications as specified in Section 2734-b, Supplement to the Code, 1913, before being eligible to an election as county superintendent of schools, or is it sufficient that the person chosen to fill the office of county superintendent of schools shall have the required qualifications before assuming the duties of the office of county superintendent? In other words, should the person chosen as county superintendent of schools as provided by law be qualified to meet all requirements at the time of election to the office of county superintendent, or is it sufficient that such person be qualified when the time arrives to assume the duties of the office?
>
> In case of failure on the part of the convention of school officers to elect a person properly qualified to fill the office of

> county superintendent has the county auditor the power to call another convention of the school officers for the purpose of electing a superintendent who is qualified?

It is the opinion of this department that both of these questions should be answered in the affirmative.

Section 1072, Supplement of the Code, 1913, provides as follows:

> * * * Said convention shall organize by the selection of a chairman and when so organized, shall elect a county superintendent of schools, who shall possess the qualifications required by law. * * *

The qualifications required will be found in Section 2734-b, Supplemental Supplement to the Code, 1915:

> The county superintendent, who may be of either sex, shall be the holder of a regular five-year state certificate or a life diploma, and shall have had at least five years' experience in teaching or superintending, but this provision as to experience shall not apply until September 1st, 1918, provided that any county superintendent of schools now serving shall be deemed eligible to reappointment or re-election under this act. * * *

It will be noticed by the reading of section 1072, supra, that there is an explicit provision as to the eligibility of the person when elected. The convention in electing a county superintendent of schools "shall elect one who shall possess the qualifications required by law."

Section 2734, supra, is equally explicit as to what qualifications are required.

If the person elected was disqualified at the time of election, the convention would not have followed the specific statements of the statute, as the statute specifically directs who the convention shall nominate.

It is the rule that where the statute has expressed provisions for eligibility at the time of election these provisions should be complied with. Such cases are determined by the language of the statute. State vs. Van Beek, 87. Ia. 569.

Our supreme court, in the case of State vs. Van Beek supra, 578, in discussing this question quotes with approval the following:

> Mr. Cushing, in his Law and Practice of Legislative Assemblies (section 78), in speaking of the time to which dis-

qualifications relate, says: "Thus, where it is said that no person holding a particular office, etc., 'shall have a seat;' 'shall be a member;' 'shall at the same time have a seat;' 'shall hold a seat;' 'shall be capable of having a seat;' 'shall be capable of being a member;' 'shall be capable of holding any office;' 'shall act as a member;'—the disqualification relates to the time of assuming the functions of a member; but where the following terms are used, namely, 'shall be incapable of being elected;' 'shall be eligible to a seat;' 'shall be eligible as a candidate for;' 'shall be ineligible for;'—the disqualification relates to the time of the election.

In 29 Cyc. page 1376 we find the following:

> * * * Most of the cases hold that the term "eligible" as used in a constitution or statute means capacity to be chosen and that therefore the qualifications must exist at the time of election or appointment. * * *

On the other question, Section 1072, Supplement to the Code, 1913, further provides that:

> * * * On the first Tuesday in April, in the year nineteen hundred fifteen, and each third year thereafter, and whenever a vacancy occurs in the office of county superintendent of schools, a convention shall be held at the county seat for the purpose of electing a county superintendent of schools. * * * Such conventions shall be called by the county auditor by mailing a written notice to the president and secretary of each school corporation at least ten days prior to the date of convention, and by publication of such notice in the official newspapers published in the county.

Code section 1266 provides what shall constitute a vacancy:

> 1. A failure to elect at the proper election, or to appoint within the time fixed by law, unless the incumbent holds over. * * *

The convention electing a person disqualified at the date when the election was held would be a failure to elect, and a vacancy now exists, and the auditor would be authorized to re-call the convention, as provided by law.

C. G. WATKINS,
Assistant Attorney General.

CLOSING OF SCHOOL ON ACCOUNT OF CONTAGIOUS DISEASE.

Where a public school is closed by order of either the state or local board of health, or board of education, the teacher is entitled to her salary for the time the school is closed, if the contract of employment fails to stipulate that salary shall cease during the time the schools are closed because of contagious disease.

October 25, 1918.

Hon. A. M. Deyoe, Superintendent of Public Instruction, State House.

Dear Sir: This communication is in response to your favor of the 19th inst., wherein you submitted for an opinion the following propositions:

1. Would a teacher be entitled to receive his salary for such time as the public school is closed by order of the State Board of Health when the contract fails to stipulate that salaries shall not be paid when the school is closed because of contagious diseases?

2. Would a teacher be entitled to receive his salary for such time as the public school is closed by order of a local Board of Health when the contract fails to stipulate that salaries shall not be paid when the school is closed because of contagious diseases?

3. Would a teacher be entitled to receive his salary for time lost when the school is closed by order of the Board of Education because of prevalence of contagious diseases if the contract fails to make provision for the closing of said school under such condition?

Under the statutes of the state of Iowa, a school district, as a corporation, has exclusive jurisdiction in all school matters; and it affairs are conducted by a board of directors who make all contracts necessary or proper for exercising the powers and performing the duties required by law. It is provided by Section 2778 of the 1915 supplement of the Code of Iowa that contracts with teachers must be in writing, and shall state the length of time the school is to be taught, the compensation per week of five days or month of four weeks, and such other matters as may be agreed upon.

In this connection I will now call your attention to several cases in which the propositions submitted by you have been judicially determined.

In the case of the Board of Education of the City of Hugo vs. Couch, 162 Pac. (Okla.) 485, the board employed a certain teacher as principal for a period of nine months at an agreed

monthly salary. An epidemic of small-pox broke out in the city of Hugo and the board of health, under statutory authority, issued an order closing the schools during the prevalence of the disease; and thereupon the superintendent of the schools instructed the principal and other teachers to hold themselves in readiness to resume their duties as soon as the schools were permitted to reopen. The schools were closed one month. The principal resumed his duties to the end of the term; and this action was brought by him to recover for his services for the month that the schools were closed, and the supreme court of Oklahoma in its opinion said:

> In our judgment the board of education might have stipulated that the plaintiff should have no compensation during the time the schools were closed on account of the prevalence of a contagious disease, but, not having done so and suspension being temporary, it can not deny him compensation for the time lost on account of the temporary suspension from duties.

And in the case of Randolph vs. Sanders, 54 S. W. (Tex.) 621, it appears from the opinion of the court of civil appeals of Texas that the city of Laredo provided by ordinance that all contracts with teachers should be in writing according to a form precribed by the executive school board; and that teachers should be paid monthly. The schools were closed for three months during the year by authority of the health officers of the state, city, or county, on account of an epidemic of small-pox. This action was brought by a teacher to recover her wages for the time the school was closed, and the court held that it could not be said that the schools were closed, or the term shortened, in the sense of the contract, in view of the fact of the temporary nature of the closing of the schools, the retention of the teacher, and the requirement that she remain in readiness to resume work at any time she was called upon; and the court said:

> There was no dereliction or fault on her part in any respect. Had the schools been closed permanently she would have been able to seek other employment, but as it was, she was held as a teacher under her contract, and the city can not, in justice, claim that her time was not in the actual service of the schools.

In the case of Gear et al, School Trustees vs. Gray, 37 N. E. (Ind.) 1058, a teacher entered into a written contract to teach in the schools of the town of Carthage, Indiana, for thirty-five

weeks of five days each at an agreed price per day. At the end of twenty-eight weeks the school was closed by order of the county board of health on account of a contagious disease, and remained closed until the end of the term for which the teacher was employed. In this action brought by the teacher to recover her wages for the time the school was closed, it was said by the appellate court of Indiana that a contagious disease was one of the contingencies which might have been provided against by the contract, but was not; and that it can make no difference whether the order was made by the school authorities themselves or by the board of health.

In the case of Dewey vs. Union School District of the City of Alphena, 5 N. W. (Mich.) 646, the plaintiff in error was hired by the district to teach in the public schools for ten months at an agreed price per month. He entered his duties in the month of September and continued until in December, at which time the district officers closed the school until March on account of the prevalence of small-pox in the city. This action was brought by the teacher to recover wages for the time the school was closed. The school district resisted the claim on the ground that the suspension was the effect of an overruling necessity, or in other words, the act of God, and that all parts of the contract were suspended for the time being; but the court held it must appear that observance of the contract by the district was caused to be impossible by the act of God; and that it is not enough that great difficulties were encountered or that there existed urgent and satisfactory reasons for stopping the schools; that the contract between the parties was postive and for a lawful object; and that there was no rule of justice which would permit the district to visit its own misfortune upon the plaintiff.

In the case of McKay vs. Burnett, 60 Pac. (Utah) 1100, it appears that the board of education of Salt Lake City suspended the schools on account of an epidemic of small-pox. In this case it was held that under the contract of employment, the closing of the schools was not a breach of the contract and did not release the teacher from her obligations under it; that the board of education might have stipulated that the plaintiff should have no compensation during the time the school should be closed on account of the prevalence of contagious diseases, but not having done so, it can not deny compensation for the time the school was closed on account of small-pox. However, there is dictum in this case to the effect that there could be no re-

covery if the schools had been closed by the order of the board of health instead of the board of education; and this doctrine is laid down in the case of Sherman County School District No. 16 vs. Howard, 98 N. W. 666, on the theory that the contract of employment is suspended by law when the order comes from the board of health.

In the case of Libby vs. Inhabitants of Douglass, 55 N. E. (Mass.) 808, the committee closed the school because of diphtheria. The contingency was not expressly provided for in the teachers' contract, and it was held that in the absence of such stipulation the teachers' right to compensation is not defeated because of the closing of the school.

In the case of School District No. 1 vs. Douchy, 68 Am. Dec. (Conn.) 371, the court said:

> The act of God will excuse the not doing of a thing where the law had created the duty, but never where it is created by the positive and absolute contract of the party.

In the case of Mahaska County State Bank vs. Brown, 159 Iowa, 577, at page 585, the Supreme Court of Iowa said:

> Ordinarily a contingency which reasonably may have been anticipated must be provided for by the terms of the contract, else the impossibility of performance resulting therefrom will not excuse either party from carrying out the contract.

And in the case of the District Township of Union vs. Smith, 39 Iowa, 9, at page 11, it was held that when a duty is imposed by law, the act of God rendering its discharge impossible will excuse performance; but that it is the settled rule of the authorities that the performance of a contract will not be excused upon that ground; that when one binds himself by his solemn agreement to do an act, he is held liable for its non-performance although it is rendered impossible by events over which he had no control.

I also direct attention to the fact that, under the provisions of Section 2565 of the Code of Iowa that the rules and regulations of the state board of health pertaining to quarantine shall be enforced by local boards of health.

Basing my judgment on what I believe to be the true legal doctrine laid down in the foregoing cases, it is my opinion that a teacher would be entitled to receive her salary for such time as the public school is closed by order of either the state or local board of health,

or board of education, if the contract of employment fails to stipulate or make provision that the salary shall not be paid when the school is closed because of contagious disease.

H. M. HAVNER,
Attorney General.

EXPENSES OF COUNTY SUPERINTENDENT.

Discussion as to what expenses of county superintendent may be incurred and allowed by the board of supervisors.

May 19, 1917.

A. E. Cook, County Attorney, Malvern, Iowa.

Dear Sir: Your request of the 17th inst., for an opinion of this department on the following facts has been assigned to me for attention:

> There are several school districts in the county which have taken up the matter of consolidation and have presented their petitions to the county superintendent which have been approved and now the county superintendent spends a good deal of his time promoting the consolidation making many trips to the different districts and having meetings around over the county. This necessarily means expense and the county superintendent has filed his bill with the board the past two months and same amounts to about $20.00 per month.
>
> I am of the opinion that this does not come within the official duties of the county superintendent and that his expenses therefore should not be paid by the county, but I would like your views in the matter."

Section 2734-b, Supplement to the Code, 1913, provides:

> * * * He shall visit the different schools in his county at least once during the school year and also when requested by a majority of the directors of any school corporation. He shall also, at the request of the superintendent of public instruction, visit and report upon such schools as may be designated. He may appoint a deputy, for whose acts he shall be responsible and who may act in his stead except in visiting schools and trying appeals, the salary of such deputy to be fixed by the representatives in convention assembled. He shall, on the first Monday of each month, file with the county auditor an itemized and verified statement of his actual and necessary expense incurred during the previous month in the performance of his official duties within his county, and such expenses shall be paid by the county board of supervisors out

of the county fund, but the total amount so paid for any one year shall not exceed the sum of two hundred fifty dollars.

Under the provisions of this statute, a reasonable discretion is vested in the superintendent as to when and the number of times he will visit the schools of the county and expenses so incurred should be allowed.

Under Section 2794-a, 1913 Supplement to the Code, pertaining to consolidated school districts, one of the duties enjoined upon the county superintendent is the approval of the petition asking for such consolidation, and it would be proper for him to view the territory which they propose to include within the boundaries of such district if he did not have knowledge of the conditions without such inspection or examination and all reasonable expense thereby incurred would be a proper charge. He would not, however, have the right to participate in a controversy over the formation of a consolidated district and charge for any expense that he might thus incur, and we are therefore of the opinion that if any part of the expenses included in the bills rendered by the superintendent were thus incurred they should not be allowed.

You will, of course, notice that by the first section quoted his total expense for any one year shall not exceed two hundred fifty dollars ($250.00).

J. W. SANDUSKY,
Assistant Attorney General.

EXPENSES OF COUNTY SUPERINTENDENT.

The board of supervisors should allow the county superintendent expenses for office stationery and postage, and not to exceed $250 in one year for expenses incurred in the performances of his official duties within the county.

November 25, 1918.

T. A. Goodson, County Attorney, Bloomfield, Iowa.

Dear Sir: Your letter of the 13th inst., addressed to Attorney General Havner, has been referred to me for reply.

You ask for a construction from this department of Section 2742 of the Supplement to the Code, 1913, and Section 2734-b, Supplemental Supplement, with reference to the expenses of the county superintendent which the board of supervisors would be authorized to allow and pay.

Section 2734-b provides as follows:

> The county superintendent, who may be of either sex, shall be the holder of a regular five-year state certificate or a life diploma, and shall have had at least five years' experience in teaching or superintending, but this provision as to experience shall not apply until September first, nineteen hundred eighteen, provided that any county superintendent of schools now serving shall be deemed eligible to reappointment or reelection under this act. The county superintendent shall, under the direction of the superintendent of public instruction, serve as the organ of communication between the department of public instruction and the various officers and instructors in his county, and shall transmit or deliver to them all books, pamphlets, circulars or communications designed for them. He shall visit the different schools in his county at least once during the school year and also when requested by a majority of the directors of any school corporation. He shall also, at the request of the superintendent of public instruction, visit and report upon such schools as may be designated. He may appoint a deputy, for whose acts he shall be responsible, and who may act in his stead except in visiting schools and trying appeals, the salary of such deputy to be fixed by the representatives in convention assembled. He shall, on the first Monday of each month, file with the county auditor an itemized and verified statement of his actual and necessary expenses incurred during the previous month in the performance of his official duties within his county, and such expenses shall be paid by the county board of supervisors out of the county fund, but the total amount so paid for any one year for such purposes shall not exceed the sum of two hundred fifty dollars.

Section 2742 declares:

> He shall receive a salary of twelve hundred fifty dollars a year, the expenses of necessary office stationery and postage, and those incurred in attendance upon meetings called by the superintendent of public instruction; claims therefor to be made by verified statements filed with the county auditor, who shall draw his warrant upon the county treasurer therefor, and the board of supervisors may allow him such further sum by way of compensation as may be just and proper. Provided, however, that from and after the first day of September, nineteen hundred fifteen, county superintendents shall receive the following salary, payable monthly, and the representatives of the school corporations in session may allow them such further sum by way of compensation as may be just and proper. He shall receive a salary of fifteen hundred dollars a year, the expenses of necessary office stationery and postage, and those incurred in attendance upon meetings called by the

superintendent of public instruction; claims therefor to be made by verified statements filed with the county auditor, who shall draw his warrant upon the county treasurer therefor, and the board of supervisors may allow him such further sum by way of compensation as may be just and proper.

By comparing the two sections just quoted it will be found that each provides for a specific class of expenses and that the two do not conflict. Section 2742 allows for office stationery and postage and such expenses as are incurred in attendance upon meetings called by the superintendent of public instruction. No limit is placed upon the amount except that they must be necessary expenses. Section 2734-b allows, in addition to those mentioned in Section 2742, actual and necessary expenses of the county superintendent incurred in the performance of his official duties within the county, such as in visiting the schools and the like, but in no event to exceed the sum of two hundred fifty dollars in any one year. Such expenses are, of course, in addition to his regular salary.

The above construction seems to be a fair and reasonable one to give the statutory provisions in question.

W. R. C. KENDRICK,
Assistant Attorney General.

SCHOOL EQUIPMENT.

Furniture and equipment for schools should be paid for from the school house fund.

September 28, 1917.

Maxwell A. O'Brien, County Attorney, Oskaloosa, Iowa.

Dear Sir: Your inquiry of the 19th inst., addressed to the attorney general, has been referred to me for reply.

You ask in substance whether or not an independent rural school district board can issue school warrants not to exceed $300.00, for the payment of new seats, a furnace and other equipment necessary to complete a new schoolhouse, and if so upon what fund the order should be drawn.

Assuming that all preliminary proceedings were regular and as provided by law, and that the building itself has been completed, leaving only the equipment unprovided for, it is our opinion that the board has power to equip it with seats, furnace and the like

and authorize the president of the board to draw an order upon the treasurer of the school district to be paid out of the "school house" fund; provided, however, that there is enough money in that fund to cover the order.

There is no provision in our statutes authorizing independent rural school district boards to contract debts for furnishing schoolhouses.

We believe the board would have authority to draw an order for the payment of a duly audited claim for the above purpose, amounting to $300.00 under the conditions above set out.

W. R. C. KENDRICK,
Assistant Attorney General.

AUTHORITY OF THE COUNTY SUPERINTENDENT OF SCHOOLS,

The county superintendent of schools has authority to file information charging a violation of section 2823-a, supplement of 1913, relating to compulsory education.

February 27, 1918.

Tom Boynton, County Attorney, Forest City, Iowa.

Dear Sir: Your request for the opinion of this department on the following question has been referred to me for attention.

You ask:

> What is the construction of your department on Section 2823-a taken in connection with 2823-f, as to the proper enforcement of the compulsory school attendance law?
>
> Our county superintendent has filed complaint charging a violation of the provisions of 2823-a, without having been authorized so to do by the president of the school board, director, or truant officer. Gentlemen appearing for the defendant have moved dismissal on the ground that 2823-f is exclusive and that no one has authority to file such complaint, unless the complaint shows that they are either president of the board of school directors, school director, truant officer, or duly authorized by action of the board to make and file complaint. This does not appeal to me as being the intent, or wording of the statute, but would very much like your opinion thereon.

Section 2823-a of the 1913 Supplement to the Code provides, in part, as follows:

> Any person having control of any child of the age of seven to sixteen years inclusive, in proper physical and mental condition to attend school, shall cause such child to attend some public, private, or parochial school, where the common school

> branches of reading, writing, spelling, arithmetic, grammar, geography, physiology, and United States history are taught, or to attend upon equivalent instruction by a competent teacher elsewhere than school, for at least twenty-four consecutive school weeks in each school year, commencing with the first week of school after the first day of September, unless the board of school directors shall determine upon a later date, which date shall not be later than the first Monday in December; but the board of school directors in any city of the first or second class may require attendance for the entire time the schools are in session in any school year. * * * Any person who shall violate the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not less than three dollars nor more than twenty dollars, for each offense.

The parts quoted of the foregoing section make it the duty of the person having the control of a child between seven and sixteen years of age to require such child to attend school for at least twenty-four consecutive weeks in each school year, and it is further provided that any person who shall violate the provisions of the section shall be guilty of a misdemeanor and shall be punished as therein provided.

This section clearly defines a public offense and provides for the punishment of the person guilty thereof. It is, in and of itself, complete and any citizen of the community may institute proceedings thereunder, unless the right or privilege so to do is abridged or denied by some other provision of the statute.

Section 2823-f of the act is as follows:

> It shall be the duty of the director or president of any board of directors, or any truant officers appointed by such board of directors, to enforce the provisions of this act, to sue for and recover the penalties herein provided, and to institute criminal prosecution against any person violating the provisions of this act, and any such officers neglecting to do so within thirty days after a written notice has been served upon him by any citizen of said district, or the county superintendent of the county within which the offending person shall reside, shall himself be liable for a fine of not less than ten dollars or more than twenty dollars for each offense.

The foregoing section makes it the duty of the director or president of any board of directors, or any truant officer appointed by the board of directors to enforce the provisions of the act, to sue for and recover the penalties therein provided, and to institute criminal prosecution against any person violating its provisions.

In effect it is made the special duty of the officer or persons designated to enforce the provisions of the act, and the question very naturally arises, is the duty thus enjoined exclusive? In other words, does the enjoining or conferring of the obligation or power to enforce the provisions of the act upon a certain person or persons, preclude other persons from lodging complaints or instituting proceedings for the violation of a criminal statue?

Section 499 of the 1913 Supplement to the Code, makes it the duty of the sheriff to

> file informations against all persons who he knows, or has reason to believe, have violated the laws of the state,

but would anyone have the temerity to claim that another person might not file informations or institute proceedings in all such cases, provided such person possessed the necessary knowledge or information to enable him to verify the formal complaint?

The general public is interested in, and very properly concerns itself about, the education of the youth of the land. For such purpose taxes are levied and vast expense incurred in order that educational facilities may be placed within the reach of all persons, but notwithstanding such fact, it is quite a common occurrence for parents and other persons having the custody and control of children of proper school age to fail and neglect to perform their duty in this respect. It is also a matter of common knowledge that violations of laws of this kind and character are tolerated and permitted in many reasonably well regulated communities for the reason and upon the theory that many people do not like to meddle or concern themselves about what is termed, "other people's business" and hence the legislature thought it wise to make additional provision for the enforcement of this particular law, by authorizing the employment of a truant officer as well as requiring school directors to see to the enforcement of the law, but the enjoining of this duty upon those particular persons should not be held to prohibit or in any manner abridge the right of any citizen of the community, possessed of the necessary facts, to file informations and institute proceedings for enforcing the law and punishing those guilty of a violation thereof, and I am, therefore, of the opinion that the county superintendent had the right to file the information in question, and that the motion to dismiss should be overruled.

J. W. SANDUSKY,
Assistant Attorney General.

TITLE TO SCHOOL HOUSE SITE.

1. When the city limits are enlarged, taking in part of sub-school district, title to school house site remains in sub-district until awarded to new district.

2. A sub-school district can acquire real estate by prescription.

March 4, 1918.

H. J. Ferguson, County Attorney, Tama, Iowa.

Dear Sir: Your inquiry of the 15th ult., addressed to the attorney general has been referred to me for reply.

You state in substance that a sub-district (school district) in the year 1867 erected a schoolhouse upon an acre of land in that district, but no record can be found of any conveyance from the owner to the school district; that in the year 1917, the independent school district of Garwin was automatically enlarged by the enlargement of the corporate limits of Garwin, which took in the schoolhouse and acre of land in the sub-district. This property has been used continuously for school purposes up until about six months ago.

You ask:

1st. Can the independent school district of Garwin sell this acre of land and give good title?

2d. Can a sub-district (school district) get title to land by adverse possession?

The questions which you ask are not entirely free from doubt, and have probably caused more trouble to school districts than any other feature of their duties as such. It has heretofore been the policy of this department to advise school districts to contest the matter in court and obtain a definite ruling from the supreme court if possible. There are so many different features to your questions that it seems unwise to attempt to give an opinion that would apply to every angle of the case.

However, in dealing with the question of the disposition of used schoolhouse sites it is imperative that we start with the consideration of Section 2816, Supplement of 1913, which reads as follows:

> In any school district wholly outside any city or incorporated town, in the case of nonuser for school purposes for two years continuously of any real estate acquired for a schoolhouse 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.

You will notice that the section just quoted applies only to school districts wholly outside of any city or incorporated town, so that unless the school site in question still belongs to the sub-district the above section will not apply.

It is the general rule that in the event an incorporated city or town enlarges its city limits, such act automatically enlarges the limits of the school corporation within that city or town, and takes in that part of the rural district now within the enlarged city limits. But whether or not the school corporation within the city limits thereby acquires absolute title to all school property formerly located in that part of the rural district now within the enlarged city limits would probably depend on Section 2802, Supplement of 1913.

Section 2802 aforesaid provides in substance that whenever there is a change in the boundary of any school corporation, the assets and liabilities of the old corporation shall be equitably divided. Under this section it has been held that the schoolhouse and all its belongings are the property of the original district until awarded to the newly formed district, as provided in said section. See district Township of Franklin vs. Wiggins, 110 Ia., 702. Unless the independent district of Garwin has complied with that section there might be considerable doubt of its right to sell the land and belongings.

Again there might be some question as to the power of the independent district of Garwin to convey an absolute fee simple title, even though said district acquired the ownership of said property. If the site was originally acquired by the sub-district, then the sub-district acquired title subject to the right of the original owners to a reversionary interest, and that interest could not be diverted by the independent district of Garwin afterwards acquiring the site from the sub-district. Furthermore, when this section was originally enacted it immediately followed Section 2815 of the Code which provides for the condemnation of sites when the same could not be purchased by agreement, and it is doubtful whether the present section applies in any case, except where the site was procured by condemnation proceedings, especially in the event the school district owned the site at the time the original section went into effect.

