EIGHTH BIENNIAL REPORT

OF THE

ATTORNEY-GENERAL

OF THE

STATE OF IOWA

H. W. BYERS
ATTORNEY-GENERAL

FOR TERM ENDING DECEMBER 31, 1910

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STATE OF IOWA,
DEPARTMENT OF JUSTICE,
Des Moines.

To the Honorable B. F. Carroll,
Governor of Iowa:

In compliance with the provisions of our statute relative thereto, I have the honor to submit herewith a report of the business transacted in the Department of Justice during the years 1909 and 1910.

At the beginning of the past term there were pending in this department 107 cases, 32 of which were criminal pending on appeal in the supreme court, and 75 were civil cases. Of the number so pending 32 criminal cases and 33 civil cases have been disposed of, leaving still pending at this time 42 of the civil cases.

Since the ending of the preceding term the criminal cases appealed to the supreme court together with such cases commenced originally by this department number 115, and the civil cases commenced during the same period number 43, making a total of 158 cases entered on the docket of this department during the two years, of which number 78 criminal cases and 13 civil cases have been disposed of, leaving still pending at this time of the new cases 30 civil and 37 criminal, or a total of 67 cases, which, together with the 42 cases on the docket prior to January 1, 1909, and which are still pending, make a total of 109 cases pending on our docket at this time, a complete list of which, as well as a list of all of the cases disposed of during the term with a brief history of the questions involved in the more important ones, will be attached to this report to be included in the printed volume under proper divisions.

During the term 81 official written opinions have been given upon request from members of the general assembly, the governor, and the heads of the several state departments. In addition to these written opinions the department has furnished several hundred letter opinions in response to inquiries from city and county officers.

and in many cases private persons. These letter opinions, of course, were not official in any sense, and in giving them we simply followed a custom that has grown up in the department.

During the term I have received from the clerk of the United States court in advance costs refunded the sum of $11.65, and in attorney fees allowed the state in *American Linseed Company vs. Wright*, $20.00, all of which has been turned over to the state treasurer and his receipt taken therefor.

In addition to the above this department has succeeded in securing the payment to the state in fees that had been long past due, in round numbers, $100,000 during the past two years, and during the four years of my service in the department about $125,000.00, a very large part of which was for filing fees due from foreign corporations under section 1637 of the code and amendments thereto.

In attempting to make these collections and others that were due, the constitutionality and validity of section 1637 was seriously questioned, and to test this question three suits were brought, one against the Barber Asphalt Paving Company, one against the Western Union Telegraph Company and one against the Centerville Light & Traction Company, the latter of which was settled, the defendant paying the filing fee and the costs of the action.

Shortly after these actions were begun the department was advised that similar actions under a statute much like ours had been tried in the courts of Kansas, the statute held valid, and appeals taken to the United States supreme court. That court after full hearing, in a decision handed down January 17, 1910, and reported in Vol. 216 U. S. R. 1, held the Kansas statute unconstitutional on the ground that the provision of the law requiring the telegraph company to pay a filing fee measured by a per cent of all its capital operated as a burden and tax on the interstate business of the company in violation of the commerce clause of the constitution, and reversed the Kansas court.

While there is perhaps enough difference between the Kansas statute and ours to make it possible for us to stay in court with these cases, still I am convinced that in the end our statute will be held unconstitutional. For this reason these cases have been dismissed, and I join with Secretary of State W. C. Hayward in the suggestion that the statute be amended.

The thirty-third general assembly passed several acts which had for their purpose the making, working and improvement of the

roads and highways of the state, the destruction of weeds and the promotion of more uniform and efficient methods of road work in each county.

Sometime after these several provisions became effective Mr. Thos. H. McDonald, Iowa's very efficient and industrious highway engineer, called this department's attention to the fact that little attention was being given to that part of these acts which applied to road improvement, and especially that part of the law which enjoined upon township trustees the duty of providing for road dragging. In response to Mr. MacDonald's suggestions and request a letter was prepared and mailed to every county attorney in the state calling attention to the enactment of these laws, and asking for earnest co-operation in their vigorous enforcement. Almost without exception the county attorneys responded not only promptly but enthusiastically, and within a month after the letters were mailed out schools of instruction in road work under chapter 96, acts of the Thirty-third General Assembly, were being held in nearly every county in the state. At these meetings township trustees and road supervisors were fully advised as to their duties and their responsibility for road and bridge conditions in their several districts, and as a result of this movement, helped as it was by the press and public spirited citizens in every part of the state, the road dragging for the year 1910 exceeded by many thousands of miles that of 1909, more miles of road drainage and more miles of weed destruction along the highways was accomplished than ever before, and for the first time in the history of the state Iowa roads are receiving favorable mention throughout the country. It must be remembered, however, that the year 1910 was an unusually favorable year for road making in Iowa and it will not be either wise or safe to count upon many seasons such as we have had during the past year. To secure and maintain anything like permanent good roads in Iowa the whole system will have to be remodeled, and it is to be hoped the incoming legislature will give this subject the immediate attention its importance demands.

Under chapter 108, acts of the Thirty-second General Assembly, enjoining upon the board of railroad commissioners the duty under certain circumstances to prosecute actions against common carriers before the interstate commerce commission, we have commenced thirteen cases, entitled as follows:

Board of Railroad Commissioners of Iowa vs. Illinois Central Railroad Company, et al.

Corn Belt Meat Producers' Association, Complainant, Board of Railroad Commissioners of Iowa, Intervener, vs. Chicago, Burlington & Quincy Railroad Company, et al.

State of Oklahoma, Complainant, Board of Railroad Commissioners of Iowa, Intervener, vs. Pullman Company, et al.

State of Iowa, ex rel., H. W. Byers, Attorney General, Board of Railroad Commissioners of Iowa, Complainants, vs. The Chicago & Northwestern Railway Company.

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

State of Iowa, ex rel., H. W. Byers, Attorney General, Board of Railroad Commissioners of Iowa, Complainants, vs. The Great Western Railroad Company.

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

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

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

State of Iowa, ex rel., H. W. Byers, Attorney General, Board of Railroad Commissioners of Iowa, complainants, vs. The Chicago, St. Paul, Minneapolis & Omaha Railway Company.

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

State of Iowa, ex rel., H. W. Byers, Attorney General, Board of Railroad Commissioners of Iowa, Complainants, vs. Chicago, Burlington & Quincy Railroad Company.

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

In the first of these cases the original complaint was made by John R. Waller of Dubuque, and the relief demanded before the interstate commerce commission is the reduction of the charge made by the defendant company for hauling passengers across the bridge at Dubuque. The evidence in the case was taken at Dubuque before Commissioner Clark, and the final arguments made to the full commission at Washington and the case fully submitted in May, 1909; no decision, however, has as yet been made by the interstate commerce commission.

In the second case the original complaint to the interstate com-

merce commission was made by the Corn Belt Meat Producers' Association of Iowa, and the relief asked was a re-adjustment and reduction of the live stock rates charged by the defendant company on Iowa shipments, and while the case was pending before the commission on an application for rehearing the Corn Belt Meat Producers' Association of Iowa requested the board of railroad commissioners of Iowa to intervene on the part of the state. In response to this request petition of intervention was filed by this department, and several trips made to Chicago where additional evidence was taken before Commissioner Prouty, and in January, 1910, I went to Washington with Clifford Thorne, attorney for the Corn Belt Meat Producers' Association, at which time the case was argued orally and submitted to the commission, and later on decision was rendered granting substantially the relief asked by the complainants.

In the case against the Pullman company the original complaint was filed with the interstate commerce commission on behalf of the state of Oklahoma, and the relief asked was the reduction in the rates charged by the Pullman company for sleeping car berths. Upon the request of the railroad commissioners of this state this department prepared and filed in said case a petition of intervention asking substantially the same relief as the state of Oklahoma is seeking. In November this year notice was given by the commission that evidence in the case would be taken at Chicago. On the date fixed for the hearing Commissioners Lane and Clark were present; several of the states were represented by their respective attorneys general or their assistants, and Mr. John Fletcher of this department was present to look after the interests of this state. However, before the hearing had proceeded very far the defendant company, through its counsel, presented a proposition offering to make a substantial reduction in sleeping car rates throughout the country. The offer of the company was of such a character that the commissioners deemed it advisable to take the matter up with the whole commission before proceeding further in the case.

The next ten cases have been consolidated and entered upon the docket of the interstate commerce commission under No. 3464 and No. 3465. In these cases it is charged that certain tariffs and charges which are exacted by the defendants for the transportation of property and merchandise in and out of Iowa are unjust, unreasonable and unlawful, and in their operation discriminate against

the cities and towns and places in the interior of Iowa, and persons engaged in business therein. That such rates and charges are unfairly discriminatory, unduly preferential and grossly excessive as compared with the rates charged by the defendants for transporting property and merchandise to cities located on the Missouri river and places located on or near to or east of the Mississippi river, and the relief asked is a re-adjustment of such rates and charges to the end that no undue preference or advantage be given to the cities and towns either on or across the borders of the state; in other words, that the discrimination, preference and advantage complained of be discontinued. The defenedants have all answered the complaint but no time for hearing has been fixed by the commission, and it is not likely that they will be taken up now until some time in March or April.

In addition to the above cases the department has been called upon during the last two years to defend many of the laws of the state in actions brought to test their validity, some of the more important of which follow:

Two cases by the *Western Union Telegraph Company v. B. F. Carroll, Auditor of State, et al.* These cases were commenced in 1903, and were both injunction suits in which the plaintiff company secured temporary writs of injunction enjoining the executive council from certifying out to the several counties of the state tax levies against the property of the plaintiff company. Both of these cases were disposed of during the past year and the tax which amounted to many thousands of dollars has been levied and collected.

State of Iowa, ex rel Chas. W. Mullan, Attorney General v. J. N. Jones, Marshall Dental Manufacturing Company, et al. This action was brought in 1906 to restrain the defendants from draining Goose Lake, a body of water in Greene county, Iowa, covering about 700 acres of land. The defendants claimed the right to drain the lake under title from Greene county; the state, however, contended that the body of water is a meandered lake and held by the state of Iowa in trust for the use and benefit of the people. Decree was entered by the district court in favor of the state, which decree was later affirmed by the supreme court in an opinion filed on the 2d day of July, 1909, and the cause is now pending on appeal in the supreme court of the United States. We regard the case one of unusual importance because involved in it is the question of the right of the state to own and control in her sev-

ereign capacity all of the meandered non-navigable lakes of the state.

Standard Stock Food Company v. H. R. Wright, State Food and Dairy Commissioner. This action was commenced in the circuit court of the United States for the southern district, central division of Iowa in July, 1907. The relief asked was an injunction restraining the food and dairy commissioner from enforcing the provisions of the stock food law passed by the Thirty-second General Assembly, the plaintiff claiming that the law was unconstitutional. The case was decided in favor of the state, the law held constitutional, and up to this time the food and dairy commissioner has collected in fees under this act the sum of $37,475.39.

Samuel Carr et al. v. Chas. R. Hannan, et al., and five others: These cases were commenced several years ago and involve the title to a large tract of land in what is called East Omaha or cut-off; they are known as the river bed cases. The evidence in all of them was taken at Omaha and decision was rendered by Judge McPherson against the state; appeal was taken to the United States circuit court of appeals and the cases were fully argued in that court in May, 1909, but up to this time no decision has been handed down by that court.

W. W. Morrow v. In Re Estate of George Wells, deceased. This action was brought to recover collateral inheritance tax upon $200,000 which was paid out of the estate to one set of the Wells heirs in settlement of their claims against the estate. The defense claimed the amount thus paid as a compromise amounted to a debt against the estate, and hence, was not subject to the collateral inheritance tax. The question raised had never been passed upon by our court. The district court decided the case in favor of the state, and on appeal to the supreme court the judgment below was affirmed and the full amount of $10,000 has since been paid into the state treasury.

F. M. Hubbell, et al v. Lafayette Higgins, State Hotel Inspector. In this case the validity of chapter 68, acts of the thirty-third general assembly, known as the hotel law, was involved. The case was tried in the district court of Polk county and the act held unconstitutional. An appeal was taken by this department to the supreme court where the decision of the lower court was reversed and the act held valid. The case is now on the way to the supreme court of the United States.

McClintock v. Cedar Rapids & Iowa City Railway & Light Company. In this case the validity of the so-called two-cent fare law is involved. The case is pending in the United States circuit court, and not yet assigned for hearing.

State of Iowa, ex rel H. W. Byers, Attorney General v. Chicago, Milwaukee & St. Paul Railway Company. This action was brought originally by the Clark Coal and Coke Company of Davenport against the Chicago, Milwaukee & St. Paul Railway company before the railroad commissioners of Iowa to compel the defendant company to accept coal in cars other than their own and re-ship it over their line. The case was heard by the board and after full hearing an order was issued granting the relief asked by the Clark Coal & Coke Company; the defendant railroad company, however, refused to comply with the order of the railroad commissioners and this action was brought in the name of the state in the district court of Polk county in which a mandatory injunction was asked directing and compelling the defendant railroad company to comply with the orders of the board of railroad commissioners of Iowa. After hearing, the court granted the injunction as prayed and the defendant company appealed to the supreme court and the case is now pending in that court. The railroad company, however, pending appeal, is complying with the injunction issued by the Polk county court. The importance of this case lies in the fact that a question is involved which has been the subject of controversy in this state for years and the settlement of which is important to every shipper and common carrier in Iowa.

Frank A. Macomber v. Alva A. Nicholson, et al. This is an action pending in the United States circuit court for the southern district of Iowa, Central division, in which the constitutionality and validity of the so-called mulct law and other statutes affecting the sale of intoxicating liquors is assailed, and an injunction asked against certain officials restraining them from the enforcement of these laws. There are several of the cases and they were all presented to Judge McPherson, who handed down a decision holding against the plaintiff on every point and sustaining the constitutionality of the law. An appeal followed to the United States supreme court where application was made to one of the associate justices for stay of proceedings pending appeal. This application was denied and it has been renewed to the full bench to be heard sometime in the immediate future.

Old Colony Trust Company v. Fort Dodge, Des Moines & Southern Railway Company, State of Iowa, Intervener. The defendant company is in the hands of a receiver appointed by the United States circuit court. The service on part of the line has been irregular and inadequate, and as reported was about to be abandoned. On complaint of citizens living on the line and at the request of the railroad commissioners this department filed in said court a petition of intervention on the part of the state seeking to compel the company to furnish proper service upon the part of the line referred to. An examiner has been appointed to take testimony. The interesting question involved in the case is as to how far the power of the court may be exercised in compelling a common carrier to operate its trains over that part of its lines on which the business furnished is not sufficient to compensate the company for its service.