You can therefore see how badly complicated this question really is, and how impossible it is to proceed with any degree of certainty until the supreme court has finally passed upon the same; so that we will advise you, as the department has heretofore advised others, to contest the matter and try and get the question definitely settled.

As to your second question, it is well settled in this state that a school district may acquire title to a schoolhouse site by prescription, and this will apply to a sub-district. See Independent District of Oak Dale vs. Fagen, 94 Iowa, 676.

W. R. C. KENDRICK,
Assistant Attorney General.

OPINION RELATING TO SUNDAY CLOSING.

SUNDAY CLOSING LAW.

The Sunday closing law discussed.

May 18, 1917.

To the County Attorneys:

Dear Sirs: Numerous inquiries have reached this department with reference to its attitude toward the enforcement of what is commonly called the Sunday law, being Section 5040 of the Code of 1897, and with reference to what is and what is not a violation of this law. I deem it proper, therefore, at this time to write you with reference to the matter, and as to the policy of the department of justice with reference thereto.

In this connection, I first call your attention to the fact that the republican platform upon which the law enforcing officers of the state were elected, provided:

> We stand for the vigorous enforcement of all laws and unequivocally pledge our candidates to that policy.

Governor Harding, in his inaugural address, delivered before the members of the Thirty-seventh General Assembly, January 11, 1917, said to the members thereof:

> You will be responsible for the existence of every statute which shall be in effect when you adjourn, *and as fully so as if you had enacted it originally.*
>
> The question of law enforcement rests primarily with this legislature, for, so far as it lies in the power of this adminis-

> tration, *no officer shall usurp the power of repeal, by inaction, or resolve any doubts against the wisdom or virtue of any law* which shall remain upon the statute books when you shall have adjourned.

Section 301 of the Supplement to the Code, 1913, provides:

> It shall be the duty of the county attorney to diligently enforce, or cause to be enforced, in his county *all of the laws of the state,* actions for a violation of which may be commenced, or prosecuted in the name of the state of Iowa, or by him as county attorney.

Section 208-a, Supplement to the Code of 1913, provides:

> It shall be the duty of the attorney general to exercise supervisory power over county attorneys *in all matters* pertaining to the duties of their offices * * *.

Section 1180 of the Code of 1897 provides the oath of office taken by the attorney general and the county attorneys of this state, and is as follows:

> I do solemnly swear that I will support the constitution of the United States and the constitution of the state of Iowa, and that I will faithfully and impartially to the best of my ability, discharge all the duties of the office of———as now or hereafter required by law.

A careful reading of the platform under which the people of the state returned the largest majority in favor of the candidates of the republican party for state offices ever returned leaves no question as to what the will of the people of the state generally is in regard to the program of law enforcement.

The statement made by Governor Harding in his inaugural address, as above set forth, can leave no question as to what the attitude of the law enforcing officers must be, not only as to the laws passed by the last General Assembly, but as to those enacted by prior general assemblies which were left upon the statute book.

The statutes covering your duties as county attorney and my duties as attorney general, and the oaths which we took leave no question as to the duties and responsibilities which devolve upon us.

Soon after I took my oath of office, and before the legislature convened, an appeal was made to me as the attorney general of this state by certain of the laboring classes and also by those interested in the enforcement of the Sunday law from a moral standpoint, asking that the law with reference to Sunday closing be

enforced. I declined at that time to undertake the general enforcement of the Sunday closing law, first, because there had been no general effort made to enforce the same for more than fifty years, and second, to begin a general program of law enforcement where the statute had remained inactive for so many years and violations of the same were being indulged in as a matter of course would be unnecessary when the legislature was to meet within a very short time, and they could have an opportunity to reconsider the law, and repeal or make any amendment which they, as the representatives of the people, in their judgment might deem best.

The legislature attempted in good faith to repeal this law and to make some modifications of the same. The senate passed a bill providing for some changes, but the house failed to concur.

I was interviewed by members of the legislature, both from the senate and from the house, as to whether it would be the policy of this department, if the law remained unchanged, to undertake to enforce it, and it was made perfectly plain to them that unless the law were repealed or modified, an honest effort would be made to enforce it.

It may be that in attempting to enforce this law, we shall be the subject of criticism. However, that may be, our duty is clear and even though it may bring unpopularity, that must not cause us to shirk our duty.

I call your attention to the fact that in many instances the enforcement of this law is the only protection the laboring classes have against the unreasonable requirements of their employers. The fact that both organized labor and unorganized labor have appealed to this department to see that this law is enforced, shows that our willingness to do our duty is the only protection they have. Sunday is the only day when the laborer may be with his family, his only day of rest, and unless we do our duty in this respect, they will, in many instances, be denied these rights. The men who were the representatives of the people in legislature assembled, failed to modify the existing law, and by their acts practically re-enacted this law after having been informed that the laws which remained upon the statute books at the close of the session, and particularly this law, would be enforced after the adjournment of the legislature.

The situation as it exists is not one for which either of us is responsible. This was not done in a corner. The governor in his

inaugural address at the beginning of the session informed the legislature that they would be responsible for the existence of every statute which should be in effect when they adjourned, and as fully so as if they had enacted it originally. He further said:

> The question of law enforcement rests primarily with this legislature, for, so far as it lies in the power of this administration, *no officer shall usurp the power of repeal, by inaction, or resolve any doubts against the wisdom or virtue of any law* which shall remain upon the statute books when you shall have adjourned.

In view of this situation, I feel that the people whose representatives these men were, can not justly criticise the law enforcing officers of this state for a conscientious effort upon their part to enforce this law, or any other law.

This particular law was not overlooked by the legislature, but it was discussed, its repeal attempted, amendments attempted, yet notwithstanding its agitation before the legislature, they adjourned leaving it the same. What can this mean other than the deliberate, intentional, direction and instruction of the representatives of the people to do the thing which the governor said should be done?

The people expect the rigid enforcement of the law against murder, arson and the various other crimes against society. I do not believe the people of this state are willing that the law enforcing officers shall select what laws they desire to enforce, determined by their own personal likes and dislikes of the law, nor do I believe they will permit their law enforcing officers to repeal the laws enacted by the legislature by "inaction," in other words; I do not believe the people of the state are willing that the law enforcing officers shall decide what laws they will enforce and what laws they will "nullify by inaction." A man who is elected to office may be opposed to the laws which affect the liquor traffic, or laws respecting crimes against womanhood, and if he is permitted to determine what laws he will enforce, and what laws he will not enforce, such officer could completely nullify the will of the people as expressed by the legislature.

I shall not attempt at this time to enumerate the things that are forbidden by this statute, but the supreme court of this state has, within the last three years, made two pronouncements upon this statute, one in the cast of State vs. Warne, 147 N. W. 205, in which they held it unlawful to operate a moving picture show on Sunday as being labor other than that of necessity or charity; and the other

in the case of State vs. Linsig, 159 N. W. 995, in which they held it unlawful to operate a barber shop on Sunday, as being labor other than that of necessity or charity.

In discussing this statute, Judge Weaver, who wrote the opinion, said:

> Appellant claims that the statute, when properly construed, forbids Sunday labor only where the act charged offends or disturbs the peace and good order of society. * * * The Iowa statute inhibits any labor on the first day of the week * * * except works of necessity and charity. * * * The language of Code Section 5040, is neither obscure nor ambiguous nor doubtful. It makes it unlawful to do any labor on Sunday, save only works of charity or necessity. * * * The exception provided by the statute for works of necessity and charity is made in somewhat general terms without specifying what works are of that character. It could not be otherwise, for the demands of necessity and charity are ever varying, and the same act which may be a work of necessity or charity on one occasion may not be properly so called on another occasion; its character in that respect depends upon the peculiar circumstances in each case. If the accused person makes the point that the work done by him was an act of charity or necessity the record may or may not be such as to carry the question to the jury. It has been held as a matter of law that the ordinary work or employment of a barber is not a work of charity or necessity within the meaning of the Sunday law. * * * We hold that the labor prohibited by the statute is neither expressly nor impliedly limited to such as disturbs or tends to disturb the public peace. * * * It is not necessary for the court to consider or designate the particular purposes or reasons influencing the mind of the legislature in enacting the statute. It is enough to know that such regulation is one which may be lawfully and constitutionally enacted, and this has been settled over and over again by the courts of last resort, both state and national. * * * If it was intended to classify the various kinds of labor, prohibiting some and excepting others, it may be that a specific enumeration coming within the inhibition, or the specific act or acts denounced by the statute, would be necessary, *but when all labor is forbidden no more specific description is needed to convey the meaning to a mind of ordinary intelligence.* The exception provided by the statute is applicable to any and all kinds of labor which are shown to be either necessary or charitable. There is no chance for mistake or misconstruction on the part of any citizen honestly desiring to obey the law.

In our judgment, it was well said by the court that "there is no chance for mistake or misconstruction on the part of any citizen

honestly desiring to obey the law," both as to the letter and the spirit, especially is this true at this particular time; when we are hearing so much of the patriotism of our citizenship. We believe as good, patriotic, law abiding citizens, they will be willing to obey and observe the law as it was enacted by their representatives in legislature assembled.

I am asking you as a part of the department of justice of the state of Iowa to do your duty in this matter, the same as you would in connection with any other law. I shall at a later date furnish you an opinion relative to various questions which have arisen in connection with the enforcement of this law.

H. M. HAVNER,
Attorney General.

SUNDAY BASEBALL.

Sunday baseball is not prohibited by the present statute unless admission is charged or parties so engaged disturb worship or a private family. Cities and towns do not have right to provide penalties for crime punished by state law.

March 27, 1917.

Frank C. Lewis, County Attorney, Mt. Ayr, Iowa.

Dear Sir: The following is a copy of a letter received from W. S. Monger, mayor of Benton, Iowa:

> As mayor of our little town, I have become very much interested in the discussion of the repeal of the so-called "Blue Laws" of Iowa, and of their present application. If not intruding too much upon your valuable time, I should like a little information on the subject for my guidance in my official duties, and therefore respectfully submit the following questions:
>
> 1st: What section, or sections, of the Code constitute the so-called "Blue Laws?"
>
> 2nd: Is the playing of base ball on Sunday a violation of said laws, as at present interpreted?
>
> 3rd: Has an incorporated town the legal right and power to pass and enforce ordinances, placing restrictions upon such amusements, beyond the limit of restrictions placed by the state laws? In other words: In case the state of Iowa's laws as at present interpreted do not prohibit such amusements on Sunday, has an incorporated town the legal right and power to pass and enforce ordinances, establishing such prohibition within their corporate limits?

In answer to his first question, the so-called blue laws are found in Section 5040 of the Code of 1897.

In answer to his second question, it is the holding of this department that the playing of baseball on Sunday is not a violation of the laws as they exist at the present time, unless there is admission charged, or the conduct of the parties engaged in the game is such as to disturb a worshipping assembly or private family.

In answer to his third question, a city or town does not have the right to provide penalties for any crime where the same is provided by the statute. As to any matter which the present law does not prohibit, or provide a penalty, a city or town would have the legal right and power to pass and enforce ordinances establishing such prohibition within its corporate limits.

We have written the mayor that we would take the matter up through you, and that you would advise him in the matter.

H. M. HAVNER,
Attorney General.

OPINIONS RELATING TO THE STATE BOARD OF EDUCATION.

EXPENSES OF STATE BOARD OF EDUCATION.

Discussion of matter of incurring traveling expenses, etc., of the State Board of Education.

March 16, 1917.

State Board of Education, State House.

Gentlemen: Your favor of the 7th instant addressed to the attorney general, relating to the expense accounts of members of the state board of education and finance committee, has been referred to me for answer.

In your letter you ask the opinion of this department upon the following questions:

1. Under the general powers of the board of education, as conferred by Section four of the acts of the thirty-third general assembly and Section eleven of the same act, has the board

authority to authorize the payment of certain expenses of members of the board of education and members of the finance committee for trips outside the state?

2. Whether the expenses incurred by a committee consisting of three members of the board of education and one member of the finance committee appointed to visit libraries recently erected were properly authorized and paid.

3. Whether the expenses of members appointed to attend institutional conferences and the like, and to confer with candidates under consideration for appointment, were properly authorized and paid.

4. Whether it is necessary to obtain the consent of the executive council before making such authorizations.

In reply thereto this department has to say: The state board of education was created by Chapter 170 of the acts of the thirty-third general assembly. Section four of said act defines the powers and duties of said board and reads as follows:

> The state board of education shall have power to elect a president from their number; a president and treasurer for each of said educational institutions, and professors, instructors, officers, and employes; to fix the compensation to be paid to such officers and employes; to make rules and regulations for the government of said schools, not inconsistent with the laws of the state: to manage and control the property, both real and personal, belonging to said educational institutions; to execute trusts or other obligations now or hereafter committed to the institutions; 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; and to do such other acts as are necessary and proper for the execution of the powers and duties conferred upon them by law. Within ten days after the appointment and qualification of the members of the board, it shall organize and prepare to assume the duties to be vested in said board, but shall not exercise control of said institutions until the first day of July, A. D. one thousand one hundred nine (1 09).

Section eleven of said act relates to the compensation and expenses of the board and reads as follows:

> Each member of the board shall be allowed seven dollars for each day that he is actually and necessarily engaged in the performance of official duties, not exceeding sixty days in any one year, and mileage at the rate of two cents per mile, by the nearest traveled and practicable route, in going from his home, to the different institutions, or to other places, and in returning to his home when on official business. Members of

> the finance committee shall devote their entire time to the work of said institutions and shall each receive a salary of three thousand five hundred dollars, ($3,500), a year. The members of the finance committee and other employes shall be entitled to the necessary traveling expenses by the nearest traveled and practicable route, incurred in visiting the different institutions, or other places in the state, and returning therefrom when on official business.

Section twelve of said act provides for the filing of claims for expenses with the auditor of state. Section fourteen of said act provides that before any expenses of the members of the finance committee, or other persons employed to assist such committee, under the direction of the board, shall be paid, an itemized and verified statement of every expenditure, certified to by the secretary of the board, shall be filed with the auditor of state.

Under section eleven, above referred to, the members of the finance committee, and other employes, were entitled only to necessary traveling expenses incurred in visiting the different institutions or other places "in the state."

This section was amended by Section four of Chapter 132 of the acts of the thirty-fourth general assembly by striking out the last sentence of Section eleven and enacting in lieu thereof the following:

> The members of the finance committee and other employes shall maintain their official residences at the places designated by the board, and shall be entitled to the necessary traveling expenses therefrom, by the nearest traveled and practicable route, incurred in visiting the different institutions and other places and returning therefrom when on official business; and to such other expenses as are actually and necessarily incurred in the performance of their official duties.

Section two of chapter 132 of the acts of the thirty-fourth general assembly also provided for the publication and circulation by the board of certain circulars, pamphlets, bulletins and reports, but expressly required that it must secure the approval of the executive council before incurring such expense.

By Section 170-e of chapter seven, title two of the Code Supplement of 1913, it was provided that members of boards, commissions, departments of state or state officers, who are authorized to contract expense accounts or who are allowed a per diem for services, shall file with the secretary of the executive council an item-

ized, sworn statement of the same. Section 170-f of said chapter provides for the approval and payment of such claims.

By chapter 7-A of Title II, supplemental supplement to the code, 1915, a state board of audit was created, to which board was transferred the powers and duties of the executive council with respect to the allowance and approval of claims.

Section 170-s expressly provided that nothing in said section should be so interpreted as to relieve the executive council of any duty imposed upon it by law, except that of auditing and passing upon claims as provided in said act.

Section 170 of said act provides that before approving a claim or voucher the state board of audit shall determine that certain conditions exist, one of which is that the creation of the claim is fully and clearly authorized by law.

Said section also provides that the state board of audit shall have no authority to authorize the creation of a bill against the state.

Section 170-u of said act authorizes the board of audit to formulate and publish such rules and regulations as it may deem necessary in performing its duties and protecting the interests of the state.

We have referred at some length to the different provisions which have been enacted with reference to the executive council, the state board of education and the state board of audit insofar as they seem to throw light upon the questions concerning which you have asked an opinion from this department.

It will be observed that by section four of chapter 170 of the acts of the thirty-third general assembly the members of the finance committee and other employes were allowed traveling expenses only in visiting state institutions or other places in the state. No such restriction was placed upon the members of the board of education, the act providing for the payment of mileage in going from their home to the different institutions or to other places.

By section four of chapter 132, acts of the thirty-fourth general assembly, the last sentence of said section eleven was stricken out and a new sentence inserted in lieu thereof. The new sentence does not contain the restriction of the former sentence so that, as

to mileage, the members of the board of education and of the finance committee are upon the same basis and are not restricted to the limits of the state.

It will be observed, also, that by the provisions of section four, chapter 170, above referred to, after enumerating the powers and duties of the board of education, it is expressly provided:

> and to do such other acts as are necessary and proper for the execution of the powers and duties conferred upon them by law.

We have also suggested that the board of audit has no authority to authorize the creation of a bill against the state.

It is also true that the act creating the state board of audit expressly provides that the executive council shall not be relieved of any duties imposed upon it by law, except that of auditing and passing upon claims, as provided in said act.

As the state board of audit has no authority to authorize the creation of bills against the state, such authority, in this instance, must either reside in the executive council or the state board of education. We have not been able to find any express provision clothing the executive council with such authority, so that, if the executive council has such authority, it must be by implication.

It will be observed that the act creating the state board of education, section four, chapter 170, above referred to, expressly provided that it had the authority to do such other acts as are necessary and proper for the execution of the powers and duties conferred upon them by law.

It will be observed also that section 170-e, 1913 supplement to the code, expressly recognizes the rights of certain boards, commissions, departments of state and state officers to contract expense accounts in the service of the state. The state board of education certainly comes within the terms of such section and is authorized to contract expense accounts in the service of the state, for it is expressly authorized to do such acts as are necessary and proper for the execution of the powers and duties conferred upon them by law.

The only provision which we have found which expressly limits the power of the state board of education to create an expense account in section two of chapter 132, acts of the thirty-fourth

general assembly, which provides that the board shall first secure the approval of the executive council before incurring any expenses for the publication and distribution of certain circulars, pamphlets, bulletins and reports.

Summarizing the foregoing, we find 1st. There is no express provisions requiring that the state board of education shall first secure authority from the executive council as to expenses, except as provided by section two, chapter 132, acts of the thirty-fourth general assembly.

2nd, Section 170-e, supplement to the code, 1913, recognizes the right of certain boards and commissions to authorize an expense account.

3rd, The state board of audit has no authority to authorize the creation of a bill against the state, but before approving a claim, must determine that the creation of the claim is fully and clearly authorized by law.

4th, Section four, chapter 130, acts of the thirty-third general assembly expressly provides that the state board of education shall have power to do such other acts as are necessary and proper for the execution of the powers and duties conferred upon them by law.

It is, therefore, the opinion of this department,

1st, That the only limitation upon the board of education, by statute, as to authorizing of expense accounts, referred to by you, is that they shall be such as are necessary and proper for the execution of the power and duties conferred upon the board by law, except as provided in chapter two, section 132, acts of the thirty-fourth general assembly. But, it is the opinion of this department that the state board of education should first authorize the creation of such expenses by a resolution adopted by the board and duly made a matter of record.

2nd, That the expenses incurred by the committee, consisting of three members of the board and one member of the finance committee, in visiting various libraries recently erected, the same having been in anticipation of the building of library buildings which are to be erected by the board, and it being impossible for the committee to have visited said libraries except outside the

state, it is the opinion of this department that said expense was properly authorized and paid.

3rd, That as to the expenses incurred by members appointed to attend institutional conferences, it is the opinion of this department that, if the same were necessary and proper for the execution of the powers and duties conferred upon the board by law, they were propery authorized and paid.

4th, As to the conferring with candidates under consideration for appointment, it is the view of this department that the board has the power to fix a place within the state where such conferences may be held and to authorize the necessary expense of members appointed to attend the same, but as this department is not advised whether the conferences referred to in your letter were within the state, it cannot determine whether the expense to which you refer was authorized in the particular instance.

5th, That it is not necessary to obtain the consent of the executive council before making authorizations of expense accounts which are necessary and proper for the execution of the powers and duties conferred upon the board by law, except as provided in section two, chapter 132, acts of the thirty-fourth general assembly, above referred to.

H. H. CARTER,
Assistant Attorney General.

APPROPRIATIONS FOR STATE BUILDINGS.

The State Board of Education has no authority to spend more than the amount authorized by the Legislature.

May 21, 1917.

State Board of Education, State House.

Gentlemen: Your request for the opinion of this department on the following questions has been assigned to me for attention:

> Under Senate bill No. 467 by the Military Committee, there was appropriated the sum of $125,000 for the use of said Board in the construction of an armory at the Iowa State College, at Ames; and $125,000 for the construction of an armory at the State University, at Iowa City, being a total of $250,000.
>
> Owing to the increased cost of structural steel, it is thought that the said appropriation will not be sufficient to properly construct said armories.

It is requested by Charles R. Brenton that you submit to the State Board of Education a written opinion, as to any and all laws existing under the statutes of Iowa, wherein the Executive Council is given authority to grant additional funds necessary for the construction of these armories, and in what amounts or limitations.

It is asked if House File No. 589, 37th General Assembly, introduced by the Appropriation Committee, would allow any use of funds appropriated thereunder for such a purpose. Your are also referred to Section 1400-q1, Supplemental Supplement 1915.

I have prepared copies of senate file No. 467, by the military committee, and house file No. 589, by the appropriations committee, of the 37th General Assembly, each of which were passed and copies of each of which are hereto attached. The former will take effect July 4th.; the latter contained a publication clause and is now in effect.

The senate bill authorizes and empowers the state board of education to construct at the State University at Iowa City, Iowa, an Armory building for the use of the reserve officers and other military purposes and also a like building for the same purpose at the state college of agriculture and mechanic arts at Ames, Iowa, to be constructed according to plans and specifications to be approved by the board.

For the purpose of constructing the two buildings the sum of two hundred and fifty thousand dollars ($250,000) is appropriated, one hundred and twenty-five thousand dollars ($125,000), or so much thereof as may be necessary, for each building.

The house bill appropriates one million dollars ($1,000,000), or so much thereof as may be necessary, for the organization and equipment of military organizations for service in the armies of the United States and for certain benefits for such organizations and for aid to dependent wives, mothers and children of enlisted men of such organizations, the funds appropriated to be used in providing, equipping and raising and for the benefit of any military organization of the state for service in the armies of the United States. The adjutant general, with the approval of the governor, may pay certain specified sums, to dependent wives, mothers, or children under fourteen years of age of enlisted men in any such military organization, all funds to be by warrant of the auditor of state on the treasurer of state upon requisition of the adjutant

general, approved by the governor. Further provision is made for reimbursement to the state, by the federal government, of any expenditures for purposes named in the act for which the federal government may be liable.

The appropriation for armories is in a gross sum, $250,000, but expressly provides for two buildings, one at Iowa City and one at Ames and states "the intention being to appropriate for each of said buildings the sum of one hundred and twenty-five thousand dollars, or so much thereof as may be necessary."

It might occur to the board in view of the fact that the appropriation is not sufficient to construct the two buildings that it would be proper and lawful to construct but one, at this time, and use whatever portion of the appropriation that would be necessary for such purpose, but this may not be done, for it would be a direct violation of Section 187 which prohibits the officers of such institution from diverting any money appropriated for its use to any other purpose than for the specifie one for which the appropriation was made.

The other appropriation pertains to the organization and equipment of military organizations for service in the armies of the United States, and it would, as it seems to me, require the stretching of an over vivid imagination to hold that any part thereof was available for the construction of a permanent building at either Iowa City or Ames.

Section 1400-q1 of the 1915 Supplement to which you call attention, confers certain powers upon the executive council to approve plans, specifications and expenditures for buildings, the necessity for which is created by fire or other casualty, but no power therein conferred can in any manner aid in the matter before us.

However, desirable as it would be, at this particular time, to proceed with the construction of the Armory buildings, and to locate or discover if possible, funds available for such purposes, I am constrained to believe that such is not a possibility, but if such a thing were possible, that a part of some appropriation heretofore made, remained unexpended, yet the power to make it available rests with the legislature and has not been conferred upon the executive council or other body. There is also a further obstacle in the way to which I deem it wise to call your attention. Section 185, pertaining to unauthorized expenditures, is as follows:

Any officer who shall be empowered to expend any public

money, or to direct such expenditures, is hereby prohibited from making any contract for the erection of any building or for any other purpose which shall contemplate any excess of expenditures beyond the terms of the law under which such expenditures were authorized.

J. W. SANDUSKY,
Assistant Attorney General.

STATE BOARD OF EDUCATION CANNOT ADOPT "CLOSED SHOP" POLICY.

The State Board of Education is not authorized to adopt the "Closed Shop" policy in letting contracts.

June 17, 1918.

W. H. Gemmill, Secretary State Board of Education, State House.

Dear Sir: Your letter of June 13th is hereby acknowledged and an official opinion is asked from this department on the following proposition:

> Has the Iowa State Board of Education the legal authority to adopt what is known as the "closed shop" policy to govern the employment of carpenters, plumbers, etc., who perform labor on buildings which are constructed at any of the institutions under its supervision, when such buildings are constructed and the labor is performed as directed by the said board?
>
> Stating the question differently, has the said board the legal right to adopt a policy whereby only those men who belong to a labor union would be employed as carpenters, plumbers, etc.?

One of the duties of public officers who are required to let contracts or to perform labor on buildings, is that the same be let to the lowest bidder, or the labor be performed at the lowest cost. The general rule is that in awarding such contracts reasonable discretion is allowed when exercised in good faith and in the interest of the public.

Bottomed upon these fundamental principles, it has not only been held by our supreme court in the case of Miller vs. Des Moines, 143 Iowa, 409, but is uniformly held by the supreme courts of other states that public authorities have no right to adopt what is known as "closed shop" policy to govern in the employment of carpenters and other laborers. The reason for this conclusion is stated in the

case of Miller vs. Des Moines, supra, in which the court at page 420 said:

> Experience has shown that the interests of the taxpayers are best conserved by offering contracts for public work to the competition of all persons able and willing to perform it. When the opportunity to compete is fairly and openly offered, and contracts are fairly awarded, there is ordinarily no room for official or private graft at public expense; but just in proportion as competition is restricted, and the award is hedged about with express or implied conditions by which a favored person or a favored class is insured a preference over others of equal ability and capacity, public rights are imperiled and public interests are sacrificed. Such discrimination tends to monopoly, and involves a denial of the equality of right and of opportunity which lies at the foundation of republican institutions.

In Adams vs. Brenan, 177 Ill. 194, which is quoted from with approval in the Miller case, it was held that a stipulation that none but union labor should be employed by the contractor cannot be lawfully made in a contract for repairs to school buildings by a public corporation such as a board of education, as it constitutes a discrimination between different classes of citizens, and is of such a nature as to restrict competition, and to increase the cost of the work.

In the case of Lewis vs. Board of Education, 139 Mich. 306, it was held that the board of education of a municipal corporation has no power to require contractors respecting public buildings to employ union labor exclusively. This is in harmony with the opinions in the following cases:

Holden vs. Alton, 179 Ill. 318.
Marshall & B. Co. vs. Nashville, 109 Tenn. 495.
Atlanta vs. Stein, 111 G. 789.
Fiske vs. People, 188 Ill. 206.

Therefore, the opinion of this department is that the Iowa State Board of Education has no legal authority to adopt what is known as the "closed shop" policy.

C. G. WATKINS,
Assistant Attorney General.

OPINIONS RELATING TO STATE BOARD OF HEALTH.

PRACTICE OF OPTOMETRY.

General discussion as to what constitutes a "standard school of Optometry."

July 12, 1918.

Guilford H. Sumner, Secretary Board of Optometry Examiners, State House, City.

Dear Sir: Your favor of the 10th instant, addressed to the attorney general, has been referred to me for attention.

You ask in substance:

> Can a registered optometrist, who is maintaining a place of business for the purpose of practicing optometry, conduct at the same time in the said place of business a standard school of optometry, as required by Section 2583-1 Supplement to the Code, 1913, and at the completion of the time prescribed in said section grant diplomas from said school which would entitle the holder to take the examination before the state board of optometry examiners?

As far as we are able to find, this question has never been passed upon by our supreme court, but questions of a somewhat similar character have been raised and passed upon by the courts in other states.

In State vs. Peterman, 32 Ind. App., 665, the question was raised whether a person who employed a competent school teacher and placed his child under her care and instruction during the school year, and sent the child to her home during the school hours of the school year, who taught the child the branches she would have been taught had she attended the public schools, complied with the compulsory education laws of Indiana, which requires the parent to send his child to either a public, private or parochial school each school year. The court, in passing upon the question, says at page 669:

> A school, in the ordinary acceptation of its meaning, is a place where instruction is imparted to the young. If a person employs and takes into his residence a teacher for the purpose of teaching his child or children, and such instruction

> is given as the law contemplates, the meaning and spirit of the law have been complied with. This would be the school of the child or children so educated, and would be as much a private school as if advertised and conducted as such. We do not think that the number of persons, whether one or many, makes a place where instruction is imparted, any more or less a school.

It will be noticed that the court, in State vs. Peterman, supra, was passing on the question whether the child's parents had violated a criminal statute of Indiana in connection with the compulsory education of children in that state, as well as whether the instruction of the child in the manner herein set out was equivalent to the instruction ordinarily received in a private school.

In your case, if the legislature had used the term "public or private school" when providing the qualifications necessary for applicants desiring to take the examination to be licensed to practice optometry in Iowa, there might be considerable merit in the claim that regular instruction in the required branches at the place of business of a regular optometrist would come within the definition of a school, and thereby meet the requirements of the statute. But the legislature did not use the term "public or private" when defining the kind of a school, a diploma from which would entitle the applicant to take the examination, but on the contrary, the legislature expressly provided that the school should be a "standard" school of optometry, distinguishing in the same section the study of optometry pursued in the office of a regular optometrist from that taken in a standard school. A portion of Sec. 2583-l, Supplement 1913, material to the question raised in your letter, is as follows:

> On and after October first, nineteen hundred and nine, every person desiring to begin or continue the practice of optometry in this state must furnish satisfactory evidence that he is twenty-one years of age and of good moral character; that he has preliminary education equivalent to at least two years' study in an accredited high school; that he has studied three years in the office of a registered optometrist, or is a graduate from a standard school of optometry, before he shall be eligible to examination by the board.

Now, the question arises, what is the standard school of optometry? Webster defines the word "standard," when used as a noun, to be "that which is established as a rule or model by authority, custom or general consent"; and when used as an adjective, defines it as "being, affording or according with a standard for com-

parision or judgment." Webster also defines the word "school" as "a place for learned intercourse and instruction; an educational establishment, a place for acquiring knowledge and mental training." And while the term "school" in its narrow sense, might mean a place of instruction, as defined in State vs. Peterman, supra, yet the better reasoning and greater weight of authority hold to the contrary.

In St. John's Military Academy vs. Edwards, 143 Wis. 551, at 556, the court, in defining the term "school" says:

> It is an institution. But there must ordinarily be an association of patrons, professors, or pupils, in order to constitute a school. The word "school," except when applied to a building or place, implies plurality and consociation.

The foregoing definition finds support in the following cases:

State vs. Gazer, 28 Conn., 232.
American Asylum vs. Phoenix Bank, 4 Conn., 172.
In re Sanders, 53 Kans., 191.
Commonwealth vs. Bank, 198 Penna. St., 397.
State vs. Kalaher, 145 Wis., 243.

And yet after all, regardless of the interpretation or construction placed upon the term "school" by the various courts in the above cited cases, to correctly answer your question, we must endeavor to ascertain the real intention of the legislature when enacting the legislation pertaining to the practice of optometry in Iowa, particularly with reference to the qualifications of applicants desiring to take the examination. What did they mean by the term "standard school of optometry," and why did they insert it in Section 2583-1? The answer is evident. By reading said section, you will find that the legislature required greater qualifications from applicants who had obtained their knowledge of optometry from association with a regular optometrist than from those who had pursued a regular course of study in a well equipped school, and received instruction in a systematic manner from well trained instructors. In the former case, the legislature required three years of study, and in the latter only two years. So that in using the term "standard school of optometry," in distinguishing applicants who had acquired their knowledge of the subject in an office or place of business from those who had successfully completed a regular course in a school, it is evident the legislature meant a school devoted to the teaching of optometry, with instructors proficient in the various branches of the

subject, and with scholars to instruct. To reach any other conclusion would open a path to subterfuge and evasion, and permit applicants to qualify after two years' study in the office of a regular optometrist when the statute expressly requires three years, simply by said optometrist claiming that he was conducting a school in his place of business and conferring degrees and diplomas upon such persons (possibly clerks) who had spent two years with him in his place of business.

It is our opinion, therefore, that a registered optometrist who is simply conducting the usual business of an optometrist, cannot legally claim he is also operating a "standard school of optometry" as required in Section 2583-1, supra, merely by giving instruction in the regular branches of optometry to a person who came to his place of business for two years, and a diploma under such circumstances would not be evidence of the qualifications required in the statutory provision aforesaid.

W. R. C. KENDRICK,
Assistant Attorney General.

ANNUAL LICENSE OF OPTOMETRISTS.

It is no part of the duties of the secretary of the board of optometry examiners to notify registered optometrists that they are required to pay to the board of examiners an annual license fee of one dollar. They, like all others, must take notice of all acts of a public nature passed by the general assembly.

November 19, 1917.

Guilford H. Sumner, Secretary State Board of Health, State House.

Dear Sir: Your request for the opinion of this department on the following question has been assigned to me for attention.

You say:

> The secretary of the state board of health is by virtue of his office, the secretary of the optometry board of examiners; and the said secretary believed that, as the optometrists had the law herein related passed by the Thirty-seventh General Assembly, the association of optometrists should have notified all the optometrists of the state of the enactment of this new law herein related; but, when the secretary found that the optometrists holding licenses had not been notified, that is, some of them had not been notified, that he, the secretary, had notices prepared and sent out to all optometrists who were in arrears, or had not paid. The secretary was severely criti-

cised by those who received these notices, because the notices had not been sent before. The question is: Is it the duty or was it the duty under the law, of the secretary to notify these optometrists at all? It should be noted that the secretary or his assistants receive no compensation for any services rendered to this optometry board of examiners; yet the secretary did send notices when he found that no notices had been sent by the optometry association.

Will the attorney general please give a written opinion to the secretary, Dr. Guilford H. Sumner, as regards his duty under the law herein related, and whether it is the duty of the secretary to send out notices at all to the optometrists of the state?

By the original act, Chapter one hundred sixty-seven, acts of the Thirty-third General Assembly, a board of optometry examiners, to be appointed by the governor, is provided for and the secretary of the state board of health is made secretary of the board of optometry examiners. Provision is made for holding examinations and granting certificates. The secretary is required to keep a record of the proceedings of the board and perform such duties as usually pertain to such office. It is nowhere provided in the act that notice of any kind shall be given to anyone except where it is sought to revoke the license granted a practitioner for incompetency, immorality or inebriety, in which case due notice and opportunity to be heard must be given before a certificate can be revoked. This is the only instance wherein the matter of notice is referred to in the original act and as amended by the Thirty-fourth General Assembly.

The amendment by the Thirty-seventh General Assembly provides that from and after the 30th day of June, 1917, all registered optometrists shall, during the month of July of each year pay to the board of optometry examiners an annual license fee of one dollar. It also provides for certain penalties for a failure to make such payments within six months from the time the same is due and payable, but no provision is made requiring notice to be given.

Section 26 of Article 3 of the Constitution of Iowa provides as follows:

> No law of the General Assembly, passed at a regular session, of a public nature, shall take effect until the fourth day of July next, after the passage thereof. Laws passed at a special session shall take effect ninety days after the adjournment of the general assembly by which they were passed. If

> the general assembly shall deem any law of immediate importance, they may provide that the same shall take effect by publication in newspapers in the state.

When this provision has been complied with, notice is given to every one interested in or affected by any and all public acts of the general assembly and in the absence of express provision, in the act itself requiring any other form or kind of notice, all persons are required to and must be held to have knowledge of such acts and are bound thereby and you are therefore advised that it is no part of your official duties, as secretary of the board of optometry examiners, to give notice to registered optometrists that the law requires them to pay an annual license fee of one dollar to the board of optometry examiners.

J. W. SANDUSKY,
Assistant Attorney General.

RENEWAL OF EMBALMER'S LICENSE.

No notice to licensee of expiration necessary. Licensee may renew license by making application within 30 days after expiration and paying fee.

November 1, 1917.

Guilford H. Sumner, Secretary State Board of Health, State House.

Dear Sir: I am in receipt of your letter of October 31st.

In answer to your question No. 1 will say there is no law which requires the secretary of the state board of health, or any other officer or person, to notify the licensee of the expiration of his license.

I would answer your question No. 2 in the negative. The law provides:

> Any person now holding an unexpired license from the state board of health as an embalmer shall be held to be licensed as an embalmer under the terms of this act, but all licenses now in force, *or hereafter issued,* shall expire on the thirtieth day of June following the date of issuance of such license.

It is perfectly apparent from this language that the license of Mr. Higgins expired on the 30th day of June, 1917. There is no authority for the issuance of a renewal license without examination, except as is found in this section, which is as follows:

> Licenses shall be renewed without examination annually by the state board of health within thirty days after expiration,

provided the holder of such license shall make written application to said board and pay to the secretary thereof the sum of one dollar renewal fee.

The statement of the facts in connection with your interrogatory No. 2 as contained in your letter would prevent you from issuing the renewal license in question.

Your question No. 3 must be answered in the negative. There is nothing which requires the secretary of the state board of health to send out notices relating to delinquencies or failure to renew a license, as provided in Section 2575-a39.

H. M. HAVNER,
Attorney General.

POWER OF LOCAL BOARD OF HEALTH.

Local boards of health have authority to employ other persons to carry out orders of boards effecting the health of their communities.

July 26, 1917.

Guilford H. Sumner, Secretary State Board of Health, State House.

Dear Sir: I am in receipt of your letter of July 24th asking for an interpretation of Section 2568 of the Code of Iowa, 1897, defining the duties and powers of the local boards of health on the following question:

> Do the townships adjacent to the new army cantonment where there is being established a sanitary zone around said army cantonment, have the power and authority to employ men as sanitary inspectors to aid the health officer in keeping the said sanitary zone clean from everything that is objectionable along the lines of public health, and in keeping of the said sanitary zone free from diseases and free from conditions that will produce diseases?

Section 2568 of the Code of Iowa, 1897, provides, among other things, as follows:

> The mayor and council of each town or city, or the trustees of any township, shall constitute a local board of health within the limits of such towns, cities or townships of which they are officers. * * * It shall regulate all fees and charges of persons employed by it in the execution of health laws and its own regulations and those of the state board of health; * * * make such regulations as are necessary for the protection of the public health respecting nuisances, sources of filth, causes of sickness, rabid animals and quarantine, not

in conflict with any regulations of the state board of health, which shall also apply to boats or vessels in harbors or ports within their jurisdiction; to proclaim and establish quarantine against all infectious or contagious diseases dangerous to the public *and maintain and remove the same as may be required by regulations of the state board of health;* may, when satisfied upon due examination of any cellar, room, tenement building, or place occupied as a dwelling *or otherwise,* has become, or is by reason of the number of occupants, uncleanliness or other cause, unfit for such purpose, or a cause of nuisance or sickness to the occupants or the public, issue a notice in writing to such occupants or any of them, requiring the premises to be put in proper condition as to cleanliness, or requiring the occupants to remove or quit such premises within a reasonable time to be fixed; and if the persons so notified or either of them neglect or refuse to comply therewith, *may by order cause the premises to be properly cleaned at the expense of the owner or owners, or may forcibly remove the occupants and close the premises.* * * *

There can be no question after a careful reading of this section, that other persons are to be employed if necessary by local boards to carry into execution any orders or rules which they may make to carry out the purposes of the board. If this were not true, then there would be no use to have such a board, for it would be powerless to do the very thing for which it is constituted, namely: protect the health of the people.

Any other construction of this statute would nullify the same and any matters affecting the general health and the general public welfare, it is necessary that there shall be such construction given to the statute as will effectuate the purpose for which such a board, as a local board of health, is created.

The cantonment will bring together many thousands of men, and it is a matter of common knowledge that it will require the greatest care upon the part of the local authorities to keep the conditions surrounding the camp sanitary.

The local boards have authority to employ whatever officers or assistants are necessary to properly accomplish the purpose of the local health organization, but the number should be such as will enable the officers to properly carry out the orders and effectuate the purposes of the local board of health as above stated.

H. M. HAVNER,
Attorney General.

CITIES CANNOT REQUIRE LICENSE OF PERSON WHO HOLDS STATE OPTOMETRIST LICENSE.

Cities and incorporated towns cannot exact a license from optometrists, to whom the State Board of Examiners has issued a certificate to practice in this state.

July 3, 1917.

Guilford H. Sumner, Secretary Board of Optometry Examiners, State House.

Dear Sir: Your favor addressed to the attorney general, requesting an opinion from this department as to the power of municipalities to exact a license from optometrists, to whom the state board of optometry examiners has already issued a certificate to practice in this state, has been referred to me for reply.

> You ask: "1st. Do cities and towns in Iowa have the right to charge a license or fee of optometrists who are legally authorized by this board to practice their profession in Iowa? If so, are said cities and towns warranted in charging a higher license or fee of optometrists who are duly registered, but who are not permanently located in any one place, but who make periodical visits to certain towns?
>
> "2d. What is the penalty for violation of the optometry law? Also what is the penalty for violation of an injunction, as provided for in the law as amended by the Thirty-seventh General Assembly?"

Replying to your first question we beg to advise that before an incorporated city or town can legally exact a license from any person concerning any particular subject, the entire matter must first be provided for in the way of an ordinance.

Now as to the power of a city or town to enact an ordinance relating to a particular subject, such power must have been expressly granted to the municipality by the state, or the said power must be such as is necessarily implied to carry out some other power that has been expressly granted. So that unless the state has granted municipalities the right to charge a license or fee from persons desiring to practice optometry in their locality, to whom the state board of optometry examiners has already issued a certificate, then any ordinance passed by said municipality requiring a license would be invalid.

To authorize a city or town to so legislate, such authority must come from either Section 680 or Section 700 of the Code. Section 700 aforesaid cannot apply, for the reason that nowhere in said

section is the term "optometry" used or referred to. Section 680 provides, however, that municipal corporations shall have the power to make and publish, from time to time, ordinances, not inconsistent with the laws of the state, relating to matters concerning the general welfare of the people.

Under Section 680 a city might possibly, under the general welfare clause, legally enact an ordinance requiring a license from persons desiring to practice optometry in said city, unless said ordinance would conflict with the provisions of a state law on the same subject.

Section 2583-k, Supplement 1913, makes the certificates issued by the board of optometry examiners conclusive as to the right to practice in Iowa. Section 2583-n, Supplement 1913, as amended by Chapter 213 of the Thirty-seventh General Assembly, provides for the fees to be paid by the applicant for the privilege of practicing optometry in this state; and Section 2583-o, Supplement 1913, requires every person to whom a license has been issued to file the same for record with the clerk of the district court in each and every county in which he desires to practice. Section 2583-r, Supplement 1913, as amended by Chapter 213, Thirty-seventh General Assembly, imposes a penalty for practicing optometry in the state without a license.

It is therefore observed that the legislature has fully covered the subject of optometry and the right to practice the same in Iowa; in which event, under the general rule, an ordinance covering the same subject and exacting a license to practice in any particular city would be in conflict with the state law and therefore invalid.

As to your second proposition, beg to advise that Section 2583-r, Supplement 1913, provides that any person practicing optometry without obtaining a certificate from the state board of optometry examiners, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $100.00 or imprisonment in the county jail for not more than thirty days.

Section 2583-r aforesaid was amended by the Thirty-seventh General Assembly (Section II, Chapter 213) by adding the injunctional remedy. In the event an injunction was granted and the party enjoined violating the same, he could be punished for contempt. As to the punishment, Section 4462 of the Code provides as follows:

> The punishment for contempts may be by fine or imprisonment, or both, but where not otherwise specially provided,

courts of record are limited to a fine of fifty dollars, and an imprisonment not exceeding one day, and all other courts are limited to a fine of ten dollars.

For cases discussing the above questions see

Iowa City vs. McInnerney, 114 Ia., 586, and
City of Waukon vs. Fisk, 124 Ia., 464.

W. R. C. KENDRICK,
Assistant Attorney General.

WHO ENTITLED TO OPTOMETRIST'S LICENSE.

One holding a certificate of exemption under Sec. 6, Chap. 167, 33d G. A., is entitled to a license under Sec. 1, Chap. 127, 34 G. A., under certain conditions.

March 16, 1917.

Guilford H. Sumner, Secretary Board of Optometry Examiners,
State House.

Dear Sir: Your esteemed favor of the 5th inst., addressed to the attorney general, has been referred to me for attention.

You ask the following:

> Will you kindly give me your written opinion as to whether or not this board can legally admit to examination any one who holds a certificate of exemption from examination which was obtained in accordance with Section 6, Chapter 167, Acts of the Thirty-third General Assembly, unless such applicant for examination also has the same educational qualifications as are required of other applicants for examination who do not hold certificates of exemption, but who are applying for examination under the law as amended by the Thirty-fourth General Assembly. (Chapter 127.)

Section 6, Chapter 167, Acts of the Thirty-third General Assembly, provides:

> On and after October 1, 1909, every person desiring to begin or continue the practice of optometry in this state, must furnish satisfactory evidence that he is twenty-one years of age and of good moral character; that he has a preliminary education equivalent to at least two years study in an accredited high school; that he has studied three years in the office of a registered optometrist or is a graduate from a standard school of optometry, before he shall be eligible to examination by the board. A standard school of optometry shall include a course of instruction of not less than two years duration and the terms

of schooling shall be not less than three months each year. And he shall not be entitled to be registered or to receive a license from the board unless he shall show proficiency in the following subjects: Physiology, medical physics, practical optometry, anatomy of the eye and ophthalmology. Every person successfully passing such examination shall be registered by the board and receive a license. 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 (5) 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.

Section 1, Chapter 127, acts of the Thirty-fourth General Assembly, repeals Section 6, Chapter 167, of the Thirty-third General Assembly and enacts in lieu thereof the following:

Section 6 of Chapter One Hundred Sixty-seven (167) of the Acts of the Thirty-third General Assembly is hereby repealed, and the following enacted in lieu thereof:

"On and after October 1, 1909, every person desiring to begin or continue the practice of optometry in this state must furnish satisfactory evidence that he is twenty-one years of age, and of good moral character; that he has a preliminary education equivalent to at least two years study in an accredited high school; that he has studied three years in the office of a registered optometrist, or is a graduate from a standard school of optometry before he shall be eligible to examination by the board. The standard school of optometry shall include a course of instruction of not less than two years duration, and the terms of school shall not be less than three months actual attendance each year. The requirements of a standard school of optometry shall be that each student shall devote seventy-eight hours to each subject named in this section during each three months course. He shall not be entitled to be registered, or to receive a license from the board unless he shall show proficiency in the following subjects: Physiology of the eye, optical physics, anatomy of the eye, ophthalmology, and practical optometry. Any person successfully passing such examination, and meeting all of the requirements in this section, shall be registered by the board, and receive a license. The board of examiners may issue a certificate to any person taking up a permanent residence in the state of Iowa, and desiring to practice optometry, providing satisfactory evidence is furnished of his qualifications, including credentials from the state board of examiners in optometry of the state in which he formerly resided, and upon payment of a fee of fifteen dollars."

It will be observed that Section 1, Chapter 127, Acts of the Thirty-

fourth General Assembly, omits from Section 6, Chapter 167, Acts of the Thirty-third General Assembly, the following:

> 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 (5) 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.

Section 51 of the Code provides that "the repeal of a statute does not effect any *right* which has accrued under and by virtue of the statute repealed." The *right* contemplated by this section pertains to a *property* right of the citizen, or a right directly involving the person. State vs. Mullenhoff, 74 Iowa, 27.

Where one statute includes an *exception* and later on another statute is enacted, substantially the same as the former, but without the exception, then and in that event the later statute will prevail, being the last expression of the legislative will. State vs. Bissell, 67 Iowa, 616.

Also a statute providing for an exemption is repealable unless it clearly expresses not only that the exemption is one which might be granted under the power of the state to contract, but also that it was clearly intended to be made irrepealable. Miller vs. Hagen, 114 Iowa, 195.

Section 51 of the Code was intended to protect rights, not mere privileges. In West vs. Bishop, 110 Iowa, 410, the court says: "If it was a right, it is saved to him; but if a mere privilege, it was lost through the repeal." Assuming that a party holding a certificate of exemption, which he obtained in accordance with Section 6, Chapter 167, Acts of the Thirty-third General Assembly, but under which he failed to apply for and receive from the board of optometry examiners a license to practice, now presents himself before said board for examination, it is the opinion of this department, pursuant to the foregoing decision, that said applicant stands upon the same footing and must pass the same educational qualifications as required of other candidates who do not hold certificates of exemption.

W. R. C. KENDRICK,
Assistant Attorney General.

QUALIFICATIONS OF OPTOMETRIST.

Discussion as to qualification of one seeking an optometrist license.

February 28, 1917.

Guilford H. Sumner, Secretary of Optometry Examiners, State House.

Dear Sir: I have your favor of the 23rd of February, asking this department for an opinion on the following questions relative to the practice of optometry, and in answer thereto will say:

First: Can a student of optometry take six months' instruction consecutively, or must he divide the term of instruction so as to confine three months to each year?

Under the statute, in our opinion, a student of optometry might take six months' instruction consecutively, provided, it were the last three months of one year and the first three months of the next year; but under the language of the statute, in view of the decision given by our own supreme court on this question, we think that the expression "each year" means "identical year" as indicated by the Christian calendar commencing January 1st and ending December 31st.

In the case of Sawyer vs. Steinman, 148 Iowa, 610 our supreme court said:

> The word "year" is, of course, often used as meaning a period of twelve months. But it is manifest that a clear distinction may exist between the expression "within twelve months" and "in any one year." Under our statute of definitions, the word "year" is presumptively equivalent to "year of our Lord." This latter expression undoubtedly means an identical year as indicated by the Christian calendar, commencing January 1st and ending December 31st. And we think that must be the construction to be placed upon the statute under consideration.