Iowa State Manufacturers' Association, Complainant, vs. Adams Express Company, et al.

E. B. Higley Company, et al., Complainants, vs. Wells Fargo & Company Express and the United States Express Company.

State of Iowa, ex rel., H. W. Byers, Attorney General, Complainant, vs. The Adams Express Company, et al.

These cases were all brought before the board of railroad commissioners and consolidated under their number C12. On February 20, 1908, the Iowa State Manufacturers' Association filed with the board of railroad commissioners a complaint against the several express companies doing business in Iowa, in which it was charged that the express rates exacted by the express companies in this state were excessive, unreasonable and extortionate, and in many cases discriminatory, and asked that the matter be investigated by the board of railroad commissioners and a general overhauling not only of the rates but of the schedules and classifications be had and a general reduction be made.

At about the same time the E. B. Higley Company of Mason City and the Andrew Wood Company of Rockwell City, filed complaints with the board asking for the establishment of a schedule of just, reasonable and maximum joint rates on shipments by express. On the 9th day of September, 1910, complaint was filed by the attorney general urging substantially the same relief sought by the foregoing complainants. Testimony was taken, arguments made on both sides and the matter is now pending before the board for decision.

This case in many respects is the most important one in which this department has interested itself during the two terms of the present attorney general. If the final decision should be in favor of the complainants and the reduction made for which we have earnestly contended, it will result in a saving to the people of Iowa of many hundred thousands of dollars every year.

On the criminal side of the docket a number of important cases have been before the department during the term, among which might be mentioned the following:

State of Iowa v. Carson, in which the fish and game law of the state was involved.

State of Iowa v. Holton, Gray & Company. In this case the defendant was convicted on a charge of selling misbranded linseed oil. They appealed to the supreme court and assailed the constitutionality of chapter 131, acts of the Thirty-second General Assembly, which prohibits the sale in this state of any flax seed or linseed oil unless the same answers certain chemical tests, and unless these oils when sold are sold under their true name. The supreme court in a well written opinion, upheld the law and sustained the conviction of the defendant company.

State of Iowa v. Standard Oil Company of Indiana. In this case the defendant was indicted by the grand jury of Lyon county for a violation of chapter 169, acts of the 31st general assembly, which act has come to be known as the "anti or unfair discrimination act." The defendant was charged with selling gasoline at a lower rate in one town than was charged for the same product in a near by town, making allowance for the difference in cost of transportation, and that said lower rate was made for the purpose of destroying the business of a competitor and creating a monopoly. The defendant demurred to the indictment raising numerous questions involving the constitutionality of the law. The demurrer was sustained by the lower court and the cause is now pending in the supreme court on the appeal of the state.

In addition to these cases the following table shows the number of cases submitted to the supreme court during the last four years, and the nature of the crime involved in each case.

Murder	28
Assault with intent to commit murder	2
Breaking and entering	12
Larceny	16
Burglary	9
Adultery	10

Seduction 5
Assault with intent to commit rape..... 16
Rape 18
Uttering a forged instrument..... 10
Perjury 5
Keeping a nuisance 14
Conspiracy 5
Desertion 5
Prostitution 3
Robbery 3
Incest 3
Possession of burglar tools 1
Burning timber of another..... 1
Embezzlement 2
Illegal practice of medicine..... 7
Making false entries 2
Receiving stolen property 3
Keeping a gambling house..... 2
Assisting a prisoner to escape..... 2
Exposing a child 2
Violating the pharmacy law..... 1
Assault with intent to do great bodily injury..... 2
Obtaining money under false pretenses..... 2
Receiving money unlawfully as township trustee..... 1
Leasing property for the purpose of prostitution..... 7
Unlawful distribution of liquor..... 1
Libel 1
Malicious killing of domestic animals 1
Appeal from order denying transcript 3
Throwing at a train 1
Sodomy 1
Enticing for the purpose of prostitution 1
Keeping house of ill-fame 1
Resorting to a hotel for the purpose of lewdness..... 1
Lewd acts 2
Violation of the pure food acts 2
Violation of the plumbing ordinance 1
Enticing to house of ill-fame 1
Attempt to procure abortion 1
Malicious injury to building 1
Illegal soliciting and sale of liquor 1
Unfair discrimination 1
Inebriety 1
Cheating by false pretenses 2
Forcible defilement 1
Exposing for sale and selling misbranded Adulterated Oil.... 1
Violation of the game law 1
Illegal practice of Veterinary Surgery 1
Illegal transportation of intoxicating liquors 1
Failing to provide for live stock 1

There were 11 cases in which the lower court imposed a penalty of life imprisonment, 9 for murder and 2 for rape, and one case in which the death penalty was imposed. The judgment in all of these cases met with the approval of the supreme court.

During the last four years the appeals to the supreme court in the criminal cases were 80 less than during the preceding four years, a falling off in this class of appeals of 27.7%, and of the number so appealed the judgment of the lower court was affirmed in a little over 80% of the cases.

In my former biennial report I ventured to suggest the enactment by the legislature of certain amendments to the laws of the state providing for a better enforcement of the criminal laws, and especially the law affecting the operation of saloons, gambling houses and houses of ill-fame. I urged among other things:

That the Governor be given power to remove certain law enforcing officers upon proper complaint.

A re-organization of the Attorney General's department giving to that officer the right to appear in the district court and before the grand jury of the several counties in matters pending of sufficient importance to justify such appearance.

To give to the Attorney General's department sufficient help to properly transact the business of the department, with salaries high enough to secure the best possible service.

A general revision of the laws covering criminal practice and procedure.

To further carry out the suggestions made in that report, and as a part of the plan that had been worked out in this department for the better enforcement of all the laws of the state, I directed the drafting of four bills, viz.:

A bill relating to the powers and duties of the Sheriff and his deputy.

A bill making it the duty, among other things, 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, except such laws the enforcement of which is exclusively enjoined upon others by the statute.

A bill providing for the re-organization of the Attorney General's department.

A bill empowering the Governor to remove certain officers for misfeasance, malfeasance or nonfeasance in office.

Senator George Cosson, who was then acting as special counsel in this department, and who was at the preceding election elected

to the senate, at my request introduced these bills in the senate, and after some modification and changes the bills were all passed, signed by your excellency, two of them, the bill for the removal of officers and the bill re-organizing the attorney general's department, became effective the first in March, 1909, the other in April of the same year; the other two bills relating to the duties of sheriffs and county attorneys became effective on the 4th day of July of the same year.

We cannot resist the temptation at this point to state what is the truth, and what will be fully shown by the record as we unfold it in this report, and that is that the passage and operation of these laws has placed Iowa in the very front in the matter of civic righteousness and moral cleanliness. The good that has flown from them in cleaner towns and cities, in money saved to the needy, in boys and girls turned from the haunts of vice into the paths of virtue and rectitude, in making sober and industrious husbands and fathers, in making homes happy and inspiring respect for law and order, is so immeasurably great that no matter what may come to us in the future we will never cease being grateful for the opportunity we have had to take even a small part in this great work.

The record is a source of pride to every one in this department as we know it must be to the members of the general assembly who assisted in the passage of these bills, and as it will be to the people generally when they realize fully what has been accomplished for the real and lasting good of the state.

Prior to the passage of these laws the law regulating the sale of intoxicating liquors was being openly violated every day and nearly everywhere in the state. In many places saloons were running on Sunday and in many cities, cities that boasted of the number of their churches and the size and excellency of their schools, the right to take at the gambling table the money that was needed in the home, and the privilege to rob young and old of their character and their virtue in the bawdy houses, was sold at so much a month, and so-called good men in many places were taking profit out of vice unashamed and unafraid, and court expenses and crime were on the increase; while today the liquor laws are quite generally observed, no saloons are operated in any of the cities in Iowa on Sunday, the open gambling house has gone—let us hope never to return, the red light district has been turned into a district of modest homes, vice is being put to rout everywhere

in the state, court expenses are diminishing and in most of the counties of the state crime is decreasing.

Under the sheriff and county attorney acts most of the saloon drug stores in the state have been put out of business, the liquor solicitors in dry counties driven out of the state, the boot-leggers' business made so dangerous and unprofitable that that individual is making his last stand—his only support now being the laws of the federal government.

Under the bill re-organizing the attorney general's department more good has been accomplished in cultivating respect for the law and obedience to its mandates than could have been accomplished in a life time under the old system.

Shortly after this act became effective Mr. J. I. Myerly, postmaster of Des Moines, brought to this office one of the secret officers of the government and introduced him as one of the inspectors of the postal department. This officer called our attention to the operation of a gang of thieves with headquarters at Council Bluffs. He had with him the evidence to show that men were being fleeced out of thousands of dollars every day, and some of the evidence indicated that this colossal gang of swindlers were operating with the knowledge of the local officers of that city, and this officer of the government stated that it was his belief that these officers not only had knowledge of what was going on but that they were actively protecting the gang. These swindlers were operating under the leadership of one J. C. Maybray, and the inspector informed us that he was directed by his superior to secure the co-operation if possible, of this office in the indictment and prosecution of the members of this gang. We rendered such assistance as was possible at that time, and later on a dozen or more members of the gang were indicted in both the state and federal courts.

Among other members of the gang was one John R. Dobbins who had been indicted for swindling one Ballew of Missouri out of $30,000. The appearance of the attorney general was entered in this case with the county attorney of Pottawattamie county, and just before the case was to be called for trial a letter was received at this office from one of the attorneys of the department of justice of the government of the United States in which, among other things, he said: "I understand that the case of the *State of Iowa v. John R. Dobbins,* indicted in connection with the Maybray swindles at Council Bluffs, comes on for trial next Monday. I wish very much that you could in person be present at and assist

in the trial * * * * *. I would regret very much to see an acquittal in these cases on account of the influence it would have on the trial of the cases in the federal court set for December 7th. This is the most colossal gang of swindlers that has been unearthed in this country for many years, and it behooves us as officers of the law to make every exertion to secure convictions. The case is going to be defended by able and resourceful lawyers * * * *. There is a suspicion very largely prevalent—I do not know how much foundation there is for it—that the county attorney and the city government of Council Bluffs were to some extent under the control of these swindlers while they were there, and under such circumstances I deem it exceedingly important that you should oversee this trial."

Dobbins was tried, convicted and sentenced to a term of five years in the penitentiary. His case is now pending on appeal in the supreme court.

Later the attorney general assisted in the trial of another member of this gang by the name of Scott. In this case there was an acquittal.

Later Maybray and eight or ten of his gang were tried in the federal court, all convicted and are now serving time in the penitentiary at Fort Leavenworth.

In addition to this matter the attorney general and his assistants have appeared before grand juries in several of the counties and have rendered valuable assistance in uncovering graft and frauds that were being practiced in public affairs.

The removal law, however, is the cap-sheaf of this whole system of law enforcement laws, and under it seed has been sown that will ripen into a glorious harvest for obedience to law, for morality and for decency and efficiency in public office.

Almost immediately after this law went into effect complaint was made to this department about the conduct of the mayor of Marengo. Accompanying the complaint was the affidavits of numerous citizens of that city charging the mayor with intoxication, and demanding that proceedings be commenced for his removal. The county attorney with the advice and assistance of this department instituted proceedings against the mayor and the case was tried and submitted to Judge Preston of the sixth district, and substantially every allegation of the petition found to be true. An order of removal was made; the case was appealed, the constitutionality of the law assailed upon every ground imaginable,

and after an extended and able argument by defendant's counsel, the case was decided by the supreme court, the law held to be sound upon every point urged against it; thus for the first time in Iowa notice was served that in this state the dignity and efficiency required in the public service demanded sober men.

Prior to the trial of the Maybray cases at Council Bluffs, and almost continuously thereafter until some time in March complaints were pouring into this office charging misconduct and failure in the performance of duty on the part of the chief of police of that city. These complaints culminated early in March in the following communication:

> "To Honorable H. W. Byers,
> Attorney General of the State of Iowa.
>
> The undersigned persons who are residents and citizens of Council Bluffs and interested in the prosperity, morals and welfare of the said city of Council Bluffs, state to you that upon information, we have reason to believe and do believe that George H. Richmond, as chief of police of said city, has been wilfully and knowingly negligent in the discharge of his duties in the office of chief of police, in that he has wilfully and knowingly neglected and failed to enforce the laws and ordinances in regard to pool halls and allowing minors to frequent the same; in that he has wilfully and knowingly failed to enforce the law in regard to the illegal sales of intoxicating liquors; in that he has wilfully and knowingly failed to enforce the laws in regard to prostitution and vice; in that he has wilfully and knowingly failed to enforce the laws in regard to gambling and gambling devices.
>
> We therefore ask that you in your official capacity as Attorney General of the State of Iowa, proceed against the said George H. Richmond as provided by law with a view of removing him from the office he holds and the duties of which he fails to discharge."

Complaint signed by five of the leading business and professional men of Council Bluffs among whom was the president of the law enforcement league.

In response to this demand this department sent Mr. John Fletcher to Council Bluffs for the purpose of ascertaining the exact condition. His report was of such a character that petition was immediately filed for the removal of George H. Richmond, chief of police of that city, and, notwithstanding the most desperate and persistent effort was made to prevent the removal of this officer the evidence was so overwhelming and convincing that the court found, among other things, that during the greater part

of the time said Richmond held the office of marshal and chief of police of the city of Council Bluffs:

> "Saloons, gambling houses and houses of ill-fame have existed and operated within the limits of said city in violation of the laws of the State of Iowa and the ordinances of said city that the saloons were allowed to run and do business at all hours of the night and on Sundays, and without complying with the mulct law in several important particulars not named and without any interference from this department or the police force under his authority. That several well known gambling houses were permitted to operate upon the principal streets of said city under a plan by which each proprietor paid $250.00 monthly to this department. * * *
>
> "That houses of prostitution have at all times been permitted to operate upon the principle streets of said city under arrangements of different kinds whereby each keeper of such houses paid a certain amount monthly for herself and for each female inmate thereof, such sums being usually $12.00 for each mistress and $6.00 each month for each inmate, which sums of money came into the hands of this department and all on the understanding that such place would not be molested by the police as long as such payments were kept up. That all of such money was kept by the defendant, usually deposited in the bank in his private name until the end of the month when such sums were by him turned over to the city clerk and not to the city treasurer.
>
> "The court further finds, that the ordinances of said city declare keepers and inmates of houses of ill-fame and all persons having the reputation and character of being gamblers to be vagrants, but none of the gamblers or proprietors of gambling houses were arested, and all the vagrants named in such ordinances were allowed to go free and ply their vocations without interference from the defendant or his police force, provided only, the women and the gambling proprietors paid their monthly stipend under whatever name and pretext it was paid."