The court cites in support of this proposition several cases, among them being:

Engleman vs. State, 2 Ind. 91; (52 Am. Dec. 494), in which case the court said:

> When a year is mentioned in our legislative or judicial proceedings, and no mention is made of the Jewish, Mohammedan, or other system of reckoning time, all understand the Christian calendar to be used.

In the same case the court cites

Atlanta & Charlotte Ry. Co. vs. Ray, 70 Ga., 674, in which question arose in regard to the construction of a statute, in which the court said as follows:

> The preliminary question arose in the selection of the jury to try the case. The defendant challenged one A. W. Hoffman, as being an incompetent juror, upon the ground that he had already served four weeks at that term of the court, and was therefore disqualified under Section 3938 of the Code, which declares that no person shall be allowed to serve as a traverse juror longer than that time in any one year. * * * It is true that this is a statute which should be construed liberally, so that the evil complained of might be suppressed and the remedy advanced. But this juror was only in the first week of his service for the year when he was challenged, and, as Section 4 of the Code requires that, whenever the word year is used in the statutes, it shall be construed to mean calendar year, there was no error in allowing the juror to serve.

The facts showed that he had served four weeks in the month of December, and one week in the month of January following.

The supreme court of Kansas in the case of Garfield Twp. vs. Dodsworth Book Co., 58 Pac. 568, says:

> The word "year' as used in Section 1, art. 16, c25 and Section 220, c. 25, Comp. Laws 1879, is, under the rule for the construction of statutes, construed to mean a calendar year.

This being the rule which our court has adopted, he must have three months study in two different calendar years, and yet, these three months in each year might be consecutive under the circumstances as above suggested.

Second: Is it necessary for a two year period to have expired before a student of optometry is eligible to examination from the date of entrance upon his course of instruction?

We think the student might be eligible to examination after he had taken the two three months' period of study in any two calendar years. The statute says:

> The requirement of a standard school of optometry shall be that each student shall devote seventy-eight hours to each subject named in this section during each three months' course.

When these two three months' courses have been completed, as provided by the statute, we see no reason why he might not be examined.

Third: May a student of optometry take five months of study in one year, and the remaining month in the next year?

The answer to your first question answers your third. A student could not take five months of study in one calendar year and the remaining month in the next year.

Fourth: Is it necessary for the optometrist under whom the student is studying, to be registered during the entire three year period?

It is the ruling of this department that an understudy cannot get credit for any work done under an optometrist who is not a registered optometrist during all of the time that the study is taking place.

H. M. HAVNER,
Attorney General.

OPINIONS RELATING TO STATE HIGHWAY COMMISSION.

AUTHORITY IN CONDEMNATION PROCEEDINGS.

Sec. 1527-r3 Supplemental Supplement authorizes the board of supervisors to order the county auditor to issue warrants in favor of each claimant for damages awarded, and in such case, they are given the right to enter upon the condemned property, and improve the same, but as to whether an appeal from the award to the district court suspends such right of entry, and as to the constitutional rights of the claimants under Sec. 18, Art. 1, of the Constitution if injunction proceedings are resorted to are not determined.

May 24, 1918.

Iowa State Highway Commission, Ames, Iowa.

Gentlemen: Receipt is hereby acknowledged of your letter of the 21st instant, pertaining to the condemnation of some land in Appanoose county, Iowa, for bridge purposes, and where the real question submitted seems to be embraced in the following:

> The question involved is whether the board of supervisors has the right to take possession of the land included within the proceedings started under the above referred to section at the time when the appraisal board reports, or whether this board must wait until the property owners are given an opportunity to appeal to the district court and the amount of damages determined by the court.

The part of section 1527-r3, supplemental supplement of 1915, bearing directly upon the question presented is as follows:

> The board shall order the auditor to issue warrants in favor of each claimant for the amount of damages awarded, and in such case shall have the right to enter upon such right of way and improve the same. The damages thus awarded shall be paid for out of the county road or bridge fund or out of both of said funds. Claimants for damages may appeal to the district court from the award of damages, in the manner and time for taking appeals from the establishment of highways generally.

From the foregoing, it would appear that the board of supervisors are not required to await the determination of the amount of damages which may be awarded the claimant on appeal to the district court, but section 18, article I, Constitution of Iowa, pertaining to the question of eminent domain provides as follows:

> Private property shall not be taken for public use without just compensation first being made, or secured to be made, to the owner thereof, as soon as the damages shall be assessed by a jury who shall not take into consideration any advantage that may result to said owner on account of the improvement for which it is taken.

In construing this section of the Constitution the decisions of the court have not been in accord, and I find it difficult to determine, with any degree of certainty, just what would be a proper holding under that provision of the Constitution when applied to this particular statute. In some instances, where provision has been made by statute for the taking of private property for public use it has been expressly provided that an appeal from the award of appraisers, or sheriff's jury, to the district court shall not suspend the prosecution of the work, or so to speak, the taking of the property for the purposes desired, and under such circumstances, the supreme court of this state has sustained such statutory provisions. The portion of the section of the statute above quoted does not, however, go to this length. It is true that it states that where the warrant is issued in favor of the claimant for the amount of damages awarded that the board shall have the right to enter upon such right of way and improve the same. Under this provision, I would feel constrained to advise that the board might proceed with the improvement, and if the claimant, the property owner, saw fit to institute injunction proceedings to restrain the board

of supervisors, he might do so and they would then be brought face to face with the question of whether or not the taking of the appeal would suspend the making of the improvement in question.

J. W. SANDUSKY,
Assistant Attorney General.

COST OF CONSTRUCTION OF BRIDGE.

Where the county has purchased materials in large quantities for constructing and repairing bridges, the board may employ a bridge crew by the day to construct and repair bridges where the aggregate costs of all material and labor exceed one thousand dollars, in certain cases, with or without advertising and letting at a public letting. Construing sec. 1527-s11 Sup. Sup. 1915.

May 24, 1918.

Iowa State Highway Commission, Ames, Iowa.

Gentlemen: I have your request for the opinion of this department on the following question.

You state:

> We have been requested to advise Fremont County in reference to a situation existing in the county and one which has come up in a number of the counties in the state.
>
> This county maintains a crew for doing repair work and for building wooden bridges throughout the county. It has complied with the provisions of Section 1527-s11 Supplemental Supplement in reference to advertising for materials used in the construction and repair of these bridges. The county early in the year advertised for this material and has awarded contracts for practically all of its 1918 requirements.
>
> Some of the wood bridges which this county contemplates constructing or repairing will slightly exceed the $1,000 limit as mentioned in the section referred to above. Inasmuch as the county has advertised for the material and is purchasing such material under contract can it legally pay claims for the labor involved in the construction and repair of these bridges where the total cost of the new construction or repair work will exceed $1,000.
>
> In the case which we have before us the estimated cost of the bridge will be about $1,200. The labor charge on this work would be approximately one-half of this amount.
>
> We will appreciate your advice in reference to this point.

The question presented, as I understand it, is—will it be legal for the board of supervisors to pay the wages or expense of a

bridge crew employed by the county by the day in constructing a bridge the total cost of which, including labor and all material used therein, amounted to about twelve hundred dollars. The material used in the bridge was owned and regularly purchased by the county under contracts awarded after proper advertisement and at a public letting, the value or cost thereof being about six hundred dollars. The cost of the labor of the bridge crew representing about an equal amount.

The determination of this question involves a construction of section 1527-s11 of the supplemental supplement to the code, which provides as follows:

> All culvert and bridge construction, grading, tile and tiling and repair work, or materials therefor of which the engineer's cost shall exceed one thousand dollars shall be advertised and let at public letting.

If the word "and" instead of the word "or" preceding the word "materials", as it appears in the part of the section set out had been used there could be no reasonable doubt that the bridge in question should have been advertised and let at a public letting, for the cost thereof exceeded one thousand dollars, but if the cost of "culvert and bridge construction, grading, tile and tiling and repair work" can be held to be separate and distinct from the cost of the "materials thereof", as the same appears in the statute, then they may and should be classed separately, and the limitation would not apply until the cost or expense of one class or the other exceeded one thousand dollars.

When materials have been purchased regularly in large quantities, and are owned by the county, it would, ordinarily, I think, be more economical in constructing and repairing small bridges and repair by day labor than it would to advertise and let by contract at public lettings, and in all cases, where the expense, entirely aside from the cost and expense of the material will not exceed one thousand dollars, I am constrained to think it would be legal to make the improvement by day labor without advertising, or after advertising, as the board may deem best for the interests of the county, and, I therefore, think the claim for the labor expense incurred in Fremont county may be lawfully allowed and paid.

J. W. SANDUSKY,
Assistant Attorney General.

CONTRACTS ON "COST PLUS PERCENTAGE BASIS" ILLEGAL.

The board of supervisors have no authority to let contracts for bridge or highway construction upon the so-called "cost plus percentage basis." Principles discussed.

April 19, 1918.

Iowa State Highway Commission, Ames Iowa.

Gentlemen: The question of authority of boards of supervisors to let contracts for county work upon the so-called "cost plus percentage basis" has been referred to me for attention.

The proposition is as follows:

> On Friday afternoon, April 5th, Mr. Avery and Mr. Leahmer, representing the Midwest Grading Contractors' Association, came to Ames to interview you relative to the proposition of letting grading contracts on the cost plus percentage basis. They expected to meet with the Commission, but in the absence of the Commission and yourself and Mr. White, I talked the proposition over with them and agreed to transmit their request to you.
>
> They stated that at a former meeting with the Commission about a week ago, it was suggested that the legality of contracts on a cost plus percentage basis be determined. They stated that they have been advised by attorneys that such contracts could be legally let. They did not, however, give the names of the attorneys who advised them in that manner. I suggested that the Commission would very likely be governed by whatever decision the Attorney General might make in the matter, and they then informed me that you had agreed to take the matter up with the Attorney General.
>
> I am attaching hereto two sheets which give a summary of forms of tender for work on the cost plus percentage basis and on the basis of a unit price plus a percentage to cover increased costs of labor and material. They would much prefer that a cost plus percentage basis as outlined on Sheet No. 1, be tried out if such a procedure would be legal, but if this cannot be done, they are willing that contracts be let on the basis of a unit price plus percentage to cover increased costs, which proposition, they said, was suggested by you at the last meeting.
>
> They are very anxious to have this matter settled as the season is now getting to the point where work will soon open up, and they ask that you advise them at your earliest convenience as to what disposition the Commission will make of this proposition.

FORM OF TENDER ON COUNTY ROAD WORK FOR 1918. COST PLUS PERCENTAGE BASIS.

This form of tender will not eliminate competitive bids, as each contractor will decide what percentage he will require and what schedule of prices he will establish on the following items:

Teams, including harness, stables, blacksmith outfit and all camp equipment.....$.. per day
Elevating grader .....$.. " "
Wagons .....$.. " "
Fresnoes .....$.. " "
Plows .....$.. " "
Mormon .....$.. " "
Wheeler .....$.. " "
Blade Machine .....$.. " "

Foreman, timekeeper, machine men, blacksmith, dump man, stable boss, cook, flunkies, teamsters, and all other labor, Market price.

County to pay for all feed, supplies, repairs necessary to keep the outfit in service cost of moving on and off from the work, and all other expenses in connection with the work.

All bills shall be rendered and settlement made upon the above basis, plus the contractor's stipulated percentage, on the first of each month.

Section 1527-s11, of the 1915 supplement to the code, prescribes in detail the manner in which bridge, culvert, grading, tile and repair work shall be done. If the estimated cost does not exceed one thousand dollars it may be done as follows:

All culverts and bridge construction tile and tiling and repair work, or materials therefor, of which the engineer's estimated cost shall be one thousand dollars or less, may be advertised and let at a public letting, or may be let privately at a cost not to exceed the engineer's estimate, or may be built by day labor.

If the estimated cost exceeds one thousand dollars it must be done as follows:

All culvert and bridge construction, grading, tile and tiling and repair work, or materials therefor of which the engineer's estimated cost shall exceed one thousand dollars shall be advertised and let at a public letting, provided, that the board shall have the power to reject all bids, in which event they may readvertise, or let privately by submitting contract to the state highway commission for approval, or

build by day labor, at a cost not to exceed the lowest bid received.

In each instance, and by whatever method adopted, a limitation is placed upon the cost which must not exceed the engineer's estimate in the one instance and that of the lowest bid received in the other. Such estimate must necessarily be based on fixed values and any system which contemplates or provides for any or all possible forms of increased costs or expenses to be added to the materials to be furnished or work to be performed entirely eliminates this safeguard and protection, as well as that furnished by the lowest bid received, and would, therefore, be in direct violation of the provisions of statute.

The legislature has seen fit to prescribe in detail the powers of the board of supervisors and to point out in equal detail the manner in which such powers may be exercised and any substantial departure therefrom has been and will be held to be in violation of law.

Innumerable difficulties could and, doubtless, would arise in the performance of county work, as well as in furnishing materials for such work, and this is so apparent that I deem it unnecessary to mention any of them, and I am of the opinion that the board of supervisors have no authority to enter into contracts of this kind.

J. W. SANDUSKY,
Assistant Attorney General.

POWER OF THE BOARD OF SUPERVISORS TO PROTECT BRIDGES.

The board of supervisors have authority to protect bridges across streams in their counties, by constructing a dam across an old channel of the river, where such channel forms the boundary line between the two counties, but before doing so, permission from the other county should first be secured, as a part of the dam will be upon land within the other county.

April 5, 1918.

Iowa State Highway Commission, Ames, Iowa.

Gentlemen: I have your letter of the 2nd inst. pertaining to the question of the construction of a dam across an old channel of the Wasipinicon river at a point where such channel forms the boundary line between Clinton and Scott counties. The purpose being to protect bridges located within the former

county, and a doubt arises as to the authority of the board of supervisors of such county to construct the dam, for the reason that a part thereof would be located in Scott county.

It is, doubtless, within the authority of the board of supervisors to protect the bridges of the county from damage by flood waters, floating ice, drift wood and other causes, and for such purposes they may erect dams, piers and other form of protection, and such authority should not be limited to cases where the protection, whatever its form may be, is located wholly within the particular county, and I am, therefore, of the opinion that the board of supervisors of Clinton county have authority to appropriate the money for and construct the dam in question, though before doing so, the board of supervisors of Scott county should, by proper resolution, consent to the construction of such dam.

J. W. SANDUSKY,
Assistant Attorney General.

PROCEDURE IN LETTING CONTRACTS.

The board of supervisors is required to advertise in a proper manner all culvert and bridge construction grading, and tile and repair work, or materials therefor of which the estimated costs exceed one thousand dollars. They have the power to reject all bids and may readvertise or let by private contract by submitting such contract to the highway commission for approval.

February 5, 1918.

Iowa State Highway Commission, Ames, Iowa.

Gentlemen: Receipt is hereby acknowledged of your letter of January 31.

As stated to Mr. Ames over the telephone I am persuaded that it will be proper and lawful for the boards of supervisors of the several counties of the state to advertise in the regular manner for bids for furnishing materials and construction of bridges and other improvements contemplated for the year, and in all cases where bids received are not satisfactory they may reject any or all such bids, and may then preceed as provided in section 1527-s11 of the 1915 supplement of the code to readvertise or let by private contract, as in their judgment may appear best, but the advertisement and all other proceedings should be full, free and regular the same as though the meeting at Des Moines had

never been held. In the event of the rejection of bids then private contracts may, with the approval of the commission, be made with material-men and contractors who had submitted the most satisfactory propositions to the supervisors' committee here. The cardinal principle for your guidance, as well as that of the supervisors of each county, is to secure the most advantageous terms possible for the public, but in form and manner as contemplated by the law, for while a saving to the public is always desirable, yet such saving must be effected by and through a substantial compliance with statutory requirements.

J. W. SANDUSKY,
Assistant Attorney General.

JOINT DRAINAGE DISTRICTS ON COUNTY LINE HIGHWAY.

Joint drainage district cannot be formed for drainage of a county line highway and lands tributary to the same drainage area lying in two or more counties, under section 1989-b, Sup. 1915.

July 16, 1917.

Iowa State Highway Commission, Ames, Iowa.

Gentlemen: Paraphrasing your question we note that you desire an opinion of this department as to whether a joint drainage district may be formed for the drainage of a county line highway and lands tributary to the same drainage area lying in two or more counties under the provisions of Section 1989-b, Supplemental Supplement to the Code, 1915, and following sections.

I do not believe the provisions above referred to could be construed so as to allow two or more counties to proceed under them jointly in the establishing of a joint drainage district. This law was evidently intended to relieve those conditions where it is necessary for the Board of Supervisors to take the initiative in order to procure the drainage of a particular road or roads but it does not appear that the legislature had in mind a situation like you suggest.

We do not think the powers under the sections above referred to can be aided by the authority that would arise under the usual procedure, where the district is petitioned for by some of the land owners. It is suggested that either Board might form a drainage district including so much of the benefited land as

lies in the county so acting, but there would surely be breakers ahead if two or more counties acting separately attempted in this way to construct a joint drainage improvement. The owners of the lower lands would necessarily have the burden of paying the damages and costs of construction of the more expensive part of an open ditch, or else the increased cost of a larger tile because of the necessity of taking care of the overflow from the lands lying above in the other county. This condition would present unusual difficulties in reaching an assessment that would be in proportion to benefits and might be fruitful of much litigation.

It occurs to us that it would be much better, especially if the district to be served is large, that one or more of the land owners be induced to file the petition so as to set in motion the machinery of the law as provided in Section 1989, Chapter "A".

F. C. DAVIDSON,
Assistant Attorney General.

PAVING OF COUNTY ROADS.

The conditions under which a board of supervisors may order a county road paved discussed.

June 23, 1917.

Iowa State Highway Commission, Ames, Iowa.

Gentlemen: Your request for the opinion of this department on the following question has been referred to me for attention:

> The board of supervisors of Union County wish to pave about one-half mile of a county road leading from the city of Creston to the cemetery. The city has already paved the street leading out to the corporation line, and the county now wishes to extend this pavement the half mile beyond the corporation line to reach the cemetery. It is estimated that the work will cost from eight to twelve thousand dollars, about fifty per cent of which will be donated, the county paying the remaining fifty per cent, or from four to six thousand dollars. * * *
>
> We would be pleased to have you advise us concerning the board's authority in regard to such improvement, as some of the counties have constructed short pieces of pavement of this kind and we have approved the contracts therefor. If the boards have authority to order such improvements, we wish to govern ourselves accordingly when such contracts are submitted to us for approval. If the boards have authority to order such improvements, we wish to advise the Union County board of supervisors to that effect.

As I understand the proposition, it is not a question of wisdom or expediency, as viewed by the commission, whether the improvement referred to should be made, but whether the board of supervisors have the authority to make such improvement and pay whatever portion of the cost or expense thereof, over and above the amount contributed therefor by voluntary subscription, that may be necessary, out of the county road cash fund.

Section 1482 of the code, gives the board of supervisors general supervision of the roads and highways of the county. Other sections and subsequent legislation modifies this as to streets in cities and towns, and as to roads and highways included in the township road system, but as to the county road system, and all funds available therefor, they have full and complete supervision and control, limited only by certain specified powers conferred upon the highway commission, and I am of the opinion that if the plans, profiles and specifications for the improvement of that part of the county road leading from the corporation line of the city of Creston to the cemetery grounds have been properly submitted to and approved by the highway commission and there are sufficient funds available in the county road cash fund to meet and defray whatever portion of the cost and expense, over and above the amount contributed by voluntary subscription, that the engineers estimate shows and that may be necessary for such purposes that the board of supervisors have the power and authority to make such improvement.

J. W. SANDUSKY,
Assistant Attorney General.

TOWNSHIP NOT REQUIRED TO CARRY WORKMEN'S COMPENSATION.

Townships are not compelled to carry compensation insurance under the Iowa statutes.

May 15, 1917.

Iowa State Highway Commission, Ames, Iowa.

Gentlemen: Your favor of the 8th inst., addressed to the Attorney General, in regard to townships being under the Workmen's Compensation Act has been referred to me for attention.

You asked the two following questions, to-wit:

First: Should the township, under the Workmen's Compensation law, carry compensation insurance?

Second: If the township should carry compensation insurance, from what fund should such insurance be paid?

The Workmen's Compensation Act relative to municipal corporations, and the like, provides as follows:

(Section 2477-m, sub-division B, supplement to the code, 1913.)

> Where the state, county, municipal corporation, school districts, cities under charter or commission form of government is the employer, the terms, conditions and provisions of this act for the payment of compensation and amount thereof for such injury sustained by an employe of such employer shall be exclusive, compulsory and obligatory upon both employer and employe.

It is clear that unless a civil township comes within one of the classifications referred to in the foregoing section, the so-called "compensation act" does not apply. It is also evident that the only classification in said section which could possibly apply is that in relation to municipal corporations. Now, is a civil township, a municipal corporation within the contemplation of the Iowa law? Our courts repeatedly held that civil township is not a corporation nor a legal entity and cannot sue or be sued. It is no more than a legal sub-division of the county for governmental purposes. These provisions clearly indicate that civil townships have no corporate powers as such.

Austin Company vs. Township of Weaver, 136 Iowa, 709;
Theulen vs. Reed, 139 Iowa, 68.

Pursuant to the foregoing authorities, we would answer your first question in the negative.

Your second question therefore requires no answer.

W. R. C. KENDRICK,
Assistant Attorney General.

REPAIR OF HIGHWAYS PARTLY IN CITY AND PARTLY IN COUNTY.

The rights and duties of a city in regard to the repairing of highways which are partly in a city and partly in control of the county discussed.

May 31, 1917.

Iowa State Highway Commission, Ames, Iowa.

Gentlemen: Your recent letter, concerning the highway along the corporation line between the city of Webster City and a

township road district, has been assigned to me for attention.

The question presented is, "may the city share in the expense of repairing a highway along the corporate limits of the city, one-half of which lies within the limits of the city and the other half lies within the limits of a township road district, when the part to be repaired is on and along the side of the highway next to said township and no part thereof within the corporate limits of the city?"

I have not been able to find that the statute makes any very complete or satisfactory provision for a case of this kind.

The statute section 751 of the code provides that "cities and towns shall have power to establish, lay off, open, widen, straighten, narrow, vacate, extend, improve and repair streets, highways, avenues, alleys, public grounds, wharfs, landings, and market places within their limits," and section 753 further provides that "they shall have the care, supervision and control of all public highways, streets, avenues, alleys, public squares and commons within the city, and shall cause the same to be kept open and in repair and free from nuisance."

Similar duties are enjoined upon the county and township road district, as to roads and highways, outside the corporate limits of cities and incorporated towns. The highway in question forming, as it does, the boundary line between the city and the township road district, one half thereof lying within the corporate limits of the city, and the other half lying within the limits of the township road district, could, no doubt, be maintained and kept in repair far more economically and effectively at the joint expense and by the joint efforts of the highway officials of the city and the township road district, than could otherwise be possible, but my attention has not been called to nor have I been able to find any provision of the law which provides for or by reasonable inference could be held to impose such obligation and I am unable to point out any authority by which the city may be compelled or permitted to share in the expense necessary to make the required repairs.

J. W. SANDUSKY,
Assistant Attorney General.

WHO LIABLE FOR COST OF REPLACING TRESTLE WORK WITH DIRT FILL.

When it becomes necessary to replace trestle work on a township road with a dirt "fill" the county should bear the cost of the change.

May 5, 1917.

Iowa State Highway Commission, Ames, Iowa.

Gentlemen: Your request for the opinion of this Department on the following proposition has been handed to me for attention.

> There are several long span, wood pile trestle, highway bridges located within the limits of the drainage area of one of the larger streams in the county. One of these bridges serves as the main channel structures or bridges that take care of the overflow discharge under flood conditions. During the greater portion of the year no water passes through them.
>
> The highway in question is a township road carrying an ordinary amount of traffic. The board of supervisors now desires to remove one of these long span wooden bridges which have become dangerous, due to lack of repairs and natural decay, and which in the opinion of the board of supervisors is not required to provide the necessary waterway to accommodate the flood discharge of this stream.
>
> The board of supervisors of Cherokee county is willing to remove the old structure, but some question has arisen as to whose duty it is to fill up the old opening and put the highway in a passable condition. In the particular case at hand, the township trustees have refused to fill the opening, but are not objecting to the county's making the fill and charging up to $150.00 of the cost to the township. The cost of making the fill will exceed the $150.00 by a substantial amount, and the question then arises as to whether the board of supervisors have authority to pay any amount above the $150.00 since the work which they would be doing might be construed to be road work on the township roads.
>
> It seems to us that the entire question is hinged upon an interpretation of what is meant by bridge work, and we respectfully request your advice in this matter. It is a proposition that has given us considerable difficulty, not only in this county, but in several others, and we feel that it is one that should be decided if possible so that future advice to the township and county officials from your office and from the Highway Commission may be uniform in respect to this question.

The question here presented is simply this: Where it is proposed to replace a bridge heretofore constructed and maintained by the county on a road or highway, which is now a part of the township road system, with an embankment or fill, should the expense thereof be borne by the township or by the county?

I shall assume there was no question about its being the duty of the county to construct and maintain the bridge in question, so long as it was regarded necessary that a bridge should be there, and that the doubt arises when it is determined that the bridge shall be replaced with an embankment or fill.

Section 1482 of Chapter 1, Title 8, of the code, pertaining to the supervision of the roads of the county is as follows:

> The board of supervisors has the the general supervision of the roads in the county with power to establish, vacate and change them as herein provided, and to see that the laws in relation to them are carried into effect.

Paragraph 5 of Section 48 of the code, defining words and phrases, is as follows:

> The words "highway" and "road" include public bridges, and may be held equivalent to the words "county way", "county road", "common road", and "state road".

Under the provisions of said chapter, and the paragraph of section 422 set out, the establishment and supervision of the roads of the county is placed in the hands of the board of supervisors, and by the concluding sentence in section 1511 of the chapter it is stated that the term "road", as used in the code, means any public highway, unless otherwise specified. Subsequent legislation has authorized the creation of a Highway Commission and provides for what is termed "county road system", which includes the highway now designated as county roads, by the plans and records now on file in the County Auditor's office, and also the county highways from time to time added thereto, and also, provides for what is termed the "township road system", which later includes all other highways in the county, except in cities and towns.

This legislation provides for the organization of township road districts, and in more or less specific terms, defines the duties devolving upon the board of supervisors and township trustees, respectively.

Section 1527-s8 of the supplemental supplement provides as follows:

> * * * The duty to construct and maintain all bridges and permanent culverts throughout the county is imposed upon the board of supervisors. All culverts and bridges shall be paid for out of the county bridge fund, except as provided in section thirteen of this act. Where conditions are such as to warrant or necessitate the same, the board or supervisors shall furnish township trustees metal or other temporary culverts authorized by the state highway commission to be placed by them on their township road system. Said culverts to be purchased by the board of supervisors and paid for out of the county bridge fund and shall not exceed in size thirty-six inches in diameter, or its equivalent. The county, however, shall be at no expense for placing, filling, or transportation of said temporary culverts other than their delivery at a railroad station to be designated by the board of supervisors. Immediately upon the completion by the board of supervisors of any bridge or culvert situated upon the township road system, or the installation of a temporary culvert furnished to the township by the board of supervisors, it shall be the duty of the township trustees to properly fill over with dirt all such culverts and fill in and uniformly grade the approaches to all such bridges. Should the trustees fail for a period of two weeks after notification to make such fill, or fail to fill in and grade over such culvert, as herein provided, the board of supervisors shall proceed to do so, and the engineer shall report the actual cost of so doing and such amount, not exceeding one hundred fifty dollars, for any such bridge or culvert, shall be certified by the board of supervisors to the county treasurer who shall transfer said amount to the county road cash fund from the first collection of road funds belonging to said township.

This section requires that immediately upon the completion by the board of supervisors of any bridge or culvert situated upon the township road system, or the installation of a temporary culvert furnished to the township by the board of supervisors, it shall be the duty of the township trustees to properly fill in and uniformly grade the approaches to all such bridges, and should the trustees fail to perform this work, the board of supervisors shall proceed to do so, and the engineer shall report the actual cost of so doing, and such amount not to exceed $150.00 for any such bridge or culvert, shall be certified to the county treasurer, who shall transfer said amount to the county road cash funds

from the first collection of road funds belonging to said township.

It will be observed that upon the failure of the township trustees to perform this work that the board of supervisors shall proceed to do so, and the engineers shall report the actual cost of so doing, and such amount not to exceed $150.00 for any such bridge or culvert, shall be transferred to the county road fund from the township road fund.

The evident purpose and intent of the legislature was to place the expense of the ordinary grading, repair and up-keep of the highways comprising the "township road system" upon the township, and very naturally the question arises whether the embankment necessary in the case before us is of that character. It is not a question whether the fill which is required to replace the bridge is "road work" or "bridge work". It is surely not the latter, for it must be constructed of dirt. It is, however, to take the place of a bridge, constructed and kept in repair by the county and when replaced with the fill the expense to the county will cease, and I am of the opinion that no part of the expense necessary to construct the fill should be charged to the township but that the entire cost thereof should be borne by the county.

J. W. SANDUSKY,
Assistant Attorney General.

DUTY OF CITIES TO KEEP APPROACHES TO BRIDGES IN REPAIR.

Cities and Towns should keep in repair fills or embankments of bridges located inside city limits after the same are properly constructed by the county.

April 3, 1917.

Iowa State Highway Commission, Ames, Iowa.

Gentlemen: We have your request for an opinion from this department on the following facts:

> We have been requested to advise the Board of Supervisors of Clay County in reference to its duty in maintaining an earth fill which serves as an approach to a concrete bridge which is approximately 400 feet long, located inside of the city limits of Spencer. Briefly stated the proposition which confronts the Board is as follows:
>
> The new bridge which is 225 feet shorter than the old wood bridge and approach, was built in 1915 by the county and paid for out of county funds. Last spring the grade

settled and it became necessary to fill in this settled portion of the road. The settlement came in the center of the grade and was in the nature of a mud-hole. The question was raised at that time as to whom the work belonged, but the county finally did the work and paid for the same out of the bridge fund. Since that time the city has raised the claim that the portion of the grade filled by the county belongs to the county to maintain. The county, of course, takes the opposite viewpoint. There is also some danger of high water washing out a portion of the grade and the question naturally arises as to who should pay for rebuilding the grade in such an event.

We would greatly appreciate your advice in this matter as to who should maintain the earth fill which leads up to the bridge and the responsibility of the county in case of a flood washing away a portion of the approach grade. If there are any other points in this consideration that you will wish to be advised upon before rendering a decision, we would be glad to furnish you with this information.

Paragraph 18 of section 422, of the code, pertaining to the duties of the board of supervisors, is as follows:

To provide for the erection of all bridges which may be necessary, and which the public convenience may require, within their respective counties, and to keep the same in repair, except as is otherwise provided by law.

Paragraph 5 of section 48, of the code, is as follows:

The words "highway" and "road" include public bridges, and may be held equivalent to the words "county way", "county road", "common road", and "state road".

Section 751, 752 and 753 of the code, pertaining to the powers and duties of cities and towns is as follows:

Cities and towns shall have power to establish, lay off, open, widen, straighten, narrow, vacate, extend, improve and repair streets, highways, avenues, alleys, public grounds, wharfs, landings and market places within their limits; but no street, avenue, highway, or alley which shall hereafter be dedicated to public use by the proprietor of the ground in any municipal corporation shall be deemed a public street, avenue, highway, or alley, or be under the use or control of such municipality, unless the dedication shall be accepted and confirmed by an ordinance or resolution specially passed for such purpose. The expenses of such repairs and improvements may be paid from the general fund, or from

the highway or poll taxes of such cities or towns, or partly from each of such funds.

Sec. 752. They shall have the power to provide that the width of all streets, highways, avenues and alleys of all additions to any city or town shall conform to the width of the existing streets, highways, avenues and alleys of such cities and towns.

Sec. 753. They shall have the care, supervision and control of all public highways, streets, avenues, alleys, public squares and commons within the city, and shall cause the same to be kept open and in repair and free from nuisances.

Under the provisions of the first two sections it was proper and right for the county to construct the bridge in question, as well as the fill or embankment connected therewith. It was, however, its duty to construct the fill or embankment in a permanent manner and of a width to correspond with the street to which it was attached, and of which it became a part. It was also its duty to protect the same from ordinary freshets and floods by riprapping or other substantial protection, and when these things were done in a substantial and proper manner the county had performed its full duty and it then became the right and duty of the city to keep and maintain in proper repair the fill or embankment the same as the other streets and avenues within its corporate limits.

J. W. SANDUSKY,
Assistant Attorney General.

POSTING OF WARNING OF DEFECTIVE BRIDGE.

The mere placing of a sign on a county bridge warning the public of the danger in using the bridge for specific purposes does not relieve the county.

March 7, 1918.

Lew McDonald, County Attorney, Cherokee, Iowa.

Dear Sir: I have been directed to answer your letter of March 4th addressed to Attorney General Havner.

You state:

A county bridge has a sign along the side at the approach warning drivers of herds of cattle and tractors of all kinds that the bridge is not safe for certain heavy traffic. You then ask: In case drivers of the kind described should go onto this bridge and suffer damage, what is your opinion as to the right of recovery for damages.

The question is: Is the warning referred to sufficient to notify a person exercising ordinary and reasonable care of the unsafe condition of the bridge. If such notice was sufficient to warn a person in the exercise of ordinary care and prudence that the bridge was unsafe, then such person in going upon the bridge would be guilty of contributory negligence and could not recover. It is very difficult to lay down a broad, general rule that would apply to every case. Each case has its own peculiar facts and circumstances. There will always be a question as to what constituted heavy traffic, and the court might well find that it is for the jury to say whether or not the driver of the vehicles or stock mentioned acted as a reasonable and prudent man in determining that the bridge, after reading the said notice, was strong enough to support the stock or the vehicle. The safe way, of course, is to place a barricade across the bridge in such a manner that passers-by will be confronted with the obstruction. In the case you mention, a stranger might pass over the bridge in the night time and not notice the warning at all. In such event, he would not be guilty of contributory negligence.

J. W. KINDIG,
Assistant Attorney General.

PATROLING OF HIGHWAYS.

Highway patrolmen are employed by the board of supervisors to patrol the county road system and should be paid from the county road fund.

February 20, 1918.

Lew McDonald, County Attorney, Cherokee, Iowa.

Dear Sir: I have your request for the opinion of this department on the following question:

> Chapter 316, page 356, Acts of the 37th General Assembly, provides for road patrols. What county funds should these be paid from?

Section 1 of Chapter 316, Acts of the 37th General Assembly, provides in part as follows:

> Boards of supervisors shall cause all of the highways in their jurisdiction to be patrolled as hereinafter provided, and to carry out the provisions of this act they are hereby empowered and required to appoint patrolmen for the county road system and to fix their compensation who shall be known as county road patrolmen and who shall hold their office during the pleasure of the board so appointing them.

The patrolmen are appointed by the board of supervisors, and when so appointed, shall be known as the county road patrolmen and shall hold their office during the pleasure of the board. This places the patrolmen under the absolute control and supervision of the board of supervisors, and while this act does not in terms provide for their payment out of the county road fund, it is very clear to my mind that such was the intention of the legislature and it is, therefore, my opinion that these men must be paid from the county road fund.

J. W. SANDUSKY,
Assistant Attorney General.

APPROACHES TO BRIDGES.

Permanent approaches to bridges in the form of fills or embankments, become a part of streets and highways, and all such, within the corporate limits of cities and towns, must be maintained by the city or town in which they are located.

March 25, 1918.

F. J. Kennedy, County Attorney, Estherville, Iowa.

Dear Sir: Receipt is hereby acknowledged of your letter of the 21st instant, and in reply will say that Section 1457 and Sec-

tion 1462 of the 1913 Supplement to the Code fixes and determines what shall be done with the county funds, except, of course, such parts thereof as are properly appropriated for legitimate purposes, and I do not think the board of supervisors have any authority to invest any part of the county funds in Liberty Bonds or other securities.

As to your second question, paragraph 5 of Section 48 of the Code pertaining to the construction of statutes is as follows:

> The words "highway" and "road" include public bridges, and may be held equivalent to the words "county way", "county road", "common road" and "state road".

and I think it has been held that the county was liable for injuries occurring at or on an approach to a bridge on the theory that the approach was a part of the bridge, but this principle should not, and I think can not be extended to the question of the duty of maintaining a permanent approach to a bridge within the city limits.

A permanent approach to a bridge in the form of fill or embankment becomes a part of the highway or street, and it is therefore the duty of the city to maintain all such approaches to bridges within its limits.

J. W. SANDUSKY,
Assistant Attorney Genearl.

THE COUNTY IS LIABLE FOR DEFECTIVE BRIDGES.

Liability of the county for damages caused by defective bridges discussed.

February 18, 1918.

D. A. Crowley, County Attorney, Greenfield, Iowa.

Dear Sir: I have your request for the opinion of this department on the following question:

> A claim for damages has been filed with the board of supervisors of this county by the owner of a threshing engine for damages to his engine which broke through a bridge on the public roads of this county.
>
> The road was a township road, the bridge which was about twelve feet in width was one erected by the township. The owner of engine claimed that he planked the bridge before driving on the same.

> Our board will be in session the 18th of this month. I will greatly appreciate any information that your office can give me as to the liability of the county for damages in this case.

There is a long line of decisions of our Supreme Court holding that the county is liable for injuries resulting from defects in the construction of county bridges as well as for injuries resulting from a failure on the part of the county to keep the bridges in repair. These decisions, however, do not include certain kinds of bridges—that is, short bridges which may have been constructed by the township, or by the road supervisor, and as to the latter class, the courts have denied any liability on the part of the county.

Section 1571-a of the 1913 supplement to the code which provided that no traction engine should cross a bridge or culvert on the highways without planking the same has expired by limitation, and it is now presumed that the public bridges are so constructed that they should carry the traction engine without such planking. It was therefore not incumbent upon the party moving the traction engine to plank the bridge, though you state that he did do so.

It might be inferred from this that the man was using all reasonable caution and that he was in no sense negligent or careless. But however, that may be, such facts should be determined in the proper manner.

You will notice by section 1527-s8 of the 1915 supplemental supplement, pertaining to bridges, highways, and the board of supervisors, provides in part as follows:

> The duty to construct and maintain all bridges and permanent culverts throughout the county is imposed upon the board of supervisors.

This language makes it incumbent upon the board of supervisors to construct and maintain all bridges regardless of their length, and the effect of which is to extend the rule of liability of the county to the short bridges as well as to those of greater length. I am, therefore, constrained to believe that the county will not be permitted to deny liability for the reason that the bridge in question was only about twelve feet in length, and that you should approach an adjustment of this matter with the

thought in view that a liability may extend to injuries occuring through defects in any bridge, regardless of its length.

J. W. SANDUSKY,
Assistant Attorney General.

PROCEDURE WHEN A CONTRACTOR FAILS TO COMPLETE CONTRACT.

If a contract is not completed by the original contracting company, new bids must be advertised for unless another person offers to finish the contract at the original price.

March 16, 1917.

T. M. McAdam, County Attorney, Mt. Pleasant, Iowa.

Dear Sir: Your favor of the 10th instant addressed to the attorney general, relative to a certain bridge contract between Henry County, Iowa, and the Standard Construction Company, and enclosing copies of certain exhibits with reference thereto, has been referred to me for answer.

In your letter you ask the opinion of this department upon the following questions:

> 1. Under the contract between the Standard Construction Company and Henry County, Iowa, would the American Fidelity Company be subrogated to the rights of the Standard Construction Company so as to complete the contract of said Standard Construction Company?

It is the opinion of this department that, under the facts stated in your letter, the American Fidelity Company would not be so subrogated.

> 2. Did Henry County have a right to enter into a contract with the American Fidelity Company for the completion of the work provided for in the original contract between Henry County and the Standard Construction Company different from the orginal contract without readvertising for bids?

It is the opinion of this department that it would not have such right for the law expressly provides that where the amount involved exceeds one thousand dollars it shall be advertised and let at a public letting, provided that the board shall have power to reject all bids, etc., and it is the view of this department that, where a different contract is contemplated than the original contract the same steps most be taken as for an original letting.

3. Does not paragraph six of the contract signed by the American Fidelity Company and submitted to the board of supervisors change the contract between Henry County and the Standard Construction Company?

It is the opinion of this department that it does.

4. Is Henry County obliged to accept the offer of the American Fidelity Company to complete the contract of the Standard Construction Company; or, may Henry County ignore the offer, proceed to advertise for bids and let a new contract to the lowest responsible bidder?

As to the first part of your inquiry, it is the opinion of this department that Henry County is not obliged to accept the offer made by the American Fidelity Company to complete the contract of the Standard Construction Company as it differed from the original contract.

As to the second part of your inquiry, we have to say that Henry County may, therefore, ignore the offer, readvertise for bids and let a new contract to the lowest responsible bidder.

5. Taking into consideration that the American Fidelity Company offered to complete the contract of the Standard Construction Company for the consideration of $40,166, would Henry County be safe in making a contract with the lowest responsible bidder, after due publication of notice inviting bids for the completion of the work that was unfinished by the Standard Construction Company, at a higher price than the offer made by the American Fidelity Company?

It is the opinion of this department that, if the American Fidelity Company offered to complete the work upon the terms of the original contract made by the Standard Construction Company and for the balance due under said contract, it would have the right so to do; but it is our understanding that it refused to complete the work upon the terms of the original contract. Assuming that it refused to complete the work upon the terms of the original contract, it is the opinion of this department that it would be safe to make a new contract, after giving notice, etc., as suggested in your letter, but it is the opinion of this department that the same steps should be taken by the board as if this were an original letting, and we suggest that notice be given to the American Fidelity Company of the time and place of filing bids

and the terms thereof, and also the time when the contract would be let.

H. H. CARTER,
Assistant Attorney General.

TRANSFER OF CULVERT FUNDS.

The culvert fund may be transferred to the road fund where occasion for which it was created no longer exists.

February 23, 1917.

A. J. Shaw, County Attorney, Pocahontas, Iowa.

Dear Sir: Replying to your letter of the 20th instant wherein you request the opinion of this department on the following facts:

> There is a balance in the culvert fund of Cedar Township of $351.52. This has not been used for the past three or four years and I was wondering if their was any law against transferring this fund to the road fund.

will say, as a general propositoin, where a fund has been provided for a specific purpose, it is not competent for the board of supervisors to transfer such fund to the general, or other, fund, but, in this instance, where the occasion for which the particular fund was created and for which it could have been used no longer exists, there can be no impropriety in the board transferring such fund to the road fund where it may be available.

J. W. SANDUSKY,
Assistant Attorney General.

INTEREST ON STREET IMPROVEMENT CERTIFICATES.

Interest on street improvement certificates should be computed and collected up to April first, as provided by Section 827 of the Code of 1897.

March 6, 1918.

C. H. Cook, Assistant County Attorney, Glenwood, Iowa.

Dear Sir: Your letter of February 22nd addressed to the Department of Justice has been given me for answer.

You state:

> Last year the town of Malvern ordered about $40,000.00 in pavement and issued certificates against the abutting property in payment of the same. Interest on said certificates by the County Auditor was figured until the first day

of March, 1918. The purchaser of the certificates is now insisting on interest to the first day of April on each installment.

You then ask:

> Should the treasurer figure interest on said certificates until the first day of April.

It is our opinion that interest should be figured until the first day of April.

Section 827 of the Code of 1897 provides that:

> Each installment of any special assessment shall bear interest from the date of the assessment * * * which shall become due and payable at the March semi-annual payment of the ordinary taxes * * * upon the payment of any installment there shall be computed and collected the installment and interest on the whole assessment remaining unpaid up to the first day of April following.

It would seem then that by this expressed statutory provision it was the intention of the legislature that these certificates should bear interest on each installment from the date of the assessment until the first day of April of each year.

Section 828 of the Code contains a provision whereby payment of the installments may be made before due, but that relates to the entire assessment including all the installments, and not in any way refers to a single installment. Therefore it was not intended that a single installment could be paid at any time in order to reduce the interest thereon.

As stated above, Section 827 contains the following provision:

> Upon the payment of any installment there shall be computed and collected the installment and interest on the whole assessment remaining unpaid up to the first day of April following.

This quotation contains two propositions. First, the collection of the installment, and second, the interest on the installment collected and all other installments until the following April. To interpret this quotation otherwise would place a construction upon the sentence which would leave the installment to be collected without any provision for interest. The provision "interest on the whole assessment remaining unpaid" includes the installment which is being paid. At the time the interest is being

figured the installment in question has not been paid, because the interest and installment are paid the same time; one is not paid or figured before the other, and therefore the installment in question is unpaid at the time the interest is figured, and is necessarily included as a part of the assessment remaining unpaid.

The penalty which might be imposed should this tax not be paid when due, is a penalty similar to that imposed for the non-payment of ordinary taxes and is entirely distinct from the interest provided by the certificate.

J. W. KINDIG,
Assistant Attorney General.

ESTABLISHING ROADS.

The board of supervisors have power to establish a road and tax the cost to petitioner or the county.

June 25, 1918.

J. M. C. Hamilton, County Attorney, Fort Madison, Iowa.

Dear Sir: We regret the delay in answer to your letter of June 11, but the same was unavoidable on account of the rush of work and being short of help. In your letter you request the opinion of this department on the following questions:

> First. The board of supervisors of this county has before it the petition of two Lee county residents for the establishment of a road, and believes that the road should be established. They also believe that the county should pay part of the damages assessed for the taking of necessary right-of-way, etc., and that the petitioners should pay part of the damages; the road is not a part of the county road system. In my opinion, under section 1482, et seq. of the code of 1897, the board of supervisors can establish a road on condition that the petitioners pay a certain part of the damages, the county paying the balance.
>
> Second. Can the board of supervisors establish the road upon conditions that part of the damages be paid by the petitioners, the balance to be paid by the township? In my opinion, this condition would not be effectual unless the township trustees have signified their desire to pay a part of the damages.

First: Section 422, supplement of 1913, paragraphs 16 and 17, give authority to the board of supervisors to establish roads

and highways. Code sections 1482-1527, inclusive, and the amendments thereto provide the method and procedure for the establishment of highways. If you will refer to code section 1501 you will find that this section provides as follows:

> * * * Said board may increase or diminish the damages allowed by the appraisers, and may make such establishment, vacation or alteration conditioned upon the payment, in whole or in part, of the damages awarded, or expenses in relation thereto.

This section gives the board authority to establish the road in question, on condition that the petitioners pay a certain part of the damages and the county pay the balance, or, they may pay the whole of the damages.

Second: Code section 1501, as stated above, answers the part of this question that the damages, or a part thereof, may be paid by the petitioners. The other part of this question relating to whether or not a part of the damages may be paid by the township trustees, I would say there is no authority by which the township trustees can appropriate any money for damages in the establishment of a highway.

C. G. WATKINS,
Assistant Attorney General.

REMOVAL OF UNDERBRUSH IN HIGHWAYS.

The owner of land adjoining a public highway cannot be required to remove trees and underbrush from that portion of the highway lying between a hedge fence owned and used as such by him and the traveled portion of the highway.

December 26, 1917.

Harry F. Garrett, County Attorney, Corydon, Iowa.

Dear Sir: Your request for the opinion of this department on the following questions has been referred to me for attention.

You state:

> Can a land owner be required not only to trim and cut back the hedge fence on his land where it borders the public highway but also be compelled to cut and destroy brush and shrubbery growing in the highway along his land?

This question calls for reconstruction of Chapter 417 of the acts of the 37th General Assembly.

> In certain localities of this county brush and shrubbery has been permitted to grow upon and thus obstruct the public highways practically up to the narrow traveled track. Can the property owner be required to remove it as a part of their road work on township roads?

The chapter referred to provides for trimming hedges along the public highways, repeals section 1570 of the 1913 supplement to the code and enacts a substitute therefor and is in part as follows:

> The owners of osage orange and hedges of shrubbery other than trees along the public highway, shall keep the same trimmed by cutting back within five feet of the ground at least once in every two years, and burn or remove the trimmings from off the road. With the exception of osage orange hedge fences, no trees or shrubbery, except as hereinafter provided, shall be permitted on the line of the highway along the public road, unless the same shall be used as a wind-break for residences, orchards or feed lot, and no wind-break shall exceed forty rods in length, such forty rods to be determined by the owner within one day when requested by the board of supervisors; and in case he neglect or refuse to designate the forty rods of wind-break he desires, the board of supervisors shall select such forty rods of hedge.

Authority is also given the board of supervisors to enforce the provisions of the act and to destroy or cut back the hedges and trees as specified above, upon the failure of the owner of the hedge or fence to do so after notice in writing has been served upon the owner.

The object and purpose of this act is to require the owner of hedges along the public highways to keep them trimmed and cut back to a given height above the ground and upon failure to do so the expense thereof may be assessed and taxed against the land upon which the hedge is located.

It is true that the title to land upon which public highways, outside of cities and towns, are located, remains in the adjoining land owner, but the right to the use of the entire width of the highway is in the public and the duty of placing and maintaining it in proper and safe condition for highway purposes rests upon the public and such responsibility cannot be imposed upon the adjoining land owner and this principle of law is really not infringed by the statute which requires him to destroy noxious weeds upon

his land and the public highways adjoining them and I am of the opinion that the owner of land adjoining a public highway upon which brush and timber are growing naturally and which is not used as a hedge or fence by him cannot be required to remove such brush or timber.

J. W. SANDUSKY,
Assistant Attorney General.

OPINIONS RELATING TO DRAINAGE.

DRAINAGE ASSESSMENTS.

Making drainage assessments and letting contracts therefor are independent acts following establishment of a drainage district.

August 9, 1917.

W. H. Wehrmacher, County Attorney, Waverly, Iowa.

Dear Sir: In your letter of the 6th inst. to the Attorney General you say:

> Our board of supervisors have established a drainage district and advertised for bids and let the work as required by section 1989-a8, code supplement, and now are about to make an assessment of costs under section 1989-a12, code supplement, and a question has now been raised as to the right of the board to advertise for bids and let the contract for the work before making an assessment of the cost.
>
> I would be pleased to have an opinion from your department as to whether or not it is a compliance with the statutes to advertise for bids and let the contract and then make an assessment of the costs.