There was much more in the decree but enough has been quoted to show how necessary it was that some legislation be had to make such conditions in a state like Iowa impossible, and how just and proper it was for this judge to remove Chief Richmond.

After this proceeding at Council Bluffs affidavits were filed with your excellency by citizens of Ottumwa charging the mayor of that city with misconduct and asking for his removal. Upon your direction this department investigated that case, filed petition and upon the showing made the mayor was removed for failure to perform the duties of his office and intoxication.

So far as we know there were but three other cases commenced under this removal law; one at Kellogg against the mayor for intoxication, the case, however, was not tried as the mayor resigned before hearing was had; one in Sioux county against the county attorney which was brought by local parties against our judgment and advice and in which the county attorney was vindicated; and one in Union county against the marshal, as we are informed, and for which there was no substantial ground.

Prior to the prosecution by this department of the cases at Marengo, Council Bluffs and Ottumwa we were receiving almost daily complaints from some of the cities charging misconduct to local officers. Since these trials, as I now remember it, we have not had a single complaint from the cities, not even the so-called river cities, and I am sure that the conditions that existed in Council Bluffs, and other cities of Iowa, prior to the trial of the Richmond case cannot now be found to exist in a single city in this state.

All this has been brought about under the removal law without harm to any innocent man or legitimate business; surely no good citizen anywhere with knowledge will lend further respectability to the effort that is being made in some quarters to discredit it.

Now to sum up the general effect of these laws throughout the state.

On September 30, 1906, just prior to the beginning of our first term, there were 43 counties in the state in which the mulct law was in operation, 240 cities and towns with 1770 saloons.

September 30, 1908, there were 40 counties, 219 cities and towns with 1612 saloons.

September 30, 1910, there were 37 counties, 208 cities and towns with 1262 saloons; and the number at this time we do not believe will exceed 1200 saloons, and after July next when new petitions of consent are required to be on file the number of counties operating under the mulct law, in my judgment, will be reduced nearly if not quite half, and under the operation of the Moon law when properly interpretated there will not be to exceed 700 saloons in the whole state.

On December 31, 1908, there were in use in the state 599 druggists permits to sell liquor; today there are not to exceed 400, a decrease in two years of nearly 200, and our reports show that there is less boot-legging carried on in the so-called dry counties

than ever before, all of which shows a steady and certain advance toward the ideal or "no saloon" condition.

Good men may and do differ as to the best method of dealing with the saloon question. Some favor regulation, others prohibition; there is, however, substantial agreement that the institution is an evil and that every effort possible should be made to minimize and reduce the harm that comes to every community in which it exists.

The reports of the county attorneys made to this office within the last month show that there has been a decrease in criminal business for the past year in 35 counties, in some of them the decrease being reported as high as 50 per cent., 29 county attorneys report the criminal business about the same as last year, while in only 14 counties has there been any increase, and in most of these the increase very slight.

The improvement thus shown all along the line is not, of course, all due to the work of this department. Much has been accomplished by civic societies and organizations all over the state, nor should we be content with what has been accomplished great as it is, because it may as well be understood that only a beginning has been made in law enforcement.

The saloon and the gambling house are bad enough and have taken toll to the limit; the house of ill fame is worse and counts its victims by the scores of thousands, and while no let up in the fight against these evils should be encouraged there are other evils that need the immediate and earnest attention of every law enforcing officer as well as every good citizen. Much is being said nowadays about the white plague, and much good is being accomplished toward wiping it out; its victims, however, are numbered by the hundreds while the victims of what has recently been termed the "yellow finger" plague can be counted by the thousands, and the shame of it is that a large per cent of them are boys under twenty-one years of age. Fifteen or more years ago the sale of cigarettes was made unlawful in this state, and it is against the law today to sell them anywhere in Iowa, but notwithstanding this, the signs of the use of the deadly weed is observable on every hand, and only a short time ago one of the greatest railroad systems of the country issued an order that after a certain date no person with "yellow fingers" should be employed or retained by that system.

Then there is the adulterated food and short-weight men; the illegal combine to maintain unreasonable prices, and many other things that need constant attention.

So far as the liquor and cigarette question is concerned the law enforcing machinery of the state is now in splendid working order. All we need to complete it is some federal legislation authorizing the state authorities to deal with interstate shipments and prohibiting the issuance of government licenses to persons doing business in so-called dry counties, and there is no good reason why we should not have this federal legislation in the immediate future.

There are many other things that this department has to deal with that might be mentioned but this report is already too long; however, before closing it I feel it my duty to suggest the following amendments and changes in our laws.

First. A general revision of the laws covering practice and procedure in the courts of the state. Simplify court methods by repealing every provision that permits delay as a matter of right by motion or other pleading so that it may no longer be said, as it was just recently by one of our prominent district judges, that, "It is absurd to reverse a civil case and send it back for retrial because of the non-observance of some technicality that has nothing to do with the merits of the case, and it is a travesty upon justice to discharge some criminal who is unquestionably guilty merely because some mouldy precedent was not followed."

Second. Rearrange and readjust the judicial districts of the state. Under the present arrangement some of the districts have more business than can be speedily and properly disposed of while many of them do not have enough to keep the courts busy half of the time.

Third. Increase the salary of the attorney general and his assistants. The salary of the head of the department of justice ought to be the same as the salary now paid to the members of the supreme court, and the annual salary of each of the assistants ought to be at least $2,500.00, and that of the stenographers $100.00 a month.

Fourth. Amend the law prohibiting trusts, combinations and pools for the purpose of controlling prices by adding the necessary provisions for making investigations and procuring evidence. As the law is written now in this state it is a dead letter. No matter how zealous the prosecuting officer may be in his desire to protect the people against unlawful combinations and trusts, he

is practically helpless unless the legislature furnishes him the necessary machinery and funds to carry on a successful investigation and prosecution.

During the four years of my service in this department Mr. Charles W. Lyon has had charge of the appeals in criminal cases, and aside from a few days vacation he has hardly missed a day from his desk and the credit for the showing made in this department of the work of this office is due to his industry and the care with which the record made in the courts below has been made up and presented to the supreme court. Mr. Lyon leaves the office the first of the year to enter the practice in Des Moines with Judge Howe under the firm name of Howe & Lyon.

During the first year if this term Mr. Charles S. Wilcox acted as special counsel for the department, and his work was not only satisfactory but of the very highest order. He resigned his position to enter the practice of law here in the capital city, and the position for the last year of the term has been filled by Mr. John Fletcher of Avoca, Iowa, who has shown himself to be an industrious and failthful public officer.

Mr. George Cosson who served with us during the former term has continued his faithful and efficient work throughout this term.

Miss Hobbs and Miss Gilpin have been with the department during the entire four years. They have had charge of the dockets and the stenographic work of the office and have performed their duties faithfully and well.

The uniform courtesy and kindness of all the officers and employes in and about the capitol building will always be remembered with gratitude.

Respectfully,

H. W. BYERS,
Attorney General.

Schedule A is a complete list of all appeals in criminal cases submitted to the supreme court during the years 1909 and 1910, and also all rehearings asked during that period, and shows the final disposition of the cases.

Schedule B is a list of all criminal cases pending on the first day of January, 1911.

Schedule C is a list of civil cases which were pending in the state and federal courts January 1, 1909, and have since been disposed of.

Schedule D is a list of civil cases which have been commenced and disposed of since January 1, 1909.

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

Schedule F contains some miscellaneous letters addressed to the county attorneys of the state which will, no doubt, be of interest to the public.

Schedule G is the official written opinions given by this office during the years 1909 and 1910.

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

SCHEDULE "A"

The following is a list of criminal cases submitted to the Supreme Court, and also rehearings asked during the years 1909 and 1910 and the final dispositon of the cases.

Title of Case	County	Decision	Offense
State v. Allan, George, Appellant	Polk	Affirmed Feb. 19, 1910	Uttering a forged instrument.
State v. Adkins, L. M., Appellant	Poweshiek	Affirmed Feb. 10, 1910	Practicing medicine without a license.
State v. Alley, John, Appellant	Polk	Affirmed Nov. 15, 1910	Larceny.
State v. Bailey, Creed, Appellant	Polk	Affirmed Oct. 25, 1909	Burglary.
State v. Baker, George, Appellant	Montgomery	Affirmed June 30, 1909	Murder in the first degree.
State v. Baker, S. P., Appellant	Winneshiek	Affirmed April 5, 1910. (Petition for rehearing overruled May 16, 1910.)	Adultery.
State v. Bennett, Lulu, Appellant	Scott	Affirmed June 30, 1909	Murder.
State v. Blodgett, D. T., Appellant	Polk	Affirmed June 7, 1909. (Petition for rehearing overruled Sept. 24, 1909.)	Forgery
State v. Brown, Grant, Appellant	Mahaska	Affirmed June 5, 1909. (Petition for rehearing granted Sept. 28, 1909.) Reversed Feb. 16, 1910.	Adultery.
State v. Brown, J. M., Appellant	Calhoun	Dismissed Sept. 10, 1909	Murder.
State v. Brown, J. S., et al., Appellants	Jasper	Dismissed Jan. 11, 1910	Liquor nuisance.
State v. Brown, W. R., Appellant	Woodbury	Affirmed Sept. 28, 1909	Rape.
State v. Butler, John C., Appellant	Hamilton	Reversed March 8, 1910	Assault with intent to commit murder.
State v. Brooks, Byron, Appellant	Hamilton	Affirmed March 8, 1910	Inebriety.
State v. Bell, J. B., Appellant	Carroll	Affirmed April 5, 1910. (Petition for rehearing overruled May 14, 1910.)	Cheating by false pretenses.
State v. Burns, Lizzie, Appellant	Wapello	Affirmed Feb. 8, 1910	Prostitution.

SCHEDULE "A"—CONTINUED

Title of Case	County	Decisions	Offense
State v. Baker, Guy, Appellant.....	Wapello	Affirmed July 7, 1910....	Burglary.
State v. Blotcky, Charles, Appellant..	Woodbury	Dismissed Sept. 27, 1910..	Wife desertion.
State v. Carter, S. E. et al, Appellants.	Polk	Affirmed June 5, 1909.... (Petition for rehearing overruled Oct. 28, 1909.)	Conspiracy.
State v. Carter, W. L. Appellant.....	Polk	Affirmed June 5, 1909.... (Petition for rehearing overruled Oct. 28, 1909.)	Larceny.
State v. Carlson, August, Appellant...	Pottawattamie.	Reversed Dec. 18, 1909....	Uttering a forged instrument.
State v. Chamberlain, L. C., Appellant.	Polk	Dismissed Feb. 9, 1909....	Obtaining signatures by false pretenses.
State v. Chapman, Isaac, Appellant..	Appanoose ...	Affirmed Jan. 23, 1909....	Nuisance.
State v. Clark, John, Appellant.....	Jefferson	Reversed Oct. 27, 1909... (Petition for rehearing overruled Feb. 15, 1910.)	Larceny.
State v. Clark, W. G., Appellant.....	Jefferson	Reversed Feb. 17, 1909....	Obtaining money under false pretenses.
State v. Cook, Paul, Appellant.....	Woodbury	Affirmed Sept. 28, 1909....	Murder.
State v. Criswell, Charles, Appellant..	Mills	Affirmed July 8, 1910.....	Seduction.
State v. Cutler, Edwin, Appelant.....	Polk	(Petition for rehearing dismissed Sept. 20, 1910.) Reversed Nov. 19, 1909...	Installing plumbing contrary to law.
State v. Clayton, Harry, Appellant...	Polk	Affirmed Feb. 8, 1910....	Murder.
State v. Casper, John, Appellant.....	Harrison	Affirmed June 15, 1910....	Breaking and entering.
State v. Carson, J. D., Appellant.....	Clay	Affirmed June 9, 1910.....	Unlawfully shipping game birds. ..
State v. Casper, John, Appellant.....	Harrison	Stricken Nov. 21, 1910....	Breaking and entering.
State v. Cowell, Clyde, Appellant.....	Carroll	Reversed Dec. 13, 1910....	Breaking and entering.
State v. Davenport, Charles, Appellant	Polk	Affirmed Nov. 18, 1910....	Burglary
State v. Delahoyde, Charles, et al, Appelees	Marshall	Affirmed May 10, 1910....	Nuisance.

State v. Dillingham, Frank, Appellant	Carroll	Affirmed July 1, 1909.....	Murder.
State v. Duff, Nelson, Appellant.....	Winneshiek ..	Affirmed Oct. 19, 1909....	Aiding a prisoner to escape.
State v. Dyer, Frank, Appellant.....	Monona	Affirmed Feb. 8, 1910..... (Petition for rehearing overruled May 14, 1910.)	Murder.
State v. Dudley, Frank, Appellant....	Guthrie	Reversed June 14, 1910....	Rape.
State v. Dean, Charles, Appellant....	Marion	Affirmed June 9, 1910.....	Forcible defilement.
State v. Dougherty, B. F., Appellant..	Lucas	Affirmed June 9, 1910.....	Nuisance.
State v. Driscoll, Patrick, Appellant..	Webster	Affirmed Oct. 26, 1910....	Unnecessarily failing to provide live-stock with food, etc.
State v. Edmonds, Arthur, Appellant.	Pottawattamie.	Dismissed Nov. 20, 1909...	Enticing to house of ill fame.
State v. Eckenrode, J. B., Appellee...	Johnson	Affirmed July 8, 1910.....	Violation of pure food law.
State v. Farrell, Harriett, Appellant.	Winneshiek ..	Affirmed Dec. 20, 1909....	Adultery.
State v. Feinberg, M., Appellant.....	Polk	Affirmed Jan. 11, 1910....	Receiving stolen property.
State v. Fuller, John E., Appellant..	Webster	Reversed May 12, 1909....	Desertion.
State v. Floyd, W. B., Appellant.....	Wapello	Affirmed Sept. 29, 1909..	Nuisance.
State v. Fitzgerald, Leon, Appellant.	Lee	Affirmed Oct. 25, 1909....	Burglary.
State v. Finley, Jesse, Appellant.....	Poweshiek ...	Affirmed June 9, 1910....	Murder.
State v. Ferguson, William, Appellant	Sac	Affirmed Dec. 13, 1910....	Breaking and entering.
State v. Flood, John, Appellant.....	Polk	Affirmed July 7, 1910.....	Uttering a forged instrument.
State v. Gibbons, Martha, Appellee...	Fayette	Reversed April 7, 1909....	Murder.
State v. Giffrow, Wm., Appellant....	Plymouth	Affirmed Oct. 26, 1910....	Larceny.
State v. Gustaveson, Axel, et al, Appellants	Webster	Affirmed May 10, 1910....	Maintaining a nuisance.
State v. Gregory, George, Appellant.	Polk	Affirmed July 7, 1910.....	Rape.
State v. Hall, Alexander, Appellant..	Jasper	Dismissed Jan. 11, 1910...	Practicing medicine without a certificate.
State v. Hardin, Eli, et al, Appellants	Polk	Affirmed April 7, 1909.... (Petition for rehearing overruled Oct. 28, 1909.)	Conspiracy.
State v. Hassan, Joseph, et al, Appellants	Crawford	Affirmed Dec. 15, 1910....	Murder.
State v. Hedgpeth, Marion, Appellant	Pottawattamie.	Reversed April 7, 1909....	Breaking and entering.
State v. Herriman, Sam, Appellant..	Fayette	Dismissed May 11, 1909...	Lewdness.
State v. Hetland, John, Appellant....	Wright	Affirmed March 10, 1909..	Assault with intent to commit rape.
State v. Hogan, George A., Appellant	Jones	Affirmed Jan. 11, 1910....	Rape.