This involves a construction of Section 1989-a12, Supplement to the Code, 1913, which in part provides:

> When the levee or drainage district or other improvement herein provided for shall have been located and established as provided for in this act, or when it shall be necessary to cause the same to be repaired, enlarged, re-opened, or cleared of any obstruction therein, unless such repairs, re-opening or clearing of obstructions can be paid for as hereinafter provided, the board shall appoint three commissioners * * * and they shall within twenty days after such

> appointment begin to personally inspect and classify all the lands, * * * and they shall make an equitable apportionment of the costs. * * * This classification when finally established shall remain as a basis for all future assessments connected with the objects of said levee or drainage district * * * If the first assessment made by the board of supervisors for the original cost or for repair of any improvement as provided by this act is insufficient, the board may make an additional assessment and levy in the same ratio as the first for either purpose.

This section gives the board the power just as soon as a levee or drainage district is located and established to cause the assessment for benefits to be made. At that time the commissioners to assess benefits have access to the estimated cost as shown in the recommendation returned by the engineer as required by section 1989-a2, supplement to the code, 1913, and the amount of damages allowed, if any, as provided in Section 1989-a6, supplement to the code, 1913; so that the commissioners have data from which they can report a proposed classification and assessment; after revision by the board this classification is made the basis for additional or future levies that may be required, unless the board, for good cause shall cause a revision thereof.

The letting of the work under section 1989-a8 may be done by the board without reference to the making of the assessment. In large districts it would be impractical to complete the work before the assessment should be made, because there would be no way in which sufficient funds could be raised to pay the contractor.

It is the opinion of this department that there is nothing in the law requiring the work to be let or performed before proceedings are taken to classify the lands and levy the assessment.

F. C. DAVIDSON,
Assistant Attorney General.

RECOVERY FOR DAMAGE TO DRAINAGE DITCH.

The board of supervisors have the right to charge the expense of repairs occasioned by owners of property to such owners.

March 22, 1917.

Frank Ganoe, County Attorney, Boone County, Boone, Iowa.

Dear Sir: I am in receipt of an inquiry made by Charles G. Moravetz, member of your board of supervisors, where property

owners allow willow trees to grow over or near the tile drain, and the roots of these trees enter the tile drain, and in some cases completely close the water-way, causing a necessary repair, whether under section 1989-a21 of the supplement 1913, the board of supervisors can order the repairs made in a case of this kind, and charge the same to the property owner on whose land the repair is made?

Section 1989-a21 Code Supplement 1913, among other things, provides:

> If the repair is made necessary by the act or negligence of the owner of any land through which such improvement is constructed or by the act, or the negligence of his agent or employe * * * then the cost thereof shall be assessed and levied against the lands of such owner alone.

It is the opinion of this department if the owner of land through neglect permits willow trees to grow along or over a tile drain, in the manner described in the letter of March 19th, and the tile drain becomes choked by reason of the permission of said trees to grow along said tile drain, that such a condition comes within the provision of the statute above quoted, and such costs could be lawfully assessed against the lands of such offending party.

H. M. HAVNER,
Attorney General.

WHEN STATE LAND IS IN DRAINAGE DISTRICT.

The board of supervisors is without power to bind drainage district to make good any deficiency state land sells for and the amount for which it is assessed.

It is not proper for the State to deed land to drainage district, except the same be necessary for right of way purposes.

April 25, 1918

R. E. Bales, Secretary Executive Council, State House.

Dear Sir: Your letter of the 19th instant, addressed to the Attorney General, has been referred to me for answer. The facts as set forth, together with your questions, are as follows:

> In drainage district No. 13, composed of Muscatine and Louisa Counties, the State has had drained what is known as Muscatine Slough, including Keokuk and Odessa Lakes. The drainage ditch has done all that was expected of it in

portions of the district, but in another and very important part, the lake bed is still covered with water and unfit for any agricultural purpose. The Highway Commission was requested to make an investigation of the matter and in a report made to the Executive Council advises against the sale of the land for the reason that in this portion of the district in which the drainage work is a failure, the land could not possibly bring the returns required by law sufficient to pay the expenses of drainage, surveying and other costs incident to the drainage work. Recently the council has had a communication from the chairman of the board of supervisors of Muscatine County, representing the joint drainage district, in which an offer is made that if the State will proceed with the sale of the land and the returns fail to meet the requirements of law that the joint district will make good the deficit.

The council has directed that I request an opinion from you as to whether the council could legally enter into such a contract with the drainage district and if the provisions could be enforced in the event such a contract is made. For your information, I will say that I have the opinion of Thomas McDonald, Chief Highway Engineer, in the matter and he regards the offer of joint district No. 13 as a very fair one, and one which the State should accept.

In addition the joint drainage district has requested that the Executive Council give the joint drainage district a quit claim deed to the old slough bed, which according to their description is dry now and useful only for spoil banks in the event it is recleaned. The chief highway engineer has recommended, that this be done, in the event that there are no legal objections in the way of such transfer. He suggests that it be referred to you for your decision, and the Executive Council has directed that I request from you an opinion in the matter.

Answering your first inquiry, I beg to say that I do not think the board of supervisors, acting for the drainage district, has any right or authority to obligate the district to pay the state the difference between the selling price of the state's land and the assessment which has been placed upon it. I think any taxpayer in the district could object to such a proposition and defeat the object of it.

The district is not a body corporate, or even a legal entity for any purposes except those expressly provided by statute. It has no right or authority to enter into such a undertaking.

The same answer and reasoning applies to your second inquiry regarding the propriety of deeding to the district the strip of land belonging to the state known as "Muscatine Slough." In my judgment, the district has no right to acquire lands except such as are necessary for right of way purposes, and I take it that that right has already been exercised in the manner pointed out in the drainage statutes.

I would like to make some suggestion that might assist in a solution of the difficulty. As I understand it, the assessment is considerably higher than the probable amount that can be received if the land is sold by the state, and as I understand it, this is due to the fact that the drain has not proven efficient.

If the engineer in his report recommending the establishment of this district represented that the lands would be afforded drainage and made fit for agricultural purposes, including the old lake beds belonging to the state, and the assessment was made upon the basis of affording this relief to the state as well as to the other land owners, it is probable that the state is entitled to require the district to clean out, deepen and enlarge the drains so that the state may receive the drainage contemplated in the original recommendation of the engineer.

Under section 1989-a12, the board will be called upon to determine whether the basis of the assessment should be changed or not, and it seems to me that the state is in a position to insist that the basis should not be changed because it has not secured the benefits which it should have secured if the original plan had resulted in a sufficient drain.

If merely cleaning out is all that would be required, the board could proceed without giving notice to the land owners and others, but if deepening and enlarging the ditch is necessary, then notice must be given. The supreme court has lately passed upon this question in the case of Lade vs. Board of Supervisors, 166 N. W. 586.

It occurs to me that the proper procedure would be to apply to the joint boards of supervisors for the cleaning out or the enlargement of the ditch, whichever may be necessary, and in that way the machinery can be put in motion that should result in giving the state complete drainage. Surely if the land in Odessa

Lake can receive adequate drainage, the state ought to be able to make sales at a price that would cover the expenditures required to cover the first drainage assessment and the re-assessment.

Of course, I am not familiar with the proceedings, and it is possible that these suggestions are not of any benefit, but as I see it, there is nothing to do but to make such a course as would result in the complete drainage of this land.

F. C. DAVIDSON,
Assistant Attorney General.

OPINIONS RELATING TO MISCELLANEOUS MATTERS.

VACATIONS OF STATE EMPLOYEES.

Vacations of employees under General Appropriation Act of 37th General Assembly provides for only two weeks' vacation.

June 11, 1917.

E. R. Harlan, Curator, Historical Department, City.

Dear Sir: Your favor of the 6th inst., addressed to the Attorney General has been referred to me for answer.

Your inquiry is as follows:

> Please observe the appropriation bill providing the help for the various departments of the State, and advise me whether it is within my discretion to grant any employe in this department more than two weeks time by way of vacation. By this I mean, if we begin in the department the next fiscal year on July 1, 1917, and end the fiscal year June 30, 1918, and if an individual has already had a vacation of two weeks between July 1, 1916 and July 1, 1917, and proposes taking another of two weeks in June, 1917, but taking none between July 1, 1917, and July 1, 1918, the next year, does the head of a department have authority to make such an arrangement?

In answer thereto, we have to say by referring to Senate Journal of the 37th General Assembly, page 1875, will be found the following language:

> All employees provided for in this act shall devote their entire time to the service of the state, except that this requirement shall not be interpreted to prevent the allowance of a reasonable vacation, such vacation to be at the discretion of the head of the department or commission interested, and in no case to exceed two weeks in any one year.

It will be observed that it is expressly provided that in no case shall the vacation exceed two weeks in one year. The word "year", as here used, has reference to the fiscal year. The only discretion given to the head of the department is to determine when such vacation may be taken.

It is, therefore, the opinion of this department that under the provision above quoted you would have no authority to make such arrangement as was suggested in your letter.

H. H. CARTER,
Assistant Attorney General.

TRAVELING EXPENSES OF CONSULTING ARCHITECT.

Traveling or other expenses of consulting architect must not exceed fifteen hundred dollars.

January 17, 1917.

State Board of Audit, State House.

Gentlemen: Relative to the claim of W. T. Proudfoot for traveling expenses incurred while employed as consulting architect will say the statute which provides for securing the advice of a consulting architect is section 2727-a23 of the 1913 supplement to the code and reads as follows:

> The board may employ an architect who shall be skilled in the most improved method of sanitation, and competent to prepare plans, specifications, estimates and details for the buildings, betterments, and every item of equipment which may be necessary in any of the institutions, whose duty shall be to perform the work usually done by architects in preparing plans and specifications, and supervising the work of construction on all the buildings, betterments and improvements done at institutions under the control of the board. Said architect shall also perform such other labor as may be designated by the board, and shall receive a compensation to be by the board fixed, which, including expenses, shall in no event exceed three thousand dollars per annum. In cases of sufficient magnitude, the board may secure the advice of a

consulting architect, or may procure plans and specifications and drawings from other architects, but the expense thereof shall not exceed fifteen hundred dollars in any one year. The state architect shall be entitled to receive in addition to the compensation for his services fixed by the board, his necessary traveling expenses within the state when engaged in official business, and the board may allow him compensation for assistant draftsmen for services performed for the state when, in the opinion of the board, such services are necessary; provided, however, that the total amount allowed for traveling expenses and draftsmen shall not exceed two thousand dollars in any biennial period.

That portion of the section which authorizes the board to secure the advice of a consulting architect, or plans and specifications, namely:

> In cases of sufficient magnitude, the board may secure the advice of a consulting architect, or may procure plans and specifications and drawings from other architects, but the expense thereof shall not exceed fifteen hundred dollars in any one year.

contemplates the temporary employment, only, of such architect in cases of sufficient magnitude and, as the statute limits the amount of the expense that may be thus incurred to fifteen hundred dollars in any one year, we are of the opinion that no claim for traveling or other expenses incurred by, or for, such consulting architect in excess of the fifteen hundred dollars can be allowed.

J. W. SANDUSKY,
Assistant Attorney General.

GAMBLING DEVICE.

Discussion of what constitutes a gambling device.

February 7, 1917.

F. B. Shaffer, County Attorney, New Hampton, Iowa.

Dear Sir: We have your letter of the 2nd instant asking the opinion of this department on the following facts:

> I am enclosing you cut of a gum machine which I wish to submit to your approval and get your opinion whether or not it is a gambling proposition. A certain Mr. Francis of Lawler, Iowa, has asked me to consent to his running the machine but in my opinion it seems to be gambling.

> The reason that I am asking for your decision in the matter is that the manufacturer has placed an indicator on the face of the machine indicating to the player what he will receive for his nickle. Every time a nickle is played the player will receive five cents worth of gum. Should the indicator show 4 chips then if a nickle or a chip is played the player will receive his bunch of gum and four chips, these chips may be played again in the machine or cashed for trade with the store-keeper. There is no gum given when a chip is played. This last feature seemed to me that it was a gambling proposition and I have instructed the party not to use the machine until I hear from you.

A machine or device, by whatever name it may be designated, which, upon placing a nickel or other piece of money in it, simply yields a package of gum or box of matches, is not necessarily a gambling device, and may properly be termed a "gum vender" or "match vender." But if there is any element of uncertainty as to what it will yield, if it may not yield anything at one time, or may yield more at one time than at another, in fact, if there is the slightest element of chance or uncertainty as to what it may yield, then it is a gambling device and may be suppressed.

J. W. SANDUSKY,
Assistant Attorney General.

ANNULMENT OF MARRIAGE OF INMATES OF A STATE INSTITUTION.

Action to annul marriage of an inmate of the institution for feeble minded at Glenwood should be brought by the guardian of such inmate in the county where such inmate has a residence.

April 3, 1918.

Ralph S. Stanbery, County Attorney, Mason City, Iowa.

Dear Sir: I have your letter of the 1st instant, addressed to the Attorney General, and wherein you ask who is the proper party to bring the action for annulment of the marriage of one Alma Jones, an inmate of the institution for the feeble minded at Glenwood, and one John Shultz, and in reply will say the matter as stated by you presents a proper subject for annulment of marriage, as provided under Paragraph 4 of Section 3182 of the Code.

Section 3183 provides that:

> A petition shall be filed in such cases as in action for divorce, and all the provisions of this chapter in relation thereto shall apply to such cases, except as otherwise provided.

It therefore follows, I think, that a guardian should be appointed for this unfortunate girl in the county of her residence, and that such guardian should bring the action, asking an annulment of the marriage.

The fact that this girl is confined in the institution for the feeble minded at Glenwood would not confer jurisdiction on the courts of Mills County to entertain this particular action. Neither would the fact that the superintendent of that institution who has the control and custody of the inmates thereof confer the authority upon him to bring such action.

There is no question, I take it, that the superintendent of the institution will retain the custody of this girl, at least so long as her mental condition remains as it doubtless is at this time, and as I view it, there is no present urgent need of the bringing of the action of annulment.

J. W. SANDUSKY,
Assistant Attorney General.

COMPENSATION OF TOWNSHIP OFFICERS.

The statutes relating to compensation of township officers reviewed.

June 21, 1917.

John Menzies, County Attorney, Emmetsburg, Iowa.

Dear Sir: Your letter of the 19th instant, concerning the matter of the compensation for trustees, and wherein you asked the opinion of this Department on the following facts, has been referred to me for attention:

> Section 1528 of the Supplement to the Code provides that Township Trustees shall meet on first Mondays in February, April and November, in each year.
>
> Section 590 of the Supplement provides that (as amended by last legislature) Trustees shall receive, for each day's service, etc., $3.00 per day, to be paid out of the county treasury.

A question has arisen with our Supervisors as to whether trustees are limited, as to compensation which may be paid from the county treasury; to the three meetings specified in Sec. 1528; or whether trustees can hold such additional meetings as they deem necessary and receive pay therefor from the county.

I am somewhat in doubt as to this, and would greatly appreciate an opinion from your office.

Paragraph One of Section 590 of the 1913 Supplement as amended by Chapter 76, Acts of the 37th General Assembly is as follows:

Section 590. Township trustees shall receive:

1. For each day's service of eight hours, necessarily engaged in official business, to be paid for out of the county treasury, $3.00 each, provided, however, that in townships embraced entirely within the limits of special chartered cities, the compensation of township trustees shall be $4.00 per day.

With the exception of the per diem as fixed by the 37th General Assembly, the statute in question is the same as it has been for years, and I am of the opinion that the law does not limit the number of days for which township trustees may receive compensation from the county, provided the services, for which the compensation is sought, were rendered while necessarily engaged in official business, as contemplated by the paragraph of the section quoted.

J. W. SANDUSKY,
Assistant Attorney General.

RIGHT OF CHIEF OF POLICE TO CARRY CONCEALED WEAPON.

The marshal or chief of police not required to obtain permits to carry weapons.

February 1, 1917.

E. J. Wenner, County Attorney, Waterloo, Iowa.

Dear Sir: We have your letter of January 30th, requesting an opinion from this department upon the following:

Section 4775-1a et. seq. of the 1913 Supplement makes criminal the carrying of certain weapons concealed upon the person.

4775-3a specifically refers to the issuance of permits to carry these weapons concealed.

4775-4a provides that it is the duty of said officials to issue permits "to all peace officers."

Under these provisions does the marshal or chief of police of Waterloo, a city of the first class, issue a permit to himself? I can find no provision giving to the sheriff or the mayor, or to anyone else authority to issue a permit to the marshal or chief of police.

Chapter 297, acts of the thirty-fifth general assembly, and embracing sections 4775-1a to 4775-13a, 1913, supplement of the code, (see section 4775-13a), does not repeal any former acts, except and only in so far as the same may be in conflict therewith, and section 4775 of the code of 1897 not being in conflict with said act, was not thereby repealed and the persons "whose duty it is to execute process or warrants, or make arrests," as provided in said section, do not come within the operation of said act, and, therefore, are not required to secure permits to carry weapons.

J. W. SANDUSKY,
Assistant Attorney General.

OPERATION OF AUTOMOBILE WITHOUT LICENSE. EFFECT OF INSANITY ON RUNNING OF STATUTE OF LIMITATIONS.

It is a violation of law to operate an automobile without displaying a license number obtained in the manner required by law.

No indictment having been previously returned, an insane person cannot be prosecuted after three years' confinement for insanity.

March 24, 1917.

Lew McDonald, County Attorney, Cherokee, Iowa.

Dear Sir: We have your esteemed favor of the 9th instant, submitting the following questions to this department, upon which you desire an opinion:

(1) We have caught a man running an auto on a number manufactured by himself. I am delaying prosecution till I have an answer from you on this point whether or not there is any chance to prosecute for counterfeit of any kind.

(2) How about this case, where a man is confined in a state hospital for insane immediately after the commission of a felony and released at a time so remote that prosecution cannot be had within the statutory three years? It seems to me a clear case of evasion. Will the time by statute operate in a case of this kind?

As to your first inquiry, beg to advise that section 1571-m21, supplement to the code, 1913, provides that the violation of any

of the provisions of sections 1571-m2 to 1571-m14 inclusive, of the supplement, 1913, as amended by the 36th general assembly, constitutes a misdemeanor, punishable by fine not exceeding $50.00. Said section provides further that the violation of section 1571-m7 supplemental supplement, 1915, and section 1571-m11 supplement of 1913, or either of said sections, shall subject the violator to not only the $50.00 fine, but also an additional penalty sufficient to pay the registration fee he should have paid.

Assuming, therefore, that the man you caught running an auto on a number manufactured by himself, had neglected to pay the regular registration fee and secure his registration number, it is our opinion that the foregoing sections apply.

In regard to your second inquiry, assuming that no indictment had ever been returned, it is our opinion that the time has now passed for prosecution. If he had been indicted, then prosecution can be had; otherwise not.

Section 5285 of the Code;
Title XXV, Chapter 44 of the Code.

W. R. C. KENDRICK,
Assistant Attorney General.

EXCLUSION OF INFECTED NURSERY STOCK.

The state entomologist may exclude shipments of infected shrubbery or nursery stock which has not been inspected by an entomologist and does not have his certificate attached or that of his representative.

March 29, 1917.

R. L. Webster, State Entomologist, Ames, Iowa.

Dear Sir: We have your request for the opinion of this department on the following facts:

> On account of the presence of the white pine blister rust in certain eastern states, several western states have raised a quarantine against those states, prohibiting the shipment of all white pines into their respective states from these states. On account of the possibility of this dangerous disease gaining access to Iowa, it has been advised that a similar quarantine be raised for Iowa. Does the state entomologist have authority for such quarantine? Can the state entomologist refuse to approve certificates of inspection from other states for certain kinds of nursery stock and still approve these same certificates for other kinds of nursery stock?

Sections 2575-s49 and 2575-a50 of the 1913 supplement to the code do not appear to confer upon the state entomologist the power to establish an absolute quarantine against shipments from other states but it does confer the power to inspect all shipments into the state of nursery stock, such inspection to be by the entomologist or by an inspector duly approved by him and, under this provision, of course, you may exclude shipment into the state of any infected shrubbery or nursery stock which has not been inspected and to which is not attached the proper certificate by the entomologist or his representative.

As to the second proposition, you may approve shipments, or parts of shipments, certified by an inspector of another state and refuse shipments, or parts of shipments, so certified by him; by which we mean that the mere fact that you have approved his certificate to one shipment or consignment does not obligate you to approve it on another shipment or consignment.

J. W. SANDUSKY,
Assistant Attorney General.

USE OF CAPITAL EXTENSION FUNDS.

Capitol Extension funds may be used for whatever purpose the legislature may designate, and the previous act may be amended or enlarged upon as that body sees fit.

March 29, 1917.

P. C. Holdoegel, Senate Chamber, State House.

Dear Sir: We have your request for an opinion on the following facts:

> I voted for the use of the capitol extension funds for the purpose of erecting a temple of justice under the impression that the expenditure of these funds for building was contemplated in the original act, as provided for in Section 1400-tl and the following sections in the Supplement to the Code, 1913. There has a doubt arisen in my mind as to whether this was contemplated in the act. Will you kindly let me have your opinion as to whether the construction of additional buildings was contemplated.

Chapter 14, acts of the thirty-fifth general assembly, pertaining to the capitol extension matter, provides for the levying of a tax and, in general terms, prescribes the purposes for which such tax is levied and the use to which the funds are to be applied in the way

of improvements to the grounds, etc. The act also provided for a plat showing a diagram of the grounds and buildings which might thereafter be erected thereon. This plat is expressly made a part of the act and shows, among other buildings, the proposed temple of justice. It is true that no express provision is made for applying any part of these funds to the construction of any particular building but your body has control of the property of the state and all funds raised for state purposes by taxation or otherwise and I am of the opinion that it is competent for this legislature to amend or enlarge upon the provisions of this act of your predecessors and that you, in fact, may use the funds raised for any purpose which your honorable body may deem expedient and proper and especially for the improvements included in the plat referred to.

J. W. SANDUSKY,
Assistant Attorney General.

WHEN A CITY ORDINANCE CONFLICTS WITH STATE LAW.

A city ordinance in conflict with state law is void.
A scale license by Food and Dairy commission supersedes license under city ordinance.

July 9, 1917.

J. G. Krammerer, Assistant Attorney, Muscatine, Iowa.

Dear Sir: Replying to your favor of June 30th, pertaining to the question of conflict between Section 3009-m of the 1915 Supplement to the Code, and an ordinance of the city of Muscatine, will say, there is no doubt, I assume, that the charter under which the city of Muscatine is organized confers upon it, as the general law does upon cities and towns organized thereunder, the power, among other things, to authorize the establishment of city scales upon which produce and other commodities sold by weight within the city must be weighed, and I also assume that the ordinance establishing the three scales in different parts of the city and requiring all coal sold within the city limits to be weighed thereon was regularly adopted, but as to whether any claim is made that on account of Muscatine being organized under special charter the rule of law which might govern and control cities and towns organized under the general law, was not applicable to and could not control and govern that city, I am not advised, but, however, that may be it cannot make any difference in this instance, for the same rule must apply to both classes.

The fact that the city of Muscatine is organized under special charter does not make it any the less a creature of the state than though it was organized under the general law. It owes its official existence to an act of the legislature to the same extent, and with the same limitation and obligations as cities organized under the general law and its powers may be extended or limited by its creator just the same.

The creation of municipal corporations and the conferring upon them of certain powers does not deprive the legislature of that general control over the citizens which was before possessed. It still has authority to amend their charters, enlarge or diminish their powers, and overrule their legislative action. The rights and franchises of such a corporation being granted for the purpose of government, can never become such vested rights as against the state that they cannot be taken away, nor does the charter constitute a contract in the sense of the constitutional provision which prohibits the obligation of contract being violated. Restraints on the legislative power of control must be found in the constitution of the state, or they must rest alone in the legislative discretion. Cooley Const. Law, 228.

Applying the foregoing principles to the case before us the paramount power of the legislature must control and to the extent to which the ordinance of the city of Muscatine conflicts with the provisions of Section 3009-m, of the 1915 Supplement to the Code, it is inoperative and void, and may not be enforced against the coal dealers who use scales bearing the license tag of the dairy and food commissioner.

City of Burlington vs. Kellar, 18 Iowa, 59.

J. W. SANDUSKY,
Assistant Attorney General.

STATE BOARD OF ACCOUNTANCY.

The business and practice of accountancy is placed under statutory regulation and the law prohibits persons not holding certificates from using the abbreviation C. P. A. in connection with this name and provides penalties for violation thereof.

January 10, 1918.

Edwin C. Prouty, Secy. State Board of Accountancy, Davenport, Iowa.

Dear Sir: Your request for the opinion of this department on the following questions has been referred to me for attention. You state:

> The board of accountancy has directed me to call your attention to Chapter 21-A of the Supplemental Supplement to the Code of Iowa, 1915, and ask that you give us an opinion on certain points in reference thereto.
>
> Referring to Section 2620-A. 1. Would the holder of a certificate issued by this board have the right to use the words "Company" or "and Company" in connection with his name unless he actually was in partnership with another certified public accountant of this state? 2. Would any person or persons have the right to practice as certified public accountants under the name of a firm which said person or persons had succeeded to or acquired in some manner? 3. Would any person or persons have the right to use the name of a firm of certified public accountants of another state who had never been holders of Iowa certificates of registration, even if one of the persons using said firm name was the holder of an Iowa certificate? 4. Or do you interpret the law to mean that any firm of accountants holding themselves out to the public as certified public accountants must not use the name of any person not a member of said firm?
>
> Referring to Section 2620-1. What would be the duty of this board in the event that any person or persons are practicing as certified public accountants in this state under any of the conditions mentioned above?

Chapter 21-A of the Supplemental Supplement to the Code provides for the appointment by the governor of a board of accountancy and defines its powers and duties.

Section 1 of the act, being Section 2620-A of the Supplemental Supplement to the Code is as follows:

> That any citizen of the United States residing in the state of Iowa, or having a place for the regular transaction of business

> in the state of Iowa, as a practicing public accountant, and being over the age of twenty-five years, of good moral character, and who shall have received from the board of accountancy of the state of Iowa, a certificate as provided in this act shall be styled and known as a certified public accountant, and be entitled to use the abbreviations C. P. A. in connection with his name, and no other person and no firm all the members of which are not certified public accountants of this state, and no corporation in the state of Iowa shall assume such title or use the abbreviations C. P. A., C. A. or any other words, letters or figures to indicate that the person, firm, or corporation using the same is a certified public accountant.

The act further provides that within thirty days after it takes effect the governor shall appoint three persons to constitute and be known as the board of accountancy to be selected from a list of names of public accountants who have practiced in the state on their own account for a period of at least three years. The board is authorized to meet and formulate rules for its guidance and select a chairman, secretary and treasurer. The time and place of holding examinations under the act must be advertised and the examinations must cover the subjects of theory of accounts, practical accounting, auditing and commercial law as affecting accountancy. Applicants for certificates must produce evidence satisfactory to the board that they are over twenty-five years of age, of good moral character, a graduate of a high school with a four year course, or have an equivalent education, or pass an examination by the board and they are required to have had at least three years practical accounting experience, one year of which shall have been as an accountant in the employ of a public accountant of recognized standing in the profession or in public practice on their own account. After the examination the board shall, if in its judgment the applicants are entitled thereto, issue certificates as provided in the act. The board may, in its discretion, register the certificate of any person who need not necessarily be a resident of the state of Iowa, and who is the lawful holder of a C. P. A. certificate issued under the laws of another state which extends similar privileges to certified public accountants of this state, provided the requirements of said degree in the state which had granted it to the applicant are, in the opinion of the board of accountancy, equivalent to those herein provided, or to holders of a degree of certified public or chartered accountant or the equivalent thereof, issued by any foreign government, provided, that the requirements of such degree are equiva-

lent to those herein provided for the degree of certified public accountant.

Section 9 of the chapter, which is Section 2620-1 of the Supplemental Supplement provides penalties for violations of the act and is as follows:

> If any person shall hold himself out to the public as having received a certificate as provided in this act, or shall assume to practice as a certified public accountant or chartered accountant, or to use the abbreviation C. P. A. or C. A. or any other letters, words or figures to indicate that the person using the same is such certified public accountant, without having received such certificate, or after the same shall have been revoked, he shall be deemed guilty of a misdemeanor, the penalty for which shall be a fine of not less than one hundred dollars nor more than five hundred dollars for each offense, or imprisonment in the county jail for a period not exceeding six months.

Further provision is made that if any person practicing in this state as a certified public accountant shall be found guilty of gross negligence or carelessness or shall wilfully, falsify any report or statement bearing on any examination, investigation, or audit made by him or under his direction, he shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred nor more than one thousand dollars, or by imprisonment in the county jail for not less than three months nor more than one year or by both fine and imprisonment for each time he may be convicted of such offense.

Provision is also made requiring every person who has been granted a certificate under the provisions of the act to give a bond in the sum of five thousand dollars to the auditor of state, before entering upon his duties, for the faithful performance of the same.

As indicated by its title, the obvious purpose and effect of the act is to place the business and practice of accountancy under state regulation. To authorize the appointment of a board of public accountancy and define its powers and duties, and this board is authorized to grant certificates to those public accountants who qualify under the provisions of the act and it seeks to prohibit all persons not so qualified and holding certificates issued by the board from using the abbreviation C. P. A. in connection with their names and also to prohibit all firms, the individual members of which, are not certified public accountants, as well as all corporations who

assume such title or use the C. P. A., C. A. or other words, letters or figures to indicate that the person, firm or corporation using the same is a certified public accountant, and I am of the opinion that the holder of a certificate issued by the board of accountancy would not have the right to use the words "company" or "and company" unless he was a member of a firm or company, the individual members of which were certified public accountants of this state, and your first question is, therefore, answered in the negative. As to your second question, no person can lawfully practice as a certified public accountant who is not such and the fact that he may have purchased or succeeded to the business of a firm or company who had been certified public accountants would give him no right or authority to advertise or practice under the name of such firm or company, and your second question is also answered in the negative. As to your third question I do not believe that a person would have the right to use the name of a firm or company of certified public accountants of another state, which may or may not have been certified public accountants of this state, unless such person, and each of the individual members of such firm or company, are holders of certificates granted by the board of accountancy of this state, and your third question must also be answered in the negative.

As to the remaining question, you will observe from the provisions, of Section 2620-1, which is set out in full above, that it is made a misdemeanor for any person to hold himself out to the public as having received a certificate under the act, or to assume to practice as a certified public accountant, who has not complied with the law and been granted a certificate and in such cases as well as in all cases where the law has been violated the offenders may be prosecuted on the complaint of a member of the board or any other citizen.

J. W. SANDUSKY,
Assistant Attorney General.

INSTALLATIONS OF TOILETS.

Toilets must be provided by the owner or person having charge of the business conducted on the property and not by the owner of the building.

January 31, 1917.

Henry L. Huber, County Attorney, Tipton, Iowa.

Dear Sir: We have your letter of the 19th inst., asking this department for an opinion on the following facts:

> Before my term of office began there was an action instituted to compel a property owner to comply with Section 4999-a1. The circumstances and conditions were as follows: The property owner had, several years previous to the action being instituted, rented the second story of the building for a term of years to be used as a telephone office or exchange. At the time the contract of lease was drawn there were privies or outhouses located on the premises that could be used by the occupants under the lease. After the lease had been entered into, the city council passed an ordinance prohibiting the use of and abolishing all outside privies or vaults. Under this ordinance all outside privies and vaults were abated. The occupying tenant, being a telephone company and, at the time of bringing the action, was employing five or more persons.
>
> The question I desire to ask, or the opinion I would like to obtain is, who can be required, under the above statement of facts, to comply with the requirement of Section 4999-a1 as construed in connection with Section 4999-a5.

The question on which you desire an opinion from us, as we understand it, is—shall the owner of the establishment, the building, where a business is carried on, which employs the requisite number of people and is of such a character as to come within the operation of Section 4999-a1, 1913 Supplement of the Code, provide the facilities enumerated in said section?—or, Shall the person having charge or management of the establishment in which the requisite number of people are employed and is of such a character as to come within the operation of said section, provide such facilities?

Section 4999-a1, 1913 Supplement of the Code, is as follows:

> Sec. 4999-a1. *Water-closets and facilities for* washing. Every manufacturing establishment, workshop or hotel in which five or more persons are employed, shall be provided with a sufficient number of water-closets, earth closets or privies for the reasonable use of the persons employed therein, which shall be properly screened and ventilated and kept at all all times in a clean condition and free from all obscene marking; and such water-closets or privies shall be supplied in the proportion of at least one to every twenty employes; and if women or girls are employed in such establishment, the water-closets, earth closets or privies used by them shall have separate approaches and be separate and apart from those used by the men. In factories, mercantile establishments, mills and workshops, adequate washing facilities shall be provided for all employes; and when the labor performed by the employes is of such a character as to require or make necessary a change of clothing, wholly or in part, by the employes, there shall be provided a dressing room, or rooms, lockers for keep-

ing clothing and suitable washing facilities separate for each sex, and no person or persons shall be allowed to use the facilities assigned to the opposite sex. A sufficient supply of water suitable for drinking purposes shall be provided.

The other section to which you refer (4999-a5), and which provides for the enforcement of the provisions of the former section, is as follows:

> Sec. 4999-a5. *Enforcement—penalty—removal of safety appliances.* It shall be the duty of the commissioner of the bureau of labor of the state, and the mayor and chief of police of every city or town, to enforce the provisions of the foregoing sections. Any person, whether acting for himself or for another or for a co-partnership, joint stock company or corporation, having charge or management of any manufacturing establishment, workshop or hotel, who shall fail to comply with the provisions of said sections within thirty days after being notified in writing to do so, by any one of said officers whose duty it may be to enforce the provisions of said sections, shall be punished by a fine not exceeding one hundred dollars or by imprisonment in the county jail not exceeding thirty days. * * *

The single question presented in this matter is, who should provide the water-closets and washing facilities, for the use of employes, enumerated in Section 4999-a1 and to determine that question we must construe that portion of Section 4999-a5, which provides for the enforcement of the provisions of the former section.

The part of the section directly bearing upon the matter is as follows:

> Any person, whether acting for himself or for another or for a co-partnership, joint stock company, *having charge or management* of any manufacturing establishment, workshop or hotel, who shall fail to comply with the provisions of said sections within thirty days after being notified * * * shall be punished. * * *

This language, as it appears to us, can admit of but one construction, and that is, it is not the owner of the "establishment," the building in which the business is carried on, that must provide the conveniences enumerated, but it is the owner or person having charge of the establishment, the business carried on, who must provide the facilities required, and who may be punished if they are not so provided.

See the case of Lee vs. Smith, 42 Ohio St., 458.

J. W. SANDUSKY,
Assistant Attorney General.

RATE OF COMPENSATION FOR PRINTING OFFICIAL PROCEEDING.

Under section 441 of the Supplemental Supplement payment for the publication of legal notices is to be made at all times on the basis of the standard brevier type for the specified space and form of printing.

October 13, 1917.

J. F. Wall, Chief Examiner, County Accounting Department, State House.

Dear Sir: You ask this department for a ruling on the following question:

> Under Section 441 of the Supplemental Supplement to the Code, 1915, can a publisher charge for printing the proceedings of the board of supervisors, the compensation in said section fixed for a type larger than that specified in said section to be measured according to the number of lines used?

It is our opinion that the charge cannot be made on the basis stated. Section 441 of Supplemental Supplement of 1915 fixes the cost of such publication at 33 1-3c for each ten lines of brevier type or its equivalent. Then in fixing the compensation to be paid the publisher for performing the services in that section required, the ten lines of brevier type must be used as a basis. We believe it was the intention of the legislature to fix the compensation for a particular space of a particular kind of printing and make it the standard by which other kind of printing could be measured and compensated. That is to say, first, if the kind of printing matter is the same as the standard but the amount of such matter is more or less (that is to say, the type is larger or smaller) then the compensation will be more or less as the same compares with the said standard.

Second, if the kind of printing matter is different, for instance, tabulated instead of straight matter, then the compensation shall be increased if the cost of the work is more, or decreased if such cost is less, at all times using the cost of performing the standard as a basis of determination.

With the ten lines in brevier type as a basis, if a different form of work is desired by which the same space will cost less, then less is to be paid for it. If it cost more for the same space, then more is to be paid. If the same form of work is desired but the size of the type is less, then more is to be paid for it, but if the same form of work is desired and the size of the type is larger, then less is to be paid for it.

The payment is to be made at all times on the basis of the said standard for the specified space and form of printing. See Chas. D. Brown Co. vs. Lucas County, 94 Iowa, 70.

J. W. KINDIG,
Assistant Attorney General.

MATTRESSES AND COMFORTS.

Manufacture and sale thereof prohibited if contents consist of shoddy or heretofore used material.

Labeling required before mattresses and comforts can be exposed or offered for sale.

July 24, 1917.

George A. Johnston, Creston, Iowa.

Dear Sir: Your letter of the 16th inst., requesting the opinion of this department on the following question, has been referred to me for attention.

You say:

> Attention has been called to the provision of Chapter 406, Acts of the 37th General Assembly, with regard to branding and labeling mattresses, and upon reading this chapter, it would seem that the requirements of this act would absolutely prohibit not only the use of second hand mattresses in the manufacture of any mattresses, but would prohibit the sale of second hand mattresses as such. We have a number of dealers in this city, who keep and sell second hand mattresses and comforts, and a great many poor people are unable to procure any new mattresses and comforts, but can procure such articles second hand. I will ask you whether or not it is your opinion that said chapter prohibits the sale of second hand mattresses.

The title to this act provides for the branding and labeling of mattresses and comforts, and also provides against the use of unsanitary, unhealthy, old or second hand material in the manufacture thereof, and prohibits the sale of mattresses and comforts containing such materials.

In accordance with the provisions of the title to the act it provides that no person shall manufacture for sale, sell or offer for sale any mattress or comfort which is misbranded or mislabeled. Requires them to be branded or labeled in plain type in the English language, with a true statement of the quality and character of the material with which they are filled and that such filling consists of

wholly new and heretofore unusued material, which label shall be in the form of cloth or cloth lined tag and securely attached to each article upon the most conspicuous part thereof, and no person shall use, either in whole or in part, in the manufacture of mattresses or comforts any cotton or other materials which have been used for any other purpose, and it further provides that no person shall use, either in whole or in part, in the manufacture of mattresses or comforts, any material known as "shoddy," and made in whole or in part from old or worn clothing, carpets or other fabrics, or material previously used, or any other fabric or material from which shoddy is constructed, and defines what shall be included in the term "mattresses" and "comforts."

The penalty provides that a person who sells, offers for sale, gives away, manufactures or causes to be manufactured with intent to sell any mattresses or comforts which are not branded or labeled as required by the act, or who falsely brands or labels any mattresses or comforts, or who fails or neglects to state the true and actual quality of the materials used in any mattress or comfort, shall be fined not less than twenty-five dollars nor more than five hundred dollars, or imprisoned in the county jail not more than six months, or both.

The plain purpose and intent of this act was to prevent the sale as well as the manufacture of mattresses and comforts containing any material known as "shoddy" and which is composed, in whole or in part, from old or worn clothing, carpets or other fabric or material previously used. It does not, however, necessarily prohibit the sale of "second hand" or heretofore used mattresss or comforts, provided, of course, such mattresses or comforts were manufactured from new material, no part of it being material from which shoddy is constructed.

The brand or label, which must be properly attached to each mattress or comfort before being exposed or offered for sale, must contain a true statement of the quality and character of the material with which they are filled and that is consists wholly of new and heretofore unused material.

This must be construed to mean that the material of which the mattresses and comforts are composed was new at the time they were manufactured, as distinguished from the time they are offered for sale, otherwise the right to sell stock which had been on hand

for some considerable time might be seriously doubted if not prohibited, and I am therefore of the opinion that it would be permissible to offer for sale and sell second hand mattresses or comforts, by which is meant mattresses and comforts heretofore used, provided they are properly and correctly branded or labeled showing the true character, kind and quality of the material of which they are composed, that such material was new at the time they were manufactured, that no part thereof consists of any fabric of which shoddy is constructed and that they are second hand articles or articles heretofore used.

J. W. SANDUSKY,
Assistant Attorney General.

UNFAIR DISCRIMINATION.

Unfair discrimination is defined and punished under section 5067-a and c Supplement to Code, 1913.

May 9, 1917.

Steve F. Casey, County Attorney, Iowa City.

Dear Sir: I am in receipt of an inquiry from Mr. Robert N. Carson of your city with reference to the mutual agreement between the dealers of Iowa City as to the fixing of the price of milk in Iowa City, and asking as to whether or not the same is illegal, and if so, whether they can be punished therefor.

I have written Mr. Carson that all opinions must go through the office of county attorney, and that I have written you concerning the same, and you would advise him in the matter.

Section 5067-a Supplement to the Code, 1913, provides:

> That it shall be unlawful for any person, company, partnership, association or corporation owning or operating any business of buying, selling, handling, consigning or transporting any commodity or any article of commerce, to enter into any agreement, contract or combination with any other dealer, or dealers, partnership, company, corporation or association of dealers, whether within or without the state, engaged in like business, for the fixing of the price or prices at which any commodity or any article of commerce shall be sold by different dealers or sellers; or to divide between said dealers the aggregate or net proceeds of the earnings of such dealers and sellers, or any portion thereof; or to form, enter into, maintain, or contribute money or anything of value to any trust, pool, combination or association of persons of whatsoever character or

name, which has for any of its objects the prevention of full and free competition among buyers, sellers, or dealers in any commodity or any article of commerce; or to do or permit to be done by his or their authority any act or thing whereby the free action of competition in the buying or selling of any commodity or any article of commerce is restrained or prevented.

Section 5067-c Supplement to Code, 1913, provides:

That any person, partnership, company, association or corporation subject to the provisions of this act, or any person, trust, combination, pool or association, or any director, officer, lessee, receiver, trustee, employe, clerk, agent or any person acting for or employed by them who shall violate any of the provisions of section one of this act, or who shall aid and abet in such violation, shall be deemed guilty of a misdemeanor, and shall upon conviction thereof *be fined any sum not less than five hundred dollars and not exceeding two thousand dollars or imprisoned in the county jail for a period not exceeding six months, or both,* at the discretion of the court. It shall be the duty of the grand jury to inquire into and ascertain if there exists any pool, trust, combination or violation of any provision in this act, in their respective counties.

Our supreme court has passed upon the proposition involved in the case of

Reeves vs. Cooperative Society, 160 Iowa, 194 and it is the opinion of this department from the facts as submitted to us by Mr. Carson that there has been a violation of the law above quoted.

H. M. HAVNER,
Attorney General.

MARRIAGE.

If a marriage is legal where made, it is legal everywhere, unless the parties leave their own state for the purpose of evading its laws.

September 10, 1917.

A. E. Brown, County Attorney, Osage, Iowa.

Dear Sir: Replying to yours of the 6th inst., relative to first cousins making a contract marriage in some other state while domiciled in this state, will say that the law is in hopeless conflict. The general rule is that marriage is valid everywhere the contract is valid, but in many cases the courts have held that where the parties leave the state of their domicile and contract a marriage

ceremony in some other state for the purpose of evading the laws of their own state that such marriages will not be recognized as valid in their own state for the reason that to do so would be against public policy. Some of the courts base their decisions on the ground that their state law applies to the marriage wherever contracted.

For point bearing on the question, I call your attention to the following:

Hill vs. Nebraska, 57 L. R. A. 155, and cases cited in note.

Succession of Gabisco, 11 L. R. A. (N. S.) 1082, and cases cited in note.

State vs. Fenn, 17 L. R. A. (N. S.), 800, and cases cited in note.

Johnson vs. Johnson, 26 L. R. A. (N. S.), 179, and cases cited in note.

Nebraska vs. Hand, 126 N. W. 1002; 28 L. R. A. (N. S.), 753, and cases cited in note.

Cunningham vs. Cunningham, 43 L. R. A. (N. S.), 355, and cases cited in note.

With reference to your second question where the marriage takes place between persons actually residents of the other state and in harmony with the laws of such state, the marriage would, in my judgment, be deemed valid in this state.

C. A. ROBBINS,
Assistant Attorney General.

CONTINUANCE OF CASES UNDER MORATORIUM LAW.

Litigation, as used in Section 2, Chapter 380, Acts of the 37th G. A., applies to civil matters and not criminal prosecutions.

October 26, 1917.

Realff Otteson, Assistant County Attorney, Davenport, Iowa.

Dear Sir: Your inquiry of the 21st inst., addressed to the attorney general, has been referred to me for attention.

You refer to Section 2, Chapter 380, acts of the General Assembly, and I assume you have reference to the acts of the 37th General Assembly.

You ask whether or not this department has had occasion to construe Section 2, Chapter 380, aforesaid, particularly with reference to criminal prosecutions. The section referred to reads as follows:

> That any such person in the military or naval service of the United States who is now or may hereafter be party to any litigations; the trial of said cause shall, upon his request, be continued until the termination of such service or death of said party.

Beg to advise that this department has never rendered an opinion as to the application of said section to criminal prosecutions; and we do not find that any court has ever passed upon that particular question. In the construction of said section, we are, therefore, forced to rely upon the usual rules of statutory construction to ascertain the real intention of the legislature. To ascertain that intent, it is proper to consider the history of such legislation, that is, what was the reason for such enactment? Also, the language used by the legislature must be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law shall be construed according to such meaning.

The history of such legislation is fresh in the memory of every person. A state of war had been declared to exist between the United States and Germany and to carry that war to a successful issue congress deemed it necessary to raise a large national army, and to raise it at once.

England had demonstrated the failure of the volunteer system so that it became imperative that the army to be raised by the United States should be raised by conscription. Conscription meant that men should be drafted into the military service without giving them an opportunity to arrange their business and personal affairs so that the same would not suffer in their absence. Therefore, with that thought paramount in view, the 37th General Assembly enacted Chapter 380, or what is commonly referred to as the Moratorium Law. The title to said law reads:

> An act to exempt soldiers and sailors and other persons in the military and naval service of the United States from payment of bills of exchange and payments in pursuance of other obligations and granting to such soldiers and sailors exemption from certain taxes.

Section 1 of said law reads:

> All soldiers and sailors and other persons in the military or naval service of the government of the United States or who may hereafter enter such service during the present war are hereby exempted while in such service and for a period of six months after the termination of the war or of said service or death from payment of any bill of exchange or of any negotiable instrument or of any other payment in pursuance of any contract or from any writ of attachment or execution.

Section 2 of said laws provides:

> That any such person in the military or naval service of the United States who is now or may hereafter be party to any litigation; the trial of said cause shall, upon his request, be continued until the termination of such service or death of said party.

Nowhere in said act is any mention made of matters criminal, but the whole tone breathes matters civil in nature. In neither the title nor any section of the law can any thought be extracted, except the all-consuming desire to protect, from the money sharks and unscrupulous creditors, the boys and men brave enough to sacrifice their lives for the sake of their country. Moratorium, as defined by Bouvier, means "A term designating a suspension of all, or of certain remedies against debtors, sometimes authorized by law during times of financial distress." So that the history of this legislation deals entirely with matters civil in character.

Now, as to the meaning of the language used, section 2 of said act provides for the continuance of all causes, upon request, by any person in the military or naval service of the United States, who is now or may hereafter be a party to any litigation. Unless litigation includes criminal prosecutions, then Chapter 380, aforesaid, does not apply to matters of a criminal nature.

Litigation is derived from the Latin word "litigare" which means "to carry on a suit, either as plaintiff or defendant; to test or try the validity of a claim by action." Cyclopedic Law Dictionary.

Bouvier defines litigation to be a "A contest authorized by law in a court of justice for the purpose of enforcing a right;" and defines litigant as "One engaged in a suit."

Anderson defines the term litigate "To carry or defend a suit at law or in equity;" and litigant "A party to a law suit;" and litigation "A contest in a court of justice."

The Cyclopedic Law Dictionary defines litigation to be "A contest authorized by law in a court of justice for the purpose of enforcing a right."

Wharton's Law Lexicon defines litigant to be "One who is engaged in a law suit;" and litigation to be "A law suit."

Bouvier defines the term prosecution to be "The means adopted to bring a supposed offender to justice and punishment by due course of law."

Bouvier also says that "Prosecutions are carried on in the name of the government, and have for the principal object the security and happiness of the people in general."

The Cyclopedic Law Dictionary defines prosecutions to be "The means adopted to bring a supposed offender against the criminal law to punishment by due course of law."

Wharton's Law Lexicon defines prosecution to be "A proceeding either by the way of indictment or information in the criminal courts, in order to put an offender upon his trial."

Not only have the legal lexicographers drawn a clear line of distinction between terms litigation and prosecution, but to the profession itself those words have acquired a peculiar and appropriate meaning; for when one speaks of litigation we intuitively think of a law suit by individuals to determine some private right, but when a prosecution is mentioned our thought at once turns to scenes incident to criminal trials but not only have the law writers and practitioners given to those terms a distinct and separate meaning, but the courts themselves have taken occasion to distinguish them, and the legal meaning of the word litigation will be found to be construed in a well written opinion in the case of Dadman vs. San Diego, 9 Cal. App. 551.

The city of San Diego is a charter city and said charter made it the duty of the city attorney to prosecute on behalf of the people all criminal cases arising upon violations of city ordinances, but said charter also provided "that the common counsel shall have control of all litigation of the city, and may employ other attorneys to take charge of any such litigation, or to assist the city attorney therein."

Under the latter provision, the council passed an ordinance creating the office of special prosecutor, and pursuant thereto employed an attorney by the name of Dadman to prosecute violations of the city ordinance. When Dadman filed his claim for such service, the board of audit disallowed it, whereupon Dadman brought mandamus proceedings to compel the board to allow it. In passing upon the power of the city of San Diego, under the foregoing provisions of its charter, to either create the office of special prosecutor or to employ Dadman to prosecute offenses arising from the violation of the city ordinance, the appellate court in the Dadman case, supra, at page 551 said:

> We think that the term "litigation" of the city was intended only to apply to actions of a *civil nature* in which the city is interested, and not the mere *prosecution for criminal violations of the city ordinances.* It follows then, that the action of the city council in appointing a special prosecutor whose duty it should be to prosecute criminal violations was unauthorized and void, either as an attempt to create an office or a liability for employment.