SCHEDULE "A"—CONTINUED

Title of Case	County	Decisisns	Offense
State v. Hogan, Oscar, Appellant.....	Wapello	Affirmed Oct. 19, 1909....	Rape.
State v. Hedberg, Bruce, Appellant...	Polk	Dismissed Oct. 21, 1909....	Practicing medicine without a license.
State v. Hulsman, Charles B., Appellant	Polk	Reversed June 9, 1910....	Perjury.
State v. Hunt, Melvin, Appellant.....	Monona	Reversed Oct. 25, 1910....	Seduction.
State v. Herrington, George, Appellant	Woodbury	Affirmed June 14, 1910....	Rape.
State v. Holton, Gray & Company, Appellants	Page	Affirmed July 8, 1910.....	Exposing for sale misbranded and adulterated linseed oil.
State v. Heft, John, Appellant.....	Buchanan	Reversed Sept. 29, 1910...	Rape.
State v. Jones, Samuel, Appellant....	Pottawattamie.	Affirmed Dec. 20, 1909....	Rape.
State v. Jones, William, Appellant...	Polk	Affirmed Feb. 20, 1909....	Keeping house of ill fame.
State v. Junkin, John, Appellant.....	Wapello	Affirmed June 10, 1910....	Murder.
State v. Kimes, David, Appellant.....	Linn	Reversed Jan. 11, 1910....	Larceny.
State v. Krumm, John, Appellant....	Guthrie	Affirmed Oct. 19, 1910....	Seduction.
State v. Lane, Ren, Appellant.....	Wapello	Affirmed Oct. 2, 1909.....	Nuisance.
State v. Latham, Albert, Appellant...	Polk	Affirmed Feb. 20, 1909....	Breaking and entering.
State v. Loose, B. F., Appellant.....	Polk	Reversed Dec. 20, 1909....	Perjury.
State v. Lewis, Elmer, Appellant.....	Clinton	Affirmed Nov. 17, 1909....	Larceny.
State v. Lindsay, Earl W., Appellant.	Jasper	Affirmed Dec. 17, 1910....	Rape.
State v. McPursley, William, Appellant	Polk	Affirmed June 30, 1909.... (Petition for rehearing overruled Sept. 24, 1909.)	Rape.
State v. Mann, Jake, Appellant.....	Linn	Affirmed Dec. 18, 1909....	Breaking and entering.
State v. Matheson, George, Appellant.	Pottawattamie.	Reversed May 7, 1909....	Assault with intent to commit murder.
State v. Mayweather, William, Appellant	Polk	Dismissed May 11, 1909...	Keeping a gambling house.

State v. Miller, F. M., Appellant.....	Marshall	Affirmed Jan. 11, 1910.... (Petition for rehearing overruled Mch. 16, 1910.)	Practicing medicine without a certificate.
State v. Moore, James H., et al, Appellants	Grundy	Affirmed July 1, 1909.....	Breaking and entering.
State v. Morgan, C. A., Appellant.....	Polk	Affirmed March 8, 1910....	Wife desertion.
State v. McKey, Elmer, Appellant....	Mahaska	Dismissed Sept. 23, 1910..	Keeping a gambling house.
State v. Mitchell, John, Appellant....	Polk	Reversed Nov. 21, 1910....	Conspiracy.
State v. Maxwell, Glenn, Appellant...	Story	Affirmed Oct. 26, 1910....	Rape.
State v. Manning, Joe, Appellant.....	Polk	Affirmed Nov. 11, 1910....	Conspiracy.
State v. McCoy, John, Appellant.....	Ida	Reversed Dec. 15, 1910....	Practicing veterinary surgery without a certificate.
State v. Newbauer, Joseph F., Appellant	Clinton	Affirmed Dec. 17, 1910....	Cheating by false pretenses.
State v. Newbauer, Joseph F., Appellant	Linn	Affirmed Jan. 11, 1910....	Lewd and lascivious acts.
State v. Miller, Harrison, Appellant..	Linn	Affirmed Jan. 11, 1910....	Lewd and lascivious acts.
State v. Neslund, Andrew, Appellee..	Polk	Affirmed March 9, 1909....	Violation of pure food law.
State v. Norris, George, Appellant....	Linn	Affirmed April 9, 1910....	Breaking and entering.
State v. O'Connell, M., Appellant....	Polk	Affirmed Nov. 20, 1909....	Uttering a forged instrument.
State v. Ottley, Fred, Appellant.....	Linn	Reversed May 10, 1910....	Forgery.
State v. O'Neil, D. C., Appellant.....	Wayne	Reversed May 16, 1910....	Soliciting orders for the sale of intoxicating liquors.
State v. O'Rourk, Frank, Appellant...	Hancock	Affirmed June 15, 1910....	Nuisance.
State v. Pell, Bert, Appellant.....	Marshall	Affirmed Jan. 13, 1909....	Murder.
State v. Perkins, George, Appellant..	Bremer	Affirmed March 9, 1909.... (Petition for rehearing overruled June 5, 1909.)	Adultery.
State v. Porter, C. C., Appellant.....	Polk	Dismissed Feb. 10, 1909...	Keeping a house of ill fame.
State v. Platts, H. A., Appellant.....	Hardin	Affirmed Nov. 21, 1910....	Larceny.
State v. Roberts, Doug, Appellant....	Appanoose ...	Affirmed Jan. 23, 1909....	Nuisance.
State v. Rohn, Fred, Appellant.....	Jones	Affirmed Jan. 12, 1909....	Rape.
State v. Rome, Roy, Appellant.....	Polk	Dismissed Jan. 13, 1909...	Larceny.
State v. Rozeboom, Andrew D., Appellant	O'Brien	Affirmed Feb. 9, 1910.....	Larceny.
State v. Sells, F. W., Appellant.....	Clarke	Reversed Feb. 10, 1910....	Assault with intent to commit rape.

SCHEDULE "A"—CONTINUED

Title of Case	County	Decisions	Offense
State v. Smith, C. M., Appellant.....	Cherokee	Affirmed Oct. 19, 1910....	Malicious injury to buildings and fixtures.
State v. Stafford, Clarence, Appellant	Polk	Affirmed Nov. 17, 1910.... (Petition for rehearing overruled Dec. 21, 1909.)	Attempt to produce a miscarriage.
State v. Sloan, Benjamin, Appellant..	Pottawattamie.	Affirmed Dec. 13, 1910....	Murder.
State v. Tjernagel, L. J., Appellant..	Story	Affirmed Feb. 15, 1910....	Embezzlement.
State v. Tolliver, Charles, Appellant..	Polk	Affirmed Feb. 20, 1909....	Robbery.
State v. Welsh, Charles, Appellant...	Jasper	Dismissed Jan. 11, 1910...	Liquor nuisance.
State v. Wollett, George P., Appellant	Wapello	Affirmed Oct. 2, 1909.....	Nuisance.
State v. Workman, Willis, Appellant.	Woodbury	Affirmed Oct. 2, 1909.....	Uttering a forgery.
State v. Williams, George, Appellant.	Linn	Affirmed April 9, 1910....	Keeping a nuisance.
State v. Weaver, Walter L., Appellee.	Hardin	Reversed Nov. 21, 1910....	Uttering a forged instrument.
State v. Whitbeck, Walter M., Appellant	Fayette	Affirmed Dec. 16, 1909....	Murder.
State v. Wiley, Everett, Appellant....	Van Buren ...	Affirmed June 15, 1910....	Seduction.
State v. Watkins, James, Appellant...	Polk	Affirmed June 9, 1910....	Murder.
State v. Weyant, Emmet, Appellee...	Clayton	Reversed Dec. 13, 1910....	Desertion.
State v. Wignall, Thomas, Appellant.	Mahaska	Reversed Dec. 15, 1910....	Illegal transportation of intoxicating liquors.
State v. Yates, H. B., Appellant.....	Page	Reversed Jan. 11, 1910....	Practicing medicine without a license.
State v. Young, William, Appellant...	Wapello	Dismissed Oct. 19, 1910....	Adultery.

SCHEDULE "B"

The following is a list of criminal cases pending in the Supreme Court of Iowa, January 1, 1911.

Title of Case	County	Crime
State v. Brandenberger, Joseph, Appellant	Dubuque	Murder.
State v. Brumo, Frank, Appellant	Pottawattamie	Murder.
State v. Beede, John C., Jr., Appellant	Allamakee	Procuring intoxicating liquors.
State v. Butler, John C., Appellant	Hamilton	Assault with intent to commit murder.
State v. Corwin, George D., Appellant	Poweshiek	Practicing medicine without a license.
State v. Cotter, Allen, Appellant	Monroe	Seduction.
State v. Davenport, Charles, Appellant	Polk	Burglary.
State v. Dobbins, John R., Appellant	Pottawattamie	Larceny.
State v. Fisher, Carl, Appellant	Pottawattamie	Assault with intent to commit murder.
State v. Giffrow, William, Appellant (rehearing)	Plymouth	Larceny.
State v. Gilmore, J. E., Appellenat	Jones	Murder.
State v. Guthrie, W. C., Appellee	Polk	Compounding a felony.
State v. Gill, Barney, *et al.*, Appellants	Mahaska	Keeping a house of ill fame.
State v. Hamilton, Francis, Appellant	Decatur	Murder.
State v. Holton, Gray & Co., Appellants (rehearing)	Page	Exposing for sale misbranded and adulterated linseed oil.
State v. Harris, J. A., alias Arthur Johnson, Appellant	Linn	Appeal from an order of the district court.
State v. Harris, J. A., alias Arthur Johnson, Appellant	Linn	Burglary.
State v. Harris, J. A., alias Arthur Johnson, Appellant	Linn	Burglary.
State v. Krueger, August, Appellant	O'Brien	Incest.
State v Kimes, David, Appellant	Linn	Larceny.
State v. Luther, Jack, Appellant	Wapello	Manslaughter.
State v. Leek, Edna, Appellant	Greene	Adultery.
State v. Marley, Guy, Appellant	Harrison	Murder.

SCHEDULE "B"—CONTINUED

Title of Case	County	Crime
State v. Mullen, R. G., Appellant	Wayne	Obtaining money under false pretenses.
State v. Mattix, William, Appellee	Mahaska	Illegal transportation of intoxicating liquor.
State v. Nathoo, C. A., Appellant	Polk	Carnal knowledge of an insensible female.
State v. Novak, Frank, Appellant	Marshall	Assault with intent to commit rape.
State v. Perry, Sidney, Appellant	Polk	Desertion.
State v. Patterson, Perry, Appellant	Polk	Assault with intent to commit murder.
State v. Rankin, John Donald, Appellant	Dickinson	Murder.
State v. Standard Oil Company of Indiana, Appellee	Lyon	Unfair discrimination.
State v. Stickle, Mart, Appellant	Linn	Nuisance.
State v. Sanderson, W. R., Appellant	Johnson	Larceny.
State v. Trachsel, Ed., Appellant	Davis	Adultery.
State v. Thomas, Henry, Appellant	Polk	Murder.
State v. Weaver, Walter L., Appellant	Hardin	Uttering a forged instrument.
State v. Wright, Orlando, Appellant	Harrison	Keeping and maintaining a gambling house.

SCHEDULE C.

Cases pending January 1, 1909, have since been disposed of:

State of Iowa, ex rel Charles W. Mullan vs. German Mutual Ins. Co. of Council Bluffs, B. F. Loose, et al.
State of Iowa vs. Suel J. Spaulding.
Sioux City Gas & Electric Co. vs. W. B. Martin and G. S. Gilbertson.
Edward H. Farley vs. Northwestern Life & Savings Co., B. F. Carroll, et al.
J. W. Murphy vs. Louisiana Purchase Exposition Com., et al.
Louis Busse vs. William A. Hunter, Warden State Penitentiary.
H. A. Merrill, et al., vs. Board of Supervisors of Cerro Gordo County, et al.
Dumbarton Realty Company vs. W. B. Martin, Secretary of State, et al.
Dumbarton Realty Company vs. F. M. Mollyneux, et al.
Dumbarton Realty Company vs. Paul King, et al.
Dumbarton Realty Company vs. E. Erickson, et al.
Dumbarton Realty Company vs. Charles Newton, et al.
C. L. Dunlap vs. C. M. Keller, et al.
S. W. Flint vs. Iowa German Mutual Insurance Association.
State of Iowa, ex rel Frank A. Novak vs. Marquis Barr, Warden.
Louis Busse vs. Marquis Barr, et al.
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State of Iowa vs. Centerville Light & Traction Company.
American Linseed Company vs. H. R. Wright, State Food and Dairy Commissioner.
In re estate of George Wells, deceased.
In re estate of Grace Spangler vs. W. W. Morrow, Treasurer of State.
C. L. Tenant vs. H. F. Kuhlemeier.
State of Iowa vs. Iowa German Mutual Insurance Company.
State of Iowa, ex rel H. W. Byers, Attorney General, vs. The Western Union Telegraph Company of New York.
State of Iowa, ex rel H. W. Byers, Attorney General, vs. The Barber Asphalt Paving Company.
Talcott Bros. vs. Williams Drug Company, et al.
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A. E. Noble vs. Henry Taylor, et al.
State of Iowa, ex rel George M. Pratt vs. Secretary of State, W. C. Hayward.
William Shallenberger vs. A. M. Linn, et al.
W. A. Guild vs. City of Des Moines, et al.
W. W. Morrow, Treasurer of State, vs. Melissa Gould; In re estate of Almiron Culver, deceased.
Samuel Todd vs. Unknown Claimants and Others and Orphans' Home, et al.

SCHEDULE D.

Cases which have been commenced and disposed of since January 1, 1909:

H. E. McCullom vs. Robert McConaughy.
William Edgar Shallenberger vs. A. M. Linn, et al.
John F. Shallenberger vs. A. M. Linn, et al.
State of Iowa vs. J. H. Kern.
State of Iowa, ex rel J. F. Kirby, County Attorney, and H. W. Byers, Attorney General, vs. A. M. Henderson, Mayor of Marengo, Iowa.
Illinois Steel Company, et al., vs. B. F. Carroll, et al.
Frederick M. Hubbell, et al., vs. Lafayette Higgins.
State of Iowa, ex rel H. W. Byers, Attorney General, vs. Pure Food Cider Company.
State of Iowa, ex rel H. W. Byers, Attorney General, vs. George H. Richmond.
State of Iowa, ex rel H. W. Byers, Attorney General, vs. T. J. Phillips, Mayor of Ottumwa.
State of Oklahoma vs. Pullman Company, State of Iowa, Intervener.
W. W. Morrow, Treasurer of State, vs. Charles Alexander Smith, Executor of Estate of James E. Wilson, deceased.
R. A. Mills vs. Charles L. Halgrens.
Corn Belt Meat Producers' Association vs. Chicago, Burlington & Quincy Railroad Company, et al.

SCHEDULE E.

Cases pending in the several courts of the State and the United States, and before the Interstate Commerce Commission.

CASES PENDING IN DISTRICT COURT.

Mrs. F. M. Randolph vs. Cottage Hospital, State of Iowa, et al.
Western Union Telegraph Company vs. B. F. Carroll, Auditor of State.
In the matter of the estate of Richard Wilde, deceased.
Western Union Telegraph Company vs. B. F. Carroll, Auditor of State.
State of Iowa, ex rel B. F. Carroll, Auditor of State, vs. New Liberty Savings Bank.
Frank L. McCoy, et al., vs. James L. Paxton, et al.
Isaac Hall vs. Butler County, et al.
State of Iowa, ex rel Charles W. Mullan vs. The Fraternal Accident Society of Cedar Rapids.
L. W. Nichols, et al., vs. The National Masonic Accident Assn., et al.
City of Council Bluffs, et al., vs. W. B. Martin, et al.
Rose Ann Carravan, et al., vs. Martin Harkins, et al.
Freemont Benjamin, et al., vs. B. F. Huff, et al.

George C. Clark, et al., vs. J. W. McIntosh, et al.
Charles R. Hannan vs. W. B. Martin, et al.
A. White vs. State Board of Medical Examiners, et al.
City of Ottumwa vs. Calvin Manning, et al.
State of Iowa, ex rel H. W. Byers, Attorney General, vs. The Protective Legion of Waverly, New York. Mrs. M. E. Bush.
State of Iowa, ex rel H. W. Byers, Attorney General, vs. Iowa Business Men's Building & Loan Association.
State of Iowa, ex rel H. W. Byers, Attorney General, vs. The Pioneer Life Association of Davenport, Iowa.
State of Iowa, ex rel H. W. Byers, Attorney General, vs. Iowa Farmers' Protective Mutual Hail Insurance Association of Des Moines, Iowa.
Nina Hamilton, by her next friend, F. M. Davenport, vs. Ella Hamilton, et al.
L. P. Boyle vs. Nicholas Cronin.
Theron W. Prindle vs. Unknown Claimants and Orphans' Home, et al.
State of Iowa vs. Carrie Livingston, et al.
State of Iowa, ex rel W. W. Morrow, Treasurer of State, vs. James McKimm, et al.
Chicago, Milwaukee & St. Paul Ry. Co. vs. D. J. Palmer, et al.
Milwaukee Cement Company vs. A. B. Funk, et al.
In re estate of James Murray. Escheat.
Minnie A. Dewey, et al., vs. George F. Anders, et al.

CASES PENDING IN SUPREME COURT.

William H. Semonies, et al., vs. Charles W. Needles, et al.
State of Iowa, ex rel Mullen vs. Syndicate Land Company.
W. W. Morrow, Treasurer of State, vs. Carrie Durant.
H. F. Schulte vs. C. J. Parker, Sheriff.
E. R. Lacy, Administrator of the Estate of John Smith, vs. The Treasurer of the State of Iowa.
In re estate of Emma H. Haddock. George B. Haddock vs. W. W. Morrow, Treasurer of State.
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D. T. Denmead vs. J. M. Parker, Judge, W. H. Muelhapt, et al.
D. T. Denmead vs. J. M. Parker, Judge, P. E. Gifford, et al.
D. T. Denmead vs. J. M. Parker, Judge, Owen Bartley, et al.
In re estate of Louise C. Crawford.
In re estate of James T. Bell, deceased. State of Iowa vs. Joseph H. Bell, et al.
State of Iowa vs. Chicago, Milwaukee & St. Paul Railway Company.
W. W. Morrow, Treasurer of State, vs. Henry Depper, et al.
American Linseed Oil Company vs. W. B. Barney, State Food and Dairy Commissioner.

CASES PENDING IN UNITED STATES SUPREME COURT.

State of Iowa, ex rel Charles W. Mullen vs. J. N. Jones, et al.
Frank A. Macomber, et al. vs. Alva A. Nicholson, et al.

CASES PENDING IN FEDERAL COURT.

Robert C. Rice, et al., vs. Northwestern Life & Savings Company, B. F. Carroll, Auditor, et al.
Samuel Carr, et al., vs. Charles R. Hannan, et al.
John A. Creighton, et al., vs. Charles R. Hannan, et al.
John I. Redick vs. Charles R. Hannan, et al.
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State of Iowa, ex rel H. W. Byers, Attorney General, Board of Railroad Commissioners vs. Chicago, Milwaukee & St. Paul Railway Company.
State of Iowa, ex rel H. W. Byers, Attorney General, Board of Railroad Commissioners vs. Atchison, Topeka & Santa Fe Railway Company.
State of Iowa, ex rel H. W. Byers, Attorney General, Board of Railroad Commissioners vs. Chicago, Burlington & Quincy Railroad Company.
State of Iowa, ex rel H. W. Byers, Attorney General, Board of Railroad Commissioners vs. New York Central & Hudson River Railroad Company.

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EIGHTH BIENNIAL REPORT

OF THE

ATTORNEY-GENERAL

OF THE

STATE OF IOWA

H. W. BYERS
ATTORNEY-GENERAL

FOR TERM ENDING DECEMBER 31, 1910

Printed by Authority of General Assembly

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1911

EIGHTH BIENNIAL REPORT OF THE ATTORNEY GENERAL OF IOWA

STATE OF IOWA,
DEPARTMENT OF JUSTICE,
Des Moines.

To the Honorable B. F. Carroll,
Governor of Iowa:

In compliance with the provisions of our statute relative thereto, I have the honor to submit herewith a report of the business transacted in the Department of Justice during the years 1909 and 1910.

At the beginning of the past term there were pending in this department 107 cases, 32 of which were criminal pending on appeal in the supreme court, and 75 were civil cases. Of the number so pending 32 criminal cases and 33 civil cases have been disposed of, leaving still pending at this time 42 of the civil cases.

Since the ending of the preceding term the criminal cases appealed to the supreme court together with such cases commenced originally by this department number 115, and the civil cases commenced during the same period number 43, making a total of 158 cases entered on the docket of this department during the two years, of which number 78 criminal cases and 13 civil cases have been disposed of, leaving still pending at this time of the new cases 30 civil and 37 criminal, or a total of 67 cases, which, together with the 42 cases on the docket prior to January 1, 1909, and which are still pending, make a total of 109 cases pending on our docket at this time, a complete list of which, as well as a list of all of the cases disposed of during the term with a brief history of the questions involved in the more important ones, will be attached to this report to be included in the printed volume under proper divisions.

During the term 81 official written opinions have been given upon request from members of the general assembly, the governor, and the heads of the several state departments. In addition to these written opinions the department has furnished several hundred letter opinions in response to inquiries from city and county officers.

and in many cases private persons. These letter opinions, of course, were not official in any sense, and in giving them we simply followed a custom that has grown up in the department.

During the term I have received from the clerk of the United States court in advance costs refunded the sum of $11.65, and in attorney fees allowed the state in *American Linseed Company vs. Wright*, $20.00, all of which has been turned over to the state treasurer and his receipt taken therefor.

In addition to the above this department has succeeded in securing the payment to the state in fees that had been long past due, in round numbers, $100,000 during the past two years, and during the four years of my service in the department about $125,000.00, a very large part of which was for filing fees due from foreign corporations under section 1637 of the code and amendments thereto.

In attempting to make these collections and others that were due, the constitutionality and validity of section 1637 was seriously questioned, and to test this question three suits were brought, one against the Barber Asphalt Paving Company, one against the Western Union Telegraph Company and one against the Centerville Light & Traction Company, the latter of which was settled, the defendant paying the filing fee and the costs of the action.

Shortly after these actions were begun the department was advised that similar actions under a statute much like ours had been tried in the courts of Kansas, the statute held valid, and appeals taken to the United States supreme court. That court after full hearing, in a decision handed down January 17, 1910, and reported in Vol. 216 U. S. R. 1, held the Kansas statute unconstitutional on the ground that the provision of the law requiring the telegraph company to pay a filing fee measured by a per cent of all its capital operated as a burden and tax on the interstate business of the company in violation of the commerce clause of the constitution, and reversed the Kansas court.

While there is perhaps enough difference between the Kansas statute and ours to make it possible for us to stay in court with these cases, still I am convinced that in the end our statute will be held unconstitutional. For this reason these cases have been dismissed, and I join with Secretary of State W. C. Hayward in the suggestion that the statute be amended.

The thirty-third general assembly passed several acts which had for their purpose the making, working and improvement of the

roads and highways of the state, the destruction of weeds and the promotion of more uniform and efficient methods of road work in each county.

Sometime after these several provisions became effective Mr. Thos. H. McDonald, Iowa's very efficient and industrious highway engineer, called this department's attention to the fact that little attention was being given to that part of these acts which applied to road improvement, and especially that part of the law which enjoined upon township trustees the duty of providing for road dragging. In response to Mr. MacDonald's suggestions and request a letter was prepared and mailed to every county attorney in the state calling attention to the enactment of these laws, and asking for earnest co-operation in their vigorous enforcement. Almost without exception the county attorneys responded not only promptly but enthusiastically, and within a month after the letters were mailed out schools of instruction in road work under chapter 96, acts of the Thirty-third General Assembly, were being held in nearly every county in the state. At these meetings township trustees and road supervisors were fully advised as to their duties and their responsibility for road and bridge conditions in their several districts, and as a result of this movement, helped as it was by the press and public spirited citizens in every part of the state, the road dragging for the year 1910 exceeded by many thousands of miles that of 1909, more miles of road drainage and more miles of weed destruction along the highways was accomplished than ever before, and for the first time in the history of the state Iowa roads are receiving favorable mention throughout the country. It must be remembered, however, that the year 1910 was an unusually favorable year for road making in Iowa and it will not be either wise or safe to count upon many seasons such as we have had during the past year. To secure and maintain anything like permanent good roads in Iowa the whole system will have to be remodeled, and it is to be hoped the incoming legislature will give this subject the immediate attention its importance demands.

Under chapter 108, acts of the Thirty-second General Assembly, enjoining upon the board of railroad commissioners the duty under certain circumstances to prosecute actions against common carriers before the interstate commerce commission, we have commenced thirteen cases, entitled as follows:

Board of Railroad Commissioners of Iowa vs. Illinois Central Railroad Company, et al.

Corn Belt Meat Producers' Association, Complainant, Board of Railroad Commissioners of Iowa, Intervener, vs. Chicago, Burlington & Quincy Railroad Company, et al.

State of Oklahoma, Complainant, Board of Railroad Commissioners of Iowa, Intervener, vs. Pullman Company, et al.

State of Iowa, ex rel., H. W. Byers, Attorney General, Board of Railroad Commissioners of Iowa, Complainants, vs. The Chicago & Northwestern Railway Company.

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

State of Iowa, ex rel., H. W. Byers, Attorney General, Board of Railroad Commissioners of Iowa, Complainants, vs. The Great Western Railroad Company.

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

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

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

State of Iowa, ex rel., H. W. Byers, Attorney General, Board of Railroad Commissioners of Iowa, complainants, vs. The Chicago, St. Paul, Minneapolis & Omaha Railway Company.

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

State of Iowa, ex rel., H. W. Byers, Attorney General, Board of Railroad Commissioners of Iowa, Complainants, vs. Chicago, Burlington & Quincy Railroad Company.

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

In the first of these cases the original complaint was made by John R. Waller of Dubuque, and the relief demanded before the interstate commerce commission is the reduction of the charge made by the defendant company for hauling passengers across the bridge at Dubuque. The evidence in the case was taken at Dubuque before Commissioner Clark, and the final arguments made to the full commission at Washington and the case fully submitted in May, 1909; no decision, however, has as yet been made by the interstate commerce commission.

In the second case the original complaint to the interstate com-

merce commission was made by the Corn Belt Meat Producers' Association of Iowa, and the relief asked was a re-adjustment and reduction of the live stock rates charged by the defendant company on Iowa shipments, and while the case was pending before the commission on an application for rehearing the Corn Belt Meat Producers' Association of Iowa requested the board of railroad commissioners of Iowa to intervene on the part of the state. In response to this request petition of intervention was filed by this department, and several trips made to Chicago where additional evidence was taken before Commissioner Prouty, and in January, 1910, I went to Washington with Clifford Thorne, attorney for the Corn Belt Meat Producers' Association, at which time the case was argued orally and submitted to the commission, and later on decision was rendered granting substantially the relief asked by the complainants.

In the case against the Pullman company the original complaint was filed with the interstate commerce commission on behalf of the state of Oklahoma, and the relief asked was the reduction in the rates charged by the Pullman company for sleeping car berths. Upon the request of the railroad commissioners of this state this department prepared and filed in said case a petition of intervention asking substantially the same relief as the state of Oklahoma is seeking. In November this year notice was given by the commission that evidence in the case would be taken at Chicago. On the date fixed for the hearing Commissioners Lane and Clark were present; several of the states were represented by their respective attorneys general or their assistants, and Mr. John Fletcher of this department was present to look after the interests of this state. However, before the hearing had proceeded very far the defendant company, through its counsel, presented a proposition offering to make a substantial reduction in sleeping car rates throughout the country. The offer of the company was of such a character that the commissioners deemed it advisable to take the matter up with the whole commission before proceeding further in the case.