From all of the foregoing, it will be observed that no court has yet passed directly upon the question involved in Section 2, Chapter 380 of the acts of the 37th General Assembly, although the authorities expressly hold that a distinction must be made between the words litigation and prosecution, and we are of the opinion that Section 2, Chapter 380, aforesaid, is limited in its application and applies only to civil matters.

W. R. C. KENDRICK,
Assistant Attorney General.

MORATORIUM LAW.

A general review of effect of the Moratorium Law upon court proceedings and matters relating to exemption from taxation.

December 3, 1917.

Frank Warner, Secretary Iowa Bankers' Association, Des Moines, Iowa.

Dear Sir: I am in receipt of your letter asking for a construction of Chapter 380, acts of the 37th General Assembly, commonly known as the "Moratorium Act."

The questions submitted are as follows:

First. Are soldiers and sailors in the service of this government at the present time protected from foreclosure on any property owned by them upon which they have given a mortgage as security?

Second. Does this act protect soldiers and sailors who have purchased property under a contract of purchase or sale?

Third. If a man has purchased a house and lot, and has it partially paid for, and has given his note for the balance, which note is secured by a mortgage on the property, and who has since the giving of the mortgage been drafted into the army, can he take advantage of the moratorium?

Fourth. Can a soldier or sailor who has given a mortgage or contract in connection with the purchase of property, legally make any more payments until six months after the close of this war?

Fifth. Can the holder of a note and mortgage given as above stated compel the conscripted soldier or sailor, or his dependents, to make any payments falling due on the property, or foreclose the same?

The first question as above set out must be answered in the affirmative, and they are so protected from foreclosure.

Question No. 2 must also be answered in the affirmative.

Question No. 3 must also be answered in the affirmative.

Question No. 4 must be answered in the affirmative. The soldier or sailor can make the payments any time he desires, but he cannot be compelled to make them.

Question No. 5 must be answered in the negative.

It might be interesting to know that the questions with reference to a moratorium in times of war have been passed upon by the various state courts since the days of the Revolution, and in practically all of the states these moratoriums declared by the legislatures of the various states, have been held to be constitutional.

It is not necessary for me to go into the full history of all of the legislation that has been enacted along this line, but it is sufficient to say that these laws have not only been generally held to be constitutional, but they have been held not to be

such an impairment of an existing contract as to warrant the holding of such laws invalid.

Our own statute contains two sections which bear upon this question, which two sections are as follows:

> Section 1. All soldiers and sailors and other persons in the military or naval service of the government of the United States, or who may hereafter enter such service during the present war, are hereby exempted while in such service and for a period of six months after the termination of the war or of said service or death from payment of any bill of exchange or of any negotiable instrument or of any other payment in pursuance of any contract or from any writ of attachment or execution.
>
> Sec. 2. That any such person in the military or naval service of the United States who is now or may hereafter be a party to any litigation; the trial of said cause shall, upon his request, be continued until the termination of such service or death of said party.

Section 2, therefore, places it beyond the power of any person holding the obligation of a soldier or sailor to bring any cause to trial in which such person is interested in connection with any kind of litigation.

Our own supreme court, in the case of

McCormick vs. Rusch, 15 Iowa, 127,

in passing upon a statute very similar, if not identical, says:

> The statute is, that in all actions now pending or heretofore brought in any of the courts of the state * * * it shall be a sufficient cause for a continuance, on motion of the defendant, his agent, or attorney, if it shall be shown to the satisfaction of the court * * * that the defendant is in the actual military service of the United States or of this state, and upon such showing being made, said action shall stand continued during the actual continuance of said defendant in the military service. The theory of the statute is that such defendants are necessarily absent, engaged in the service of their country; that while thus situated they should not be called upon to defend suits and actions brought against them at home and to compel them to plead or answer before asking a continuance, would frequently defeat the very object and purpose of the statute. We need do no more than suggest that the advice and assistance of the party are frequently absolutely necessary to the proper

> preparation of the pleadings and the law provides for such continuance as much on account of such known necessity as to give him an opportunity of being present at the final trial. To say that until he pleads, it is not known that he has a defense, and that unless he has some defense, there is no necessity for a continuance, substantially begs the whole question. It is because, among other things, he is not in position to present this pleading that the law secured him the continuance. To hold that he shall not have the benefit of the law because he fails to do that which the law itself presumes him incapable of doing, would make the statute inconsistent, and defeat the very object proposed by the legislature.

It has been held by some courts, in the absence of a statute, that civil process should not be issued or served upon persons of military service on the ground of public policy.

While it is against the rules of this department to give opinions to private individuals, yet I feel that the organization which you represent, as well as the soldiers and sailors who are affected by this enactment, are entitled to the consideration which we have attempted to give this matter.

H. M. HAVNER,
Attorney General.

EXECUTIVE COUNCIL CANNOT REFUND CORPORATION FEE.

The executive council has no power to authorize the return of corporation fee because the corporation decides not to engage in business.

September 30, 1918.

R. E. Bales, Secy. Executive Council, Capitol Building, Des Moines, Iowa.

Dear Sir: Your request under date of September 26, 1918, for an opinion from this department, is based, as I understand it, upon the facts as disclosed in the affidavit of F. W. Sargent, and in your letter, which is as follows:

> I am handing you herewith application of the Lafayette Improvement Company, of Des Moines, made to the Executive Council, petitioning that body for the refund of $315.00 filing fee paid to the secretary of state in connection with the incorporation of that company. The council has directed me to request an opinion from your department as to whether it had any legal authority for complying with the application of this petitioner. For your information,

> will say that the fee has gone through the regular channels and has been received in the treasury of the state of Iowa and receipted for by the treasurer of state.

As I understand the affidavit of Mr. F. W. Sargent, this company was organized for the purpose of constructing an apartment house in the city of Des Moines, and that this fee was paid in good faith to the secretary of state by the company with the expectation of immediately constructing an apartment house.

It seems, however, that the company was unable to secure the approval of the capital issues committee, and on that account, the venture was abandoned, and that the company now desires to withdraw the corporation fee paid to the secretary of state.

While it occurs to us that there is equity in the claim made by the company, I do not believe that the executive council possesses the authority to authorize the return of this money. It has reached the state treasurer through the usual channels, and the executive council, it occurs to me, cannot legally order it returned, in the absence of an act of the legislature giving them that power.

F. C. DAVIDSON,
Assistant Attorney General.

PENSIONS TO NORTHERN BORDER BRIGADE.

Pension to the Northern Border Brigade should be computed from date of the passage of the act, April 7th.

May 10, 1917.

Guy E. Logan, Adjutant General, State House.

Dear Sir: Replying to yours of the 8th inst., addressed to the attorney general, with reference to the time when payment of pensions may begin under the provisions of senate file 118, will say:

(1) That the act carries no publication clause and ordinarily would not be in effect until July 4. However, the language of this act is somewhat peculiar. It reads as follows:

> That on and after the passage of this act the survivors of the northern border brigade as shown by the roster of Iowa soldiers * * * shall receive a monthly pension of twenty dollars per month during the lifetime of each such

> survivor, to be paid from the state treasury on the proper voucher being made, and out of funds not otherwise appropriated.

The question then arises whether this peculiar language would make the pension start from the date of the approval of the act, April 7, 1917.

Our supreme court has considered a statute designed to limit the number of saloons where the language is very similar, and reads as follows:

> From and after the passage of this act no city or town council shall by resolution grant consent to sell intoxicating liquors as a beverage at retail to a greater number of persons than one to every one thousand of the population of said city or town as shown by the last preceding state or national census.

In this case, it was held that saloon consent petitions granted after this act was passed and before July 4 when it took effect, were illegal, thus in effect holding that the act was effective from and after its passage and I see no reason why the statute under examination should not be construed in the same way.

It is possible that no act could be done towards drawing the pension until July 4, but in my judgment, it should be computed and allowed from the date of the approval of the act as above stated.

C. A. ROBBINS,
Assistant Attorney General.

CARE OF INSANE.

Liability of county for care of insane person when residing outside state but not having established new residence discussed.

March 3, 1917.

H. J. Ferguson, County Attorney, Tama, Iowa.

Dear Sir: Your favor of the 23rd ultimo, addressed to the department of justice has been referred to me for answer.

In your letter you inquire whether your county is compelled to receive one James Knowlin, formerly a resident of Tama county, Iowa, who had moved to Canada but failed to obtain residence there and who, while in Canada, was convicted of

having killed a man and was thereafter declared insane and who, you are advised, the Canadian authorities are intending to return to the United States to Tama county, and if so, whether there should be action by your commissioners of insanity before sending him to Independence.

In reply we have to say that it is the opinion of this department that, if Mr. Knowlin still continued to be a citizen of Tama county, even though having removed to Canada, Tama county would still be under obligations to receive him in case he was returned. It is also the view of this department that, if he should be returned to Tama county, the proper action would be for the commissioners of insanity of your county to pass upon the condition of the man and make a finding of insanity, if such be the fact, and order his commitment to the insane hospital at Independence.

H. H. CARTER,
Assistant Attorney General.

REPORTING OF BIRTHS.

It is the duty of physicians and midwives to report all births to the Clerk of the District Court which occur after foetus has reached the so-called viable stage.

February 11, 1918.

Simon Fisher, County Attorney, Rock Rapids, Iowa.

Dear Sir: Your request for the opinion of this department on the following questions has been referred to me for attention.

You state:

> A question has arisen under Chapter 326 of the Acts of the 37th General Assembly with special reference to the construction of 5 and 6 thereof, and as I supposed your department has probably passed on this matter for the benefit of the state registrar of vital statistics we wished your construction or interpretation of this chapter upon the following matters:
>
> First, suppose a miscarriage has occurred early in pregnancy, is the physician who attends such patient required to make his report on the blanks furnished by the registrar?
>
> Second, is the physician attending a woman who has suffered a miscarriage required to make the report regardless of the length or period of gestation.

> I think it is obvious that the medical profession should know just what position to take in matters of this kind, and that it is probable that the purposes of the act in question should enter into its proper construction.

I agree with your idea that physicians should know, and as a rule they doubtless do know, what is contemplated by the statute which requires the attending physician to make and file with the clerk of the district court certificates of births as provided for in Section 6 of Chapter 326, Acts of the 37th General Assembly.

Abortions or miscarriages which may occur in the early stages of pregnancy are not considered by the medical profession as births and are not required to be reported, but after the foetus has reached what is termed "the viable stage," by which is meant "able or likely to live," and which in point of time is about seven months from the date of conception, a birth occurring at such time is called a "premature birth." All such cases should be reported the same as all births occurring after full time.

The statute does not attempt to define the term "birth," and hence we must look to standard medical works for a proper definition of the term, and, therefore, I have given you the views as expressed by standard medical writers.

J. W. SANDUSKY,
Assistant Attorney General.

ADMISSION TO TUBERCULOSIS SANATORIUM.

No particular length of residence in the state is necessary to entitle a person to admission to such institution. If the party is actually and in good faith a resident of the state and otherwise eligible to admission he may be admitted, although he has not actually resided in the state for a period of one year.

January 24, 1918.

H. V. Scarborough, Supt. State Sanatorium, Oakdale, Iowa.

Dear Sir: Your request for the opinion of this department on the following question has been referred to me for attention.

You state:

> There seems to be some question as to the time necessary to have resided in this state before an applicant is eligible to admission to the institution.

I have always been of the opinion that the law as interpreted requires a residence of one full year, whether the patient is able to pay or whether the county is to be charged for the maintenance of the patient. This of course works a hardship in some cases, but I presume the time was set knowingly.

In your opinion, can an applicant be admitted legally before a year's residence continuously, and would the offer of payment for the treatment make any difference in the amount of time necessary for the patient to have lived in the state continuously before admission here. In other words, can the admission legally be made if the supervisors are satisfied to accept an applicant as a resident, notwithstanding the fact that he has not lived within the state continuously for one year. Inasmuch as the reception of a patient depends upon this ruling and the patient's circumstances are exceedingly necessitous, can this ruling be made at once?

The question of the right of this party to admission to the institution is doubted for the reason that he may not be, within the meaning of the law, a bona fide resident of this state, which fact, is resolved in his favor, would entitle him to admission. The question of "residence" as used in this act, should not be construed as synonymous with the term "settlement" when used in connection with the care of paupers. No particular time is necessary to constitute a person a bona fide resident of this state.

To entitle a person to vote in this state, the law requires that he shall have been a resident of the state for six months, and of the county sixty days next preceding the day of election and a resident of the precinct in which he offers his vote on the day of election.

To constitute residence within the meaning of our exemption statute, Section 4014, Code of 1897, all that is required is "that the person must be within the state, with the intention of there remaining, and if so, he shall be considered a resident.

To apply the rule governing the question of settlement of paupers to the instant case might effectually prevent the person ever becoming eligible to admission to the sanatorium for, by the service of notice on the pauper at any time within one year of his coming into the state effectually defeats his acquiring settlement.

The disease with which this person is afflicted not only endangers the life of the person afflicted but the presence in the community of a person so afflicted threatens the health and the welfare of the community and it would therefore seem as though such person

should receive proper care and attention, if he is in fact a resident of the state, although such residence may not have continued for any particular length of time. I am, therefore, constrained to believe that if this person is in fact and in good faith a resident of this state, with the intention of permanently remaining here, that he should be held to be a bona fide resident of the state regardless of the length of time he has actually resided within the state, and that he should be held to be entitled to admission to the sanatorium if the other facts exist which would entitle him to such admission.

J. W. SANDUSKY,
Assistant Attorney General.

FEES OF ADMINISTRATOR WHEN ESTATE SUBJECT TO COLLATERAL INHERITANCE TAX.

Statutory fees of executors, administrators and trustees in estates subject to collateral inheritance tax should be based on value of personal estate and such portions of real estate only as may be sold for payment of debts against the estate.

November 8, 1917.

F. J. Murphy, Deputy Treasurer of State, State House.

Dear Sir: Your request for the opinion of this department on the following question has been referred to me for attention.

You state:

> Section 1481-a2 Supplement to the Code, 1913, reads in part as follows:
>
> The statutory fees of executors, administrators, or trustees, estimated upon the appraised value of the property.
>
> The question has been raised by attorneys as to whether this would cover the value of real estate as well as personal property, and that fees be allowed upon the value of the entire estate.
>
> Will you please advise this department at once, if convenient, as to your ruling upon this statute?

Section 1481-a2 of the 1913 Supplement to the Code is as follows:

> The term "debts" as used in this act shall include, in addition to debts owing by the decedent at the time of his death, the local or state taxes due from the estate in January of the year of his death, a reasonable sum for funeral expenses, court costs, the cost of appraisement made for the purpose of assessing the collateral inheritance tax, the statutory fees of

> executors, administrators or trustees estimated upon the appraised value of the property, the amount paid by the executor or administrator for a bond, the attorney fee in a reasonable amount, to be approved by the court, for the ordinary probate proceedings in said estate, and no other sum; but said debts shall not be deducted unless the same are approved and allowed by the court within eighteen months from the death of the decendent as established claims against the estate, unless otherwise ordered by the judge or court of the proper county.

This section defines the term "debts" as used in the act to collateral inheritance tax and limits the amount thereof that may be deducted from estates subject to such tax.

The statutory fees referred to in this section are the fees allowed executors and administrators in the settlement of estates of deceased persons and the provisions of the statute applicable thereto are embraced in Section 3415 of the Code, which provides as follows:

> Executors and administrators shall be allowed the following commissions upon the personal estate sold or distributed by them, and for the proceeds of real estate sold for the payment of debts, which shall be received in full compensation for all the ordinary services:
>
> For the first one thousand dollars, five per cent.;
>
> For the overplus, between one and five thousand dollars, two and a half per cent.;
>
> For the amount over five thousand dollars, one per cent. Such further allowances as are just and reasonable may be made by the court for actual, necessary and extraordinary expenses or services.

It will be observed that the commission allowed by this section to executors and administrators is based upon the personal estate sold or distributed by them and the proceeds of the sale of so much of the real estate as may be sold for the payment of debts, which shall be received in full compensation for all ordinary services.

For the first thousand dollars a commission of five per cent is allowed, for the overplus between one and five thousand dollars two and one-half per cent and for the amount over five thousand dollars one per cent. Such further allowances as are just and reasonable may be allowed by the court for actual, necessary and extraordinary expenses or services.

The language used is clear and explicit and limits the commission or compensation allowed executors and administrators for all ordi-

nary services to a stated per cent or amount of the personal estate, and the proceeds of such portion of the real estate as may be sold for the payment of debts against the estate. 'Tis true that provision is made for additional allowances by the court for actual, necessary and extraordinary expenses or services, but the payment thereof would be from the personal estate and such portions of the real estate as may have been sold for the payment of debts.

I am therefore of the opinion that the statutory fees of executors, administrators or trustees, which may be deducted from an estate subject to the payment of a collateral inheritance tax, must be based upon and limited to the personal estate and so much only of the real estate as may be sold for the payment of debts.

J. W. SANDUSKY,
Assistant Attorney General.

PRIVILEGED COMMUNICATIONS.

Information obtained in a professional capacity by the Superintendent of the State Sanatorium for Treatment of Tuberculosis is to be treated the same as privileged communications.

October 22, 1918.

Board of Control of State Institutions, State House.

Gentlemen: We are just in receipt of your letter of the 8th inst., enclosing a letter from Dr. H. N. Scarborough, superintendent of the state sanatorium for the treatment of tuberculosis, in which he requests an opinion from this department covering the following points:

> First. When subpoenaed in a suit at law between an insurance company and a former patient in the state sanatorium for the treatment of tuberculosis how much information concerning the former patient can the superintendent give without violating the law concerning communications by a patient to his physician?
>
> Second. To what extent should such institution open its records in the making of affidavits for certificates of death to insurance companies?
>
> Third. To what extent would such institution be authorized in giving to outside parties information concerning the physical condition, length of disease, prospects, etc., of patients now in said institution, or who have been there, when this information is desired in connection with the employment of the patient, and other things?

Referring to the first question above asked, it will be pertinent to consider various principles of evidence established by the legislature and followed by our courts. The legislature has declared that any person having a matter pending in court shall be entitled to subpoena any one to attend and testify on his behalf at the trial. Section 4659 of the Code. And for failure to obey a valid subpoena without sufficient cause or excuse the delinquent is guilty of contempt of court, and subject to not only punishment, but also to having his person attached and forcibly brought into court. Section 4664 of the Code. For a distance of not to exceed seventy miles from his residence a person may be compelled to attend a civil trial in the district or superior courts. Section 4660 of the Code. Thus, it will be seen, when a litigant desires the testimony of a certain person he has the right to subpoena him, and the person subpoenaed is required to respond, or subject himself to punishment for contempt of court. It is not for the witness to predetermine his competency to testify, but the court will determine that question when the witness takes the stand and the objection is properly raised. Robb vs. McDonald, 29 Iowa, 330; State vs. Seaton, 61 Iowa, 563. This rule applies to persons holding a public office the same as to those in civil life.

Now, the question arises as to how far a witness can be compelled to divulge certain facts within his knowledge or produce certain records under his control, particularly with reference to the superintendent of the state sanatorium for the treatment of tuberculosis as to information acquired in the treatment of a patient in said institution. As bearing on this question the Iowa statutes declare that no physician shall be allowed, in giving testimony, to disclose any confidential communication properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office, according to the usual course of practice or discipline. Section 4608, Supplement to the Code, 1913. The above section is not confined in its effect to verbal communications, but extends to all facts and information learned by the physician in the discharge of his duties. Brader vs. National Masonic Accident Association, 95 Iowa 149. But it is not for the physician to raise the objection that the information acquired by him is privileged—it is only the patient who can invoke the rule of secrecy. The statute does not disqualify the physician. State vs. Bennett, 137 Iowa, 427; Woods vs. Town of Lisbon, 150 Iowa

433. And the objection may be waived by the patient. Section 4608, supra. The above rules apply to physicians holding an official position, such as the superintendent of the state sanatorium for the treatment of tuberculosis. Mehegan vs. Faber, 158 Wis., 645; Casson vs. Schoenfeld, 166 Wis., 409.

Therefore, in answer to the first question above asked, we are of the opinion that, whenever regularly subpoenaed, it is the duty of the superintendent of the state sanatorium for the treatment of tuberculosis to obey the summons and answer such questions as may be asked concerning a present or former patient in said institution, and if the patient desires to claim the privilege of secrecy, he may do so when the superintendent offers himself as a witness.

Now, as to the legal right of a physician to state in an affidavit of death, given to an insurance company, information concerning the cause of death of his patient, our supreme court has held that an affidavit containing such information should be excluded. Nelson vs. Nederland Life Ins. Co., 110 Iowa, 600. In the Nelson case the court says at page 605:

> This affidavit was objected to on the ground that death had been admitted, and it was a disclosure of confidential communication by deceased to his physician. The policy required no more than satisfactory proofs of death, and the company might, under this provision, demand that the fact of death be shown with reasonable definiteness and certainty. But, under the guise of ascertaining that fact, it had no right to insist upon information concerning the cause thereof, as that would have no direct bearing on such an inquiry.

Therefore, in answer to the second inquiry above, we hold that the superintendent should go no further than necessary to establish the fact of death, without disclosing the cause thereof. He may properly give what information he has concerning the age, residence, and family relationship of the patient, but should refuse to disclose any information pertaining to the ailment of the patient and the treatment thereof.

As to the right of the superintendent of the state sanatorium for the treatment of tuberculosis to furnish the general public information concerning the physical condition, length of disease, prospects and the like of patients who now are or have been in the institution, the prohibition, based upon privileged communications by a patient to his physician, applies only to the giving of testimony in a judicial proceeding. The statute does not prohibit the physician from

disclosing otherwise the secrets of his patients, although such a course would be reprehensible and in disregard of professional propriety. Nelson vs. Nederland Life Insurance Co., 110 Iowa, 600.

In the Nelson case it is said at page 606:

> The physician, in disclosing the secrets of his patients in conversation or writing, violates no law of which we have knowledge, although such a course may be reprehensible and in disregard of professional propriety. It is "in giving testimany" in a judicial proceeding that such disclosures are prohibited by statute.

In answer to this third inquiry above, we are of the opinion that the superintendent is acting within his legal rights in furnishing outside parties information concerning the condition of individual patients; but for him to be discussing the condition of patients with the public generally, or to be furnishing outside parties indiscriminately with information concerning individual patients would not only be a rank breach of professional ethics, but would also disclose a woeful lack of good judgment. There are occasions, of course, when it would be proper to furnish information as to the condition of individual patients, such as upon request by public officials, and relatives of the patient, but such information should never be furnished to those seeking information only, and who evidently desire the information to advance some personal interest. As to whom such information should be given in a matter calling for the exercise of the superintendent's own good judgment; and the fact that he is required to keep a record of each patient does not necessarily require him to furnish a certified copy thereof to any person who might request it.

W. R. C. KENDRICK,
Assistant Attorney General.

COMPENSATION OF SECRETARY BOARD OF DENTAL EXAMINERS.

The board of dental examiners may elect one of their number to act as secretary and treasurer. Under the provisions of Chap. 309, Acts of 37th G. A., the secretary and treasurer of the dental board is entitled to a salary not to exceed $600 per annum and also a per diem for services rendered as a member of the board.

December 16, 1918.

F. H. Paul, State Accountant, State House.

Dear Sir: We desire to acknowledge receipt of your letter of November 4th, 1918, in which you ask for an opinion as to whether

it is proper and lawful for the secretary and treasurer of the state dental board to act as one of the examining members of said board, and in which you further ask this department for an opinion as to whether the secretary and treasurer of the state dental board is entitled to charge and receive pay per diem for writing questions, aiding in conducting the examinations, and grading the papers of the applicants taking the examination, in addition to his salary as provided for in Chapter 309, Acts of the 37th General Assembly.

Section 2600-b, Supplement of 1913, provides for a state board of dental examiners, consisting of five members. Section 2600-c, Supplement of 1913, states in part as follows:

> The board shall organize by selecting one of its members as president, *and one as secretary and treasurer,* and shall meet at least once each year and at such other times as it may deem necessary, and at such place as it may select. * * *

The above section specifically provides that the officers of the board shall be selected from the members thereof. There is no provision contained in the section that restricts or limits the functions or duties such a member may perform, by reason of his being selected as an officer of such board.

It thus follows that your first question, as to whether it is proper and lawful for the secretary and treasurer to act as one of the examining members of the dental board, should be answered in the affirmative.

Your second question calls for a construction of Chapter 309, Acts of the 37th General Assembly, which is as follows:

> Sec. 5. Each member of the board shall receive the sum of seven dollars and fifty cents for each day he is actually engaged in the duties of his office, with the actual expenses incurred by him in the discharge of such duties, and the treasurer shall receive a salary not exceeding six hundred dollars per annum for his services as secretary and treasurer, which amounts shall be paid out of the fund received by the board under the provision of this act, and from no other fund or source.

It will be noted that "the treasurer shall receive a salary not exceeding $600 per annum for his services as secretary and treasurer." From this statement in the statute, it is clear that the salary thus to be paid is for services rendered as secretary and treasurer, and not as a member of the board of dental examiners.

It is the opinion of this department that the secretary is entitled to a per diem as a member of the board, and a salary, not exceeding $600 per annum, for services rendered as secretary and treasurer.

B. J. POWERS,
Assistant Attorney General.

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