The next ten cases have been consolidated and entered upon the docket of the interstate commerce commission under No. 3464 and No. 3465. In these cases it is charged that certain tariffs and charges which are exacted by the defendants for the transportation of property and merchandise in and out of Iowa are unjust, unreasonable and unlawful, and in their operation discriminate against

the cities and towns and places in the interior of Iowa, and persons engaged in business therein. That such rates and charges are unfairly discriminatory, unduly preferential and grossly excessive as compared with the rates charged by the defendants for transporting property and merchandise to cities located on the Missouri river and places located on or near to or east of the Mississippi river, and the relief asked is a re-adjustment of such rates and charges to the end that no undue preference or advantage be given to the cities and towns either on or across the borders of the state; in other words, that the discrimination, preference and advantage complained of be discontinued. The defenedants have all answered the complaint but no time for hearing has been fixed by the commission, and it is not likely that they will be taken up now until some time in March or April.

In addition to the above cases the department has been called upon during the last two years to defend many of the laws of the state in actions brought to test their validity, some of the more important of which follow:

Two cases by the *Western Union Telegraph Company v. B. F. Carroll, Auditor of State, et al.* These cases were commenced in 1903, and were both injunction suits in which the plaintiff company secured temporary writs of injunction enjoining the executive council from certifying out to the several counties of the state tax levies against the property of the plaintiff company. Both of these cases were disposed of during the past year and the tax which amounted to many thousands of dollars has been levied and collected.

State of Iowa, ex rel Chas. W. Mullan, Attorney General v. J. N. Jones, Marshall Dental Manufacturing Company, et al. This action was brought in 1906 to restrain the defendants from draining Goose Lake, a body of water in Greene county, Iowa, covering about 700 acres of land. The defendants claimed the right to drain the lake under title from Greene county; the state, however, contended that the body of water is a meandered lake and held by the state of Iowa in trust for the use and benefit of the people. Decree was entered by the district court in favor of the state, which decree was later affirmed by the supreme court in an opinion filed on the 2d day of July, 1909, and the cause is now pending on appeal in the supreme court of the United States. We regard the case one of unusual importance because involved in it is the question of the right of the state to own and control in her sev-

ereign capacity all of the meandered non-navigable lakes of the state.

Standard Stock Food Company v. H. R. Wright, State Food and Dairy Commissioner. This action was commenced in the circuit court of the United States for the southern district, central division of Iowa in July, 1907. The relief asked was an injunction restraining the food and dairy commissioner from enforcing the provisions of the stock food law passed by the Thirty-second General Assembly, the plaintiff claiming that the law was unconstitutional. The case was decided in favor of the state, the law held constitutional, and up to this time the food and dairy commissioner has collected in fees under this act the sum of $37,475.39.

Samuel Carr et al. v. Chas. R. Hannan, et al., and five others: These cases were commenced several years ago and involve the title to a large tract of land in what is called East Omaha or cut-off; they are known as the river bed cases. The evidence in all of them was taken at Omaha and decision was rendered by Judge McPherson against the state; appeal was taken to the United States circuit court of appeals and the cases were fully argued in that court in May, 1909, but up to this time no decision has been handed down by that court.

W. W. Morrow v. In Re Estate of George Wells, deceased. This action was brought to recover collateral inheritance tax upon $200,000 which was paid out of the estate to one set of the Wells heirs in settlement of their claims against the estate. The defense claimed the amount thus paid as a compromise amounted to a debt against the estate, and hence, was not subject to the collateral inheritance tax. The question raised had never been passed upon by our court. The district court decided the case in favor of the state, and on appeal to the supreme court the judgment below was affirmed and the full amount of $10,000 has since been paid into the state treasury.

F. M. Hubbell, et al v. Lafayette Higgins, State Hotel Inspector. In this case the validity of chapter 68, acts of the thirty-third general assembly, known as the hotel law, was involved. The case was tried in the district court of Polk county and the act held unconstitutional. An appeal was taken by this department to the supreme court where the decision of the lower court was reversed and the act held valid. The case is now on the way to the supreme court of the United States.

McClintock v. Cedar Rapids & Iowa City Railway & Light Company. In this case the validity of the so-called two-cent fare law is involved. The case is pending in the United States circuit court, and not yet assigned for hearing.

State of Iowa, ex rel H. W. Byers, Attorney General v. Chicago, Milwaukee & St. Paul Railway Company. This action was brought originally by the Clark Coal and Coke Company of Davenport against the Chicago, Milwaukee & St. Paul Railway company before the railroad commissioners of Iowa to compel the defendant company to accept coal in cars other than their own and re-ship it over their line. The case was heard by the board and after full hearing an order was issued granting the relief asked by the Clark Coal & Coke Company; the defendant railroad company, however, refused to comply with the order of the railroad commissioners and this action was brought in the name of the state in the district court of Polk county in which a mandatory injunction was asked directing and compelling the defendant railroad company to comply with the orders of the board of railroad commissioners of Iowa. After hearing, the court granted the injunction as prayed and the defendant company appealed to the supreme court and the case is now pending in that court. The railroad company, however, pending appeal, is complying with the injunction issued by the Polk county court. The importance of this case lies in the fact that a question is involved which has been the subject of controversy in this state for years and the settlement of which is important to every shipper and common carrier in Iowa.

Frank A. Macomber v. Alva A. Nicholson, et al. This is an action pending in the United States circuit court for the southern district of Iowa, Central division, in which the constitutionality and validity of the so-called mulct law and other statutes affecting the sale of intoxicating liquors is assailed, and an injunction asked against certain officials restraining them from the enforcement of these laws. There are several of the cases and they were all presented to Judge McPherson, who handed down a decision holding against the plaintiff on every point and sustaining the constitutionality of the law. An appeal followed to the United States supreme court where application was made to one of the associate justices for stay of proceedings pending appeal. This application was denied and it has been renewed to the full bench to be heard sometime in the immediate future.

Old Colony Trust Company v. Fort Dodge, Des Moines & Southern Railway Company, State of Iowa, Intervener. The defendant company is in the hands of a receiver appointed by the United States circuit court. The service on part of the line has been irregular and inadequate, and as reported was about to be abandoned. On complaint of citizens living on the line and at the request of the railroad commissioners this department filed in said court a petition of intervention on the part of the state seeking to compel the company to furnish proper service upon the part of the line referred to. An examiner has been appointed to take testimony. The interesting question involved in the case is as to how far the power of the court may be exercised in compelling a common carrier to operate its trains over that part of its lines on which the business furnished is not sufficient to compensate the company for its service.

Iowa State Manufacturers' Association, Complainant, vs. Adams Express Company, et al.

E. B. Higley Company, et al., Complainants, vs. Wells Fargo & Company Express and the United States Express Company.

State of Iowa, ex rel., H. W. Byers, Attorney General, Complainant, vs. The Adams Express Company, et al.

These cases were all brought before the board of railroad commissioners and consolidated under their number C12. On February 20, 1908, the Iowa State Manufacturers' Association filed with the board of railroad commissioners a complaint against the several express companies doing business in Iowa, in which it was charged that the express rates exacted by the express companies in this state were excessive, unreasonable and extortionate, and in many cases discriminatory, and asked that the matter be investigated by the board of railroad commissioners and a general overhauling not only of the rates but of the schedules and classifications be had and a general reduction be made.

At about the same time the E. B. Higley Company of Mason City and the Andrew Wood Company of Rockwell City, filed complaints with the board asking for the establishment of a schedule of just, reasonable and maximum joint rates on shipments by express. On the 9th day of September, 1910, complaint was filed by the attorney general urging substantially the same relief sought by the foregoing complainants. Testimony was taken, arguments made on both sides and the matter is now pending before the board for decision.

This case in many respects is the most important one in which this department has interested itself during the two terms of the present attorney general. If the final decision should be in favor of the complainants and the reduction made for which we have earnestly contended, it will result in a saving to the people of Iowa of many hundred thousands of dollars every year.

On the criminal side of the docket a number of important cases have been before the department during the term, among which might be mentioned the following:

State of Iowa v. Carson, in which the fish and game law of the state was involved.

State of Iowa v. Holton, Gray & Company. In this case the defendant was convicted on a charge of selling misbranded linseed oil. They appealed to the supreme court and assailed the constitutionality of chapter 131, acts of the Thirty-second General Assembly, which prohibits the sale in this state of any flax seed or linseed oil unless the same answers certain chemical tests, and unless these oils when sold are sold under their true name. The supreme court in a well written opinion, upheld the law and sustained the conviction of the defendant company.

State of Iowa v. Standard Oil Company of Indiana. In this case the defendant was indicted by the grand jury of Lyon county for a violation of chapter 169, acts of the 31st general assembly, which act has come to be known as the "anti or unfair discrimination act." The defendant was charged with selling gasoline at a lower rate in one town than was charged for the same product in a near by town, making allowance for the difference in cost of transportation, and that said lower rate was made for the purpose of destroying the business of a competitor and creating a monopoly. The defendant demurred to the indictment raising numerous questions involving the constitutionality of the law. The demurrer was sustained by the lower court and the cause is now pending in the supreme court on the appeal of the state.

In addition to these cases the following table shows the number of cases submitted to the supreme court during the last four years, and the nature of the crime involved in each case.

Murder	28
Assault with intent to commit murder	2
Breaking and entering	12
Larceny	16
Burglary	9
Adultery	10

Seduction 5
Assault with intent to commit rape..... 16
Rape 18
Uttering a forged instrument..... 10
Perjury 5
Keeping a nuisance 14
Conspiracy 5
Desertion 5
Prostitution 3
Robbery 3
Incest 3
Possession of burglar tools 1
Burning timber of another..... 1
Embezzlement 2
Illegal practice of medicine..... 7
Making false entries 2
Receiving stolen property 3
Keeping a gambling house..... 2
Assisting a prisoner to escape..... 2
Exposing a child 2
Violating the pharmacy law..... 1
Assault with intent to do great bodily injury..... 2
Obtaining money under false pretenses..... 2
Receiving money unlawfully as township trustee..... 1
Leasing property for the purpose of prostitution..... 7
Unlawful distribution of liquor..... 1
Libel 1
Malicious killing of domestic animals 1
Appeal from order denying transcript 3
Throwing at a train 1
Sodomy 1
Enticing for the purpose of prostitution 1
Keeping house of ill-fame 1
Resorting to a hotel for the purpose of lewdness..... 1
Lewd acts 2
Violation of the pure food acts 2
Violation of the plumbing ordinance 1
Enticing to house of ill-fame 1
Attempt to procure abortion 1
Malicious injury to building 1
Illegal soliciting and sale of liquor 1
Unfair discrimination 1
Inebriety 1
Cheating by false pretenses 2
Forcible defilement 1
Exposing for sale and selling misbranded Adulterated Oil.... 1
Violation of the game law 1
Illegal practice of Veterinary Surgery 1
Illegal transportation of intoxicating liquors 1
Failing to provide for live stock 1

There were 11 cases in which the lower court imposed a penalty of life imprisonment, 9 for murder and 2 for rape, and one case in which the death penalty was imposed. The judgment in all of these cases met with the approval of the supreme court.

During the last four years the appeals to the supreme court in the criminal cases were 80 less than during the preceding four years, a falling off in this class of appeals of 27.7%, and of the number so appealed the judgment of the lower court was affirmed in a little over 80% of the cases.

In my former biennial report I ventured to suggest the enactment by the legislature of certain amendments to the laws of the state providing for a better enforcement of the criminal laws, and especially the law affecting the operation of saloons, gambling houses and houses of ill-fame. I urged among other things:

That the Governor be given power to remove certain law enforcing officers upon proper complaint.

A re-organization of the Attorney General's department giving to that officer the right to appear in the district court and before the grand jury of the several counties in matters pending of sufficient importance to justify such appearance.

To give to the Attorney General's department sufficient help to properly transact the business of the department, with salaries high enough to secure the best possible service.

A general revision of the laws covering criminal practice and procedure.

To further carry out the suggestions made in that report, and as a part of the plan that had been worked out in this department for the better enforcement of all the laws of the state, I directed the drafting of four bills, viz.:

A bill relating to the powers and duties of the Sheriff and his deputy.

A bill making it the duty, among other things, 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, except such laws the enforcement of which is exclusively enjoined upon others by the statute.

A bill providing for the re-organization of the Attorney General's department.

A bill empowering the Governor to remove certain officers for misfeasance, malfeasance or nonfeasance in office.

Senator George Cosson, who was then acting as special counsel in this department, and who was at the preceding election elected

to the senate, at my request introduced these bills in the senate, and after some modification and changes the bills were all passed, signed by your excellency, two of them, the bill for the removal of officers and the bill re-organizing the attorney general's department, became effective the first in March, 1909, the other in April of the same year; the other two bills relating to the duties of sheriffs and county attorneys became effective on the 4th day of July of the same year.

We cannot resist the temptation at this point to state what is the truth, and what will be fully shown by the record as we unfold it in this report, and that is that the passage and operation of these laws has placed Iowa in the very front in the matter of civic righteousness and moral cleanliness. The good that has flown from them in cleaner towns and cities, in money saved to the needy, in boys and girls turned from the haunts of vice into the paths of virtue and rectitude, in making sober and industrious husbands and fathers, in making homes happy and inspiring respect for law and order, is so immeasurably great that no matter what may come to us in the future we will never cease being grateful for the opportunity we have had to take even a small part in this great work.

The record is a source of pride to every one in this department as we know it must be to the members of the general assembly who assisted in the passage of these bills, and as it will be to the people generally when they realize fully what has been accomplished for the real and lasting good of the state.

Prior to the passage of these laws the law regulating the sale of intoxicating liquors was being openly violated every day and nearly everywhere in the state. In many places saloons were running on Sunday and in many cities, cities that boasted of the number of their churches and the size and excellency of their schools, the right to take at the gambling table the money that was needed in the home, and the privilege to rob young and old of their character and their virtue in the bawdy houses, was sold at so much a month, and so-called good men in many places were taking profit out of vice unashamed and unafraid, and court expenses and crime were on the increase; while today the liquor laws are quite generally observed, no saloons are operated in any of the cities in Iowa on Sunday, the open gambling house has gone—let us hope never to return, the red light district has been turned into a district of modest homes, vice is being put to rout everywhere

in the state, court expenses are diminishing and in most of the counties of the state crime is decreasing.

Under the sheriff and county attorney acts most of the saloon drug stores in the state have been put out of business, the liquor solicitors in dry counties driven out of the state, the boot-leggers' business made so dangerous and unprofitable that that individual is making his last stand—his only support now being the laws of the federal government.

Under the bill re-organizing the attorney general's department more good has been accomplished in cultivating respect for the law and obedience to its mandates than could have been accomplished in a life time under the old system.

Shortly after this act became effective Mr. J. I. Myerly, postmaster of Des Moines, brought to this office one of the secret officers of the government and introduced him as one of the inspectors of the postal department. This officer called our attention to the operation of a gang of thieves with headquarters at Council Bluffs. He had with him the evidence to show that men were being fleeced out of thousands of dollars every day, and some of the evidence indicated that this colossal gang of swindlers were operating with the knowledge of the local officers of that city, and this officer of the government stated that it was his belief that these officers not only had knowledge of what was going on but that they were actively protecting the gang. These swindlers were operating under the leadership of one J. C. Maybray, and the inspector informed us that he was directed by his superior to secure the co-operation if possible, of this office in the indictment and prosecution of the members of this gang. We rendered such assistance as was possible at that time, and later on a dozen or more members of the gang were indicted in both the state and federal courts.

Among other members of the gang was one John R. Dobbins who had been indicted for swindling one Ballew of Missouri out of $30,000. The appearance of the attorney general was entered in this case with the county attorney of Pottawattamie county, and just before the case was to be called for trial a letter was received at this office from one of the attorneys of the department of justice of the government of the United States in which, among other things, he said: "I understand that the case of the *State of Iowa v. John R. Dobbins,* indicted in connection with the Maybray swindles at Council Bluffs, comes on for trial next Monday. I wish very much that you could in person be present at and assist

in the trial * * * * *. I would regret very much to see an acquittal in these cases on account of the influence it would have on the trial of the cases in the federal court set for December 7th. This is the most colossal gang of swindlers that has been unearthed in this country for many years, and it behooves us as officers of the law to make every exertion to secure convictions. The case is going to be defended by able and resourceful lawyers * * * *. There is a suspicion very largely prevalent—I do not know how much foundation there is for it—that the county attorney and the city government of Council Bluffs were to some extent under the control of these swindlers while they were there, and under such circumstances I deem it exceedingly important that you should oversee this trial."

Dobbins was tried, convicted and sentenced to a term of five years in the penitentiary. His case is now pending on appeal in the supreme court.

Later the attorney general assisted in the trial of another member of this gang by the name of Scott. In this case there was an acquittal.

Later Maybray and eight or ten of his gang were tried in the federal court, all convicted and are now serving time in the penitentiary at Fort Leavenworth.

In addition to this matter the attorney general and his assistants have appeared before grand juries in several of the counties and have rendered valuable assistance in uncovering graft and frauds that were being practiced in public affairs.

The removal law, however, is the cap-sheaf of this whole system of law enforcement laws, and under it seed has been sown that will ripen into a glorious harvest for obedience to law, for morality and for decency and efficiency in public office.

Almost immediately after this law went into effect complaint was made to this department about the conduct of the mayor of Marengo. Accompanying the complaint was the affidavits of numerous citizens of that city charging the mayor with intoxication, and demanding that proceedings be commenced for his removal. The county attorney with the advice and assistance of this department instituted proceedings against the mayor and the case was tried and submitted to Judge Preston of the sixth district, and substantially every allegation of the petition found to be true. An order of removal was made; the case was appealed, the constitutionality of the law assailed upon every ground imaginable,

and after an extended and able argument by defendant's counsel, the case was decided by the supreme court, the law held to be sound upon every point urged against it; thus for the first time in Iowa notice was served that in this state the dignity and efficiency required in the public service demanded sober men.

Prior to the trial of the Maybray cases at Council Bluffs, and almost continuously thereafter until some time in March complaints were pouring into this office charging misconduct and failure in the performance of duty on the part of the chief of police of that city. These complaints culminated early in March in the following communication:

> "To Honorable H. W. Byers,
> Attorney General of the State of Iowa.
>
> The undersigned persons who are residents and citizens of Council Bluffs and interested in the prosperity, morals and welfare of the said city of Council Bluffs, state to you that upon information, we have reason to believe and do believe that George H. Richmond, as chief of police of said city, has been wilfully and knowingly negligent in the discharge of his duties in the office of chief of police, in that he has wilfully and knowingly neglected and failed to enforce the laws and ordinances in regard to pool halls and allowing minors to frequent the same; in that he has wilfully and knowingly failed to enforce the law in regard to the illegal sales of intoxicating liquors; in that he has wilfully and knowingly failed to enforce the laws in regard to prostitution and vice; in that he has wilfully and knowingly failed to enforce the laws in regard to gambling and gambling devices.
>
> We therefore ask that you in your official capacity as Attorney General of the State of Iowa, proceed against the said George H. Richmond as provided by law with a view of removing him from the office he holds and the duties of which he fails to discharge."

Complaint signed by five of the leading business and professional men of Council Bluffs among whom was the president of the law enforcement league.

In response to this demand this department sent Mr. John Fletcher to Council Bluffs for the purpose of ascertaining the exact condition. His report was of such a character that petition was immediately filed for the removal of George H. Richmond, chief of police of that city, and, notwithstanding the most desperate and persistent effort was made to prevent the removal of this officer the evidence was so overwhelming and convincing that the court found, among other things, that during the greater part

of the time said Richmond held the office of marshal and chief of police of the city of Council Bluffs:

> "Saloons, gambling houses and houses of ill-fame have existed and operated within the limits of said city in violation of the laws of the State of Iowa and the ordinances of said city that the saloons were allowed to run and do business at all hours of the night and on Sundays, and without complying with the mulct law in several important particulars not named and without any interference from this department or the police force under his authority. That several well known gambling houses were permitted to operate upon the principal streets of said city under a plan by which each proprietor paid $250.00 monthly to this department. * * *
>
> "That houses of prostitution have at all times been permitted to operate upon the principle streets of said city under arrangements of different kinds whereby each keeper of such houses paid a certain amount monthly for herself and for each female inmate thereof, such sums being usually $12.00 for each mistress and $6.00 each month for each inmate, which sums of money came into the hands of this department and all on the understanding that such place would not be molested by the police as long as such payments were kept up. That all of such money was kept by the defendant, usually deposited in the bank in his private name until the end of the month when such sums were by him turned over to the city clerk and not to the city treasurer.
>
> "The court further finds, that the ordinances of said city declare keepers and inmates of houses of ill-fame and all persons having the reputation and character of being gamblers to be vagrants, but none of the gamblers or proprietors of gambling houses were arested, and all the vagrants named in such ordinances were allowed to go free and ply their vocations without interference from the defendant or his police force, provided only, the women and the gambling proprietors paid their monthly stipend under whatever name and pretext it was paid."

There was much more in the decree but enough has been quoted to show how necessary it was that some legislation be had to make such conditions in a state like Iowa impossible, and how just and proper it was for this judge to remove Chief Richmond.

After this proceeding at Council Bluffs affidavits were filed with your excellency by citizens of Ottumwa charging the mayor of that city with misconduct and asking for his removal. Upon your direction this department investigated that case, filed petition and upon the showing made the mayor was removed for failure to perform the duties of his office and intoxication.

So far as we know there were but three other cases commenced under this removal law; one at Kellogg against the mayor for intoxication, the case, however, was not tried as the mayor resigned before hearing was had; one in Sioux county against the county attorney which was brought by local parties against our judgment and advice and in which the county attorney was vindicated; and one in Union county against the marshal, as we are informed, and for which there was no substantial ground.

Prior to the prosecution by this department of the cases at Marengo, Council Bluffs and Ottumwa we were receiving almost daily complaints from some of the cities charging misconduct to local officers. Since these trials, as I now remember it, we have not had a single complaint from the cities, not even the so-called river cities, and I am sure that the conditions that existed in Council Bluffs, and other cities of Iowa, prior to the trial of the Richmond case cannot now be found to exist in a single city in this state.

All this has been brought about under the removal law without harm to any innocent man or legitimate business; surely no good citizen anywhere with knowledge will lend further respectability to the effort that is being made in some quarters to discredit it.

Now to sum up the general effect of these laws throughout the state.

On September 30, 1906, just prior to the beginning of our first term, there were 43 counties in the state in which the mulct law was in operation, 240 cities and towns with 1770 saloons.

September 30, 1908, there were 40 counties, 219 cities and towns with 1612 saloons.

September 30, 1910, there were 37 counties, 208 cities and towns with 1262 saloons; and the number at this time we do not believe will exceed 1200 saloons, and after July next when new petitions of consent are required to be on file the number of counties operating under the mulct law, in my judgment, will be reduced nearly if not quite half, and under the operation of the Moon law when properly interpretated there will not be to exceed 700 saloons in the whole state.

On December 31, 1908, there were in use in the state 599 druggists permits to sell liquor; today there are not to exceed 400, a decrease in two years of nearly 200, and our reports show that there is less boot-legging carried on in the so-called dry counties

than ever before, all of which shows a steady and certain advance toward the ideal or "no saloon" condition.

Good men may and do differ as to the best method of dealing with the saloon question. Some favor regulation, others prohibition; there is, however, substantial agreement that the institution is an evil and that every effort possible should be made to minimize and reduce the harm that comes to every community in which it exists.

The reports of the county attorneys made to this office within the last month show that there has been a decrease in criminal business for the past year in 35 counties, in some of them the decrease being reported as high as 50 per cent., 29 county attorneys report the criminal business about the same as last year, while in only 14 counties has there been any increase, and in most of these the increase very slight.

The improvement thus shown all along the line is not, of course, all due to the work of this department. Much has been accomplished by civic societies and organizations all over the state, nor should we be content with what has been accomplished great as it is, because it may as well be understood that only a beginning has been made in law enforcement.

The saloon and the gambling house are bad enough and have taken toll to the limit; the house of ill fame is worse and counts its victims by the scores of thousands, and while no let up in the fight against these evils should be encouraged there are other evils that need the immediate and earnest attention of every law enforcing officer as well as every good citizen. Much is being said nowadays about the white plague, and much good is being accomplished toward wiping it out; its victims, however, are numbered by the hundreds while the victims of what has recently been termed the "yellow finger" plague can be counted by the thousands, and the shame of it is that a large per cent of them are boys under twenty-one years of age. Fifteen or more years ago the sale of cigarettes was made unlawful in this state, and it is against the law today to sell them anywhere in Iowa, but notwithstanding this, the signs of the use of the deadly weed is observable on every hand, and only a short time ago one of the greatest railroad systems of the country issued an order that after a certain date no person with "yellow fingers" should be employed or retained by that system.

Then there is the adulterated food and short-weight men; the illegal combine to maintain unreasonable prices, and many other things that need constant attention.

So far as the liquor and cigarette question is concerned the law enforcing machinery of the state is now in splendid working order. All we need to complete it is some federal legislation authorizing the state authorities to deal with interstate shipments and prohibiting the issuance of government licenses to persons doing business in so-called dry counties, and there is no good reason why we should not have this federal legislation in the immediate future.

There are many other things that this department has to deal with that might be mentioned but this report is already too long; however, before closing it I feel it my duty to suggest the following amendments and changes in our laws.

First. A general revision of the laws covering practice and procedure in the courts of the state. Simplify court methods by repealing every provision that permits delay as a matter of right by motion or other pleading so that it may no longer be said, as it was just recently by one of our prominent district judges, that, "It is absurd to reverse a civil case and send it back for retrial because of the non-observance of some technicality that has nothing to do with the merits of the case, and it is a travesty upon justice to discharge some criminal who is unquestionably guilty merely because some mouldy precedent was not followed."

Second. Rearrange and readjust the judicial districts of the state. Under the present arrangement some of the districts have more business than can be speedily and properly disposed of while many of them do not have enough to keep the courts busy half of the time.

Third. Increase the salary of the attorney general and his assistants. The salary of the head of the department of justice ought to be the same as the salary now paid to the members of the supreme court, and the annual salary of each of the assistants ought to be at least $2,500.00, and that of the stenographers $100.00 a month.

Fourth. Amend the law prohibiting trusts, combinations and pools for the purpose of controlling prices by adding the necessary provisions for making investigations and procuring evidence. As the law is written now in this state it is a dead letter. No matter how zealous the prosecuting officer may be in his desire to protect the people against unlawful combinations and trusts, he

is practically helpless unless the legislature furnishes him the necessary machinery and funds to carry on a successful investigation and prosecution.

During the four years of my service in this department Mr. Charles W. Lyon has had charge of the appeals in criminal cases, and aside from a few days vacation he has hardly missed a day from his desk and the credit for the showing made in this department of the work of this office is due to his industry and the care with which the record made in the courts below has been made up and presented to the supreme court. Mr. Lyon leaves the office the first of the year to enter the practice in Des Moines with Judge Howe under the firm name of Howe & Lyon.

During the first year if this term Mr. Charles S. Wilcox acted as special counsel for the department, and his work was not only satisfactory but of the very highest order. He resigned his position to enter the practice of law here in the capital city, and the position for the last year of the term has been filled by Mr. John Fletcher of Avoca, Iowa, who has shown himself to be an industrious and failthful public officer.

Mr. George Cosson who served with us during the former term has continued his faithful and efficient work throughout this term.

Miss Hobbs and Miss Gilpin have been with the department during the entire four years. They have had charge of the dockets and the stenographic work of the office and have performed their duties faithfully and well.

The uniform courtesy and kindness of all the officers and employes in and about the capitol building will always be remembered with gratitude.

Respectfully,

H. W. BYERS,
Attorney General.

Schedule A is a complete list of all appeals in criminal cases submitted to the supreme court during the years 1909 and 1910, and also all rehearings asked during that period, and shows the final disposition of the cases.

Schedule B is a list of all criminal cases pending on the first day of January, 1911.

Schedule C is a list of civil cases which were pending in the state and federal courts January 1, 1909, and have since been disposed of.

Schedule D is a list of civil cases which have been commenced and disposed of since January 1, 1909.

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

Schedule F contains some miscellaneous letters addressed to the county attorneys of the state which will, no doubt, be of interest to the public.

Schedule G is the official written opinions given by this office during the years 1909 and 1910.

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

SCHEDULE F.

Des Moines, January 27, 1910.

DEAR SIR: For the purpose of securing your co-operation in a work of law enforcement of vital importance to the entire state, I desire to call your attention to some of the statutes covering the making, working and improvement of the roads and highways.

Upon consideration, I know you will agree with me that road improvement in Iowa is largely a matter of law enforcement, and to the end that it may not be said that the law enforcing officers of the state are responsible for road conditions in Iowa, I ask you to join with this department and the State Highway Commission in an effort to put into effective operation some of the laws which are mandatory in form, and which give promise of producing good results.

First. Chapter 101, Acts of the thirty-third general assembly makes it the duty of township trustees to provide for the use of the road drag.

This provision is mandatory and covers all main traveled roads and mail routes. The rate shall not exceed fifty (50) cents per mile traveled in dragging, and compensation shall not be allowed unless the work is authorized by the trustees. This covers the main roads within the corporate limits of towns and cities, and it is the duty of the city councils to see that its provisions are carried out.

Second. The township trustees and all other road officers are responsible for the destruction of weeds on the public highways. Chapter 96, Acts of the thirty-third general assembly.

This chapter fixes the responsibility for the destruction of weeds growing, not only on the highways, but upon private lands as well, including all depot grounds, right-of-way lands and similar corporation-owned or controlled lots or land. So far as the highways are concerned, the trustees and county supervisors are jointly liable for weed destruction thereon.

Third. The same chapter makes it the duty of the board of supervisors of each county to call the trustees and road supervisors together between November and April each year for a school of instruction. Chapter 96, acts thirty-third general assembly.

The purpose of this law is to promote uniformity and more efficient methods of road work in each county. Persons who can give expert instruction in weed destruction and road work may be

employed at county expense. The officers mentioned are required to attend such meetings as part of their official duties, and are to be allowed the same compensation for time as is allowed for their other work.

Fourth. Chapter 183, acts of the thirty-second general assembly makes it illegal for any county or township officer to act as the local agent for culvert companies, bridge companies, road machine companies, or to purchase supplies which in any way return a commission to him personally.

There is little need for comment upon this statute, as it is clear and explicit. It has, however, come to the attention of this department that there is more or less of the road and bridge work handled in a way that is a clear violation of this statute.

I earnestly ask your co-operation in the enforcement of these several provisions to the fullest possible extent. Every community of the state is vitally interested in the betterment of the public highways, and a faithful performance of the duties of public officers charged with responsibility for road improvement requires a more strict construction and enforcement of the road laws.

This department and the highway commission at Ames will be glad at any time to take up with you any of these matters in greater detail, and will be willing at all times to supply all the additional information possible.

Yours very truly,

H. W. BYERS,
Attorney General.

March 15, 1910.

COUNTY ATTORNEY C. J. CEDARQUIST,

Boone, Iowa.

MY DEAR SIR: I suggest that you call the attention of your board of supervisors to section 1989-a44 of the supplement to the code, 1907, as amended by chapter 118, acts of the thirty-third general assembly.

In many of the counties of this state vast sums of money are being expended in drainage improvement, in some counties the amount running up into the hundreds of thousands of dollars. The efficiency and permanency of many of the larger drain ditches depends upon a faithful compliance with the provisions of the foregoing section and amendment.

The inspection as originally provided for in this section was to be made at such time as the board of supervisors deemed necessary. The amendment made by chapter 118, acts of the thirty-third general assembly, requires such inspection to be made at least once each year. This amendment became operative April 19, 1909.

I am calling your attention to this now in order that the matter may not be overlooked while there is yet time to comply with the law during the year.

Yours very truly,

H. W. BYERS.

Des Moines, Iowa, April 21, 1909.

MR. W. J. KEEFE,

Clinton, Iowa.

MY DEAR SIR: In am enclosing herewith copies of several acts, among which are the ones usually referred to as the law enforcement acts, passed by the thirty-third general assembly. Among other things, they relate to the duties of county attorneys, powers and duties of sheriffs and their deputies, the abatement of houses of lewdness, the removal of officers for malfeasance, misfeasance and nonfeasance in office and the powers and duties of the attorney general.

The copies are sent to you at this time in order that you may become fully familiar with their provisions without waiting for the official publication of the acts, which will not be ready for distribution until some time in July.

The first four of these acts were passed by the last assembly in response to a widespread and insistent demand for a more rigid enforcement of the criminal laws of the state, and it is the desire of this department, with the help of the county attorneys and peace officers of the state, to see to it that this demand is fully and completely met. It is not intended or expected that any unreasonable construction shall be placed upon these laws, nor that anything unreasonable be done under them; we simply ask you to join with us in putting them into operation with the purpose and determination of putting an end, in so far as possible, to lawlessness in the cities and towns of Iowa.

The provisions of the acts enlarging the powers and prescribing and increasing the duties of county attorneys, sheriffs and other peace officers should make it unnecessary for civic leagues, societies

or private individuals in the various communities to institute prosecutions for violation of law, or in acting as collectors of evidence in such prosecutions, and if in any community such societies, leagues or individuals are compelled to institute prosecutions, such action will be regarded by this department as evidence of failure on the part of the local officers in such communities to discharge their duties.

The solution of the problem of enforcing the laws as contemplated in these new acts should and will be left to the various communities, and interference will not be attempted by this department, except as a last resort. The department will, however, at all times, be ready and willing to assist any county attorney, or other officer, to any reasonable extent, in his efforts to comply with the new duties placed upon him.

We hope and fully expect to have the co-operation, not only of the public officers of the state, but of all law-abiding people, in putting into full operation all of the provisions of these new laws.

Our people, as a rule, are law-abiding; they demand that the laws of the state be enforced. It is our duty, as before stated, to meet that demand. I am,

Yours very truly,

H. W. BYERS.

Des Moines, July 10, 1909.

TO THE COUNTY ATTORNEYS OF THE STATE OF IOWA.

GENTLEMEN: Shortly after the adjournment of the thirty-third general assembly, I forwarded to the several county attorneys of this state copies of certain laws in pamphlet form which had been passed by that body, but which were not then ready for official distribution. While a number of these laws did not become effective until the 4th day of July, yet a very considerable progress has already been made in the enforcement thereof and in bringing about better conditions in the state of Iowa. I congratulate the county attorneys upon this result.

Inasmuch as section 2 of chapter 17, acts of the thirty-third general assembly, makes it mandatory upon the county attorney to see that the laws are enforced in his county, it will no longer be claimed that the county attorney who takes the initiative in the matter of the enforcement of the laws is without his legitimate sphere and transcending his authority. Censure may now follow, not for the performance, but only for the nonperformance of duty.

While the act places the responsibility of enforcing the law upon the county attorney, chapter 34, acts of the thirty-third general assembly, specifically makes it the duty of the sheriff to ferret out crime, apprehend and arrest all criminals, secure evidence of all crimes committed in his county, present the same to the county attorney and the grand jury, and file information against all persons whom he knows, or has reason to believe, have violated the laws of the state, and the sheriff must make special investigation whenever directed to do so by the county attorney in writing.

In the passage of chapters 17 and 34 of the acts of the thirty-third general assembly relating to the duties of the county attorney and the sheriff, it was not the legislative intent to relieve mayors, police officers, marshals or constables from any of the duties enjoined upon them by law, and, considering that these officers are all subject to removal by summary process for failure to perform the duties of their offices, I take it that they will continue to enforce the criminal laws within their respective jurisdictions.

I wish to again call your attention in a general way to the laws relating to the sale of intoxicating liquors, and respectfully urge that you see that these laws are strictly enforced.

In various cities of the state where the mulct law is in operation an attempt has been made to nullify the effects of chapter 142, acts of the thirty-third general assembly, by the granting of resolutions of consent by city and town councils subsequently to the passage of the act and prior to the 4th day of July. A large number of resolutions of consent have thus been granted to persons who had no intention of using the same, who had paid no mulct tax or taken no other steps looking to the actual establishment of a mulct saloon up to the time the act went into effect.

All resolutions of consent granted for the purpose of evading the law are, in my opinion, of no force or effect, and any person attempting to operate a mulct saloon under such fraudulent resolutions should be enjoined as by law provided.

All forms of gambling, including slot machines and other gambling devices, should be abolished.

I call special attention to chapter 214, acts of the thirty-third general assembly, which provides for the abatement by action of injunction in the name of the state of Iowa upon the relation of the county attorney, of all houses of assignation, and request that you avail yourself of this law to the end that these places may be absolutely abolished from your community. I trust that within the near

future what has been known as the "red light" district in certain cities of our state will be a thing of the past.

I also direct your attention to the law prohibiting the sale or disposition in any form of cigarettes or cigarette papers or wrappers. Section 5007 of the code, providing for a mulct cigarette tax, in no wise relieves a person who violates any of the provisions of section 5006 of the code from any of the penalties of said section, but is simply an additional penalty against the traffic.

In nearly every part of the state the open sale of cigarettes has been abandoned since the 4th day of July, but it is still the custom of a number of persons who sell tobacco to either sell packages of tobacco which contain within each package a certain number of cigarette papers or wrappers, or else to leave a quantity of these cigarette papers or wrappers on the counters where the same may conveniently be appropriated by those who are addicted to the cigarette habit. This is simply another method of attempting to evade the law, and ought not to be permitted.

While we should be zealous in the enforcement of the criminal laws of the state, we should not overlook the laws enacted for the purpose of protecting the citizen in his purchases of the necessaries of life. I therefore direct your attention to sections 5060 to 5069 inclusive of the code and the code supplement; and sections 5028-b to 5028-h inclusive of the code supplement; also chapter 225, acts of the thirty-third general assembly. These laws prohibit every form of combination and unfair discrimination for the purpose of destroying competition. The legislature has placed the responsibility of enforcing these laws jointly upon county attorneys and the attorney general.

In making these suggestions it is not the intention of the department of justice to infringe upon the legitimate sphere of the county attorney by dictating the general policy of his office, or to determine in doubtful cases the advisability of bringing prosecutions, but rather to secure better results by co-operation and uni-

formity in the matter of procedure. With harmonious effort on the part of the county attorneys of the state and this department, I feel certain that we can place Iowa in the vanguard of all the states in the Union in the matter of the enforcement of laws, and this without reference to whether the laws were enacted to prohibit social evils, to protect property rights or to secure to each individual that protection to which he is entitled under our form of government.

Yours very truly,

H. W. BYERS,

Attorney General of Iowa.

SCHEDULE "G"

LOAN AND TRUST COMPANY—RIGHT TO ISSUE BOTH COMMON AND PREFERRED STOCK—LEGALITY OF FARMERS' LOAN AND TRUST COMPANY OF WATERLOO.—The articles of the Farmers' Loan and Trust Company of Waterloo as they are now drawn are in harmony with our statute.

SIR: I beg to acknowledge receipt of yours of January 5th, in which you request my opinion (1st) as to whether or not loan and trust companies organized under the general incorporation laws of the state, and in whose articles of incorporation authority is given to receive time deposits, issue certificates therefor, and to issue drafts on its depositaries as provided in section 1889 of the supplement to the code, may issue both common and preferred stock; and (2d) as to whether or not article 12 of the proposed articles of the Farmers' Loan and Trust Company of Waterloo, Iowa, is in conflict with the laws of Iowa.

In response thereto I have to say that section 1889 of the supplement to the code, in so far as it is material to your inquiry, provides in substance that loan and trust companies may receive time deposits and issue drafts on their depositaries; but to do this, all such companies are required (a) to have a paid-up capital of not less than the amount of capital of savings banks as required in section 1843 of the code (b) to be subject to examination, regulation and control by the auditor of state like savings and state banks; (c) their stockholders shall be liable to the creditors of such company as provided in section 1882 of chapter 12, title 9 of the code.

I find no other limitations upon the right of such companies to receive time deposits and make drafts upon their depositaries, nor any other conditions fixed by law for the exercise of that right or authority.

Your first question is therefore answered in the affirmative.

As to your second question, article 12 of the proposed articles of the Farmers' Loan and Trust Company, Waterloo, Iowa, as now drawn, is in harmony with the statute.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

January 5, 1909.

HON. JOHN L. BLEAKLY,
Auditor of State.

LAKE BED—SALE OF IT BY STATE—RIGHT OF ABUTTING LAND OWNER TO PURCHASE.—Where abutting land owner does not take land of a lake bed at appraised value within a reasonable time after appraisement, he is not entitled to preference.

DEAR SIR: I am in receipt of your favor in which you say:

"Please indicate in a letter to this office, without delay, whether under the provisions of section 7, chapter 186, acts of the thirtieth general assembly, the abutting land owner would have any right except as a bidder to take lands in a lake bed which had been surveyed, appraised and offered for sale two years since when he was given an opportunity at the time to take the land at the appraised value, but did not at

that time elect to do so, but at this time the lots having not been sold asks the right to take the same as an abutting land owner under the provisions of the statute cited. The circumstances are that we have two bids for the land, both of which are the appraised value, but no doubt can get a better bid if we can ignore the abutting land owner's offer of the appraised value.

I am directed to take certain steps in this matter upon your advice. Please advise me at once."

In response thereto I have to say that section 7 of chapter 186, acts of the thirtieth general assembly, so far as it is material to your inquiry, provides:

"After the report of the appraisers has been received and filed in the office of the secretary of state, the executive council shall offer the land belonging to the state and composing such lake bed, and included in such survey and appraisement, for sale, and the persons owning lands abutting upon such lake or lake bed and contiguous to lands owned by the state therein, shall have the first right to purchase the lands offered for sale by the state, in an amount sufficient to make the lands owned by them which abut upon the lake or lake bed and are contiguous to lands of the state conform to the smallest government subdivisions of public lands, at the price fixed by the appraisers."

Under the provisions and the circumstances stated in your letter, the council would not be justified in ignoring the bid of the abutting land owner.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

Des Moines, January 11, 1909.

A. H. DAVISON,
Secretary of the Executive Council.

ARTICLES OF INCORPORATION—EXAMINATION OF ARTICLES OF SPERRY & HUTCHINSON COMPANY, AND REPORT.

SIR: I beg to acknowledge receipt of your inquiry of January 16, 1909, in which you say:

"Herewith please find a certified copy of the articles of incorporation of the Sperry & Hutchinson Company of New Jersey, offered for filing in my office. Will you kindly ex-

amine same and give me your written opinion as to the legality of the articles, including any bearing the law may have on the question of public policy and method of doing business disclosed by the said articles."

In response thereto I have to say, that I have carefully examined the articles of incorporation referred to, and, without in any way attempting to pass upon the methods actually adopted by this company in the operation of its business, find no legal objection to their form, and so far as the plan or method of doing business appears from the articles themselves it cannot be said that the business proposed to be done is either in conflict with any of the statutes of this state, or against public policy.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

January 16, 1909.

HON. W. C. HAYWARD,
Secretary of State.

NOTARY PUBLIC—BONDS—FAILURE OF SURETY.—It is the duty of the governor, when, in his judgment, the bond of a notary public becomes insufficient, to require a new bond.

SIR: I beg to acknowledge receipt of yours of January 16th in which you say:

"Information has come to this office to the effect that the Metropolitan Surety Company has gone into the hands of a receiver without providing for the re-inusrance of its business by other companies.

I find that many of the notaries public are bonded in this company, and I should appreciate much an opinion as to what course we should pursue.

Will you kindly inform us if the bonds now on file in this office secured by this company meet the requirements of the law, or is it advisable for the executive department to secure new bonds to replace those about which there is much question?"

In response thereto I have to say, that section 373, supplement to the code, 1907, gives the governor power to appoint and commission notaries public, and to revoke such appointments.

Section 374, among other things, provides for the execution of a

bond by notaries, and when such bond is furnished by a surety company the same must be approved by the governor, and the bond with certain attached papers, which are provided for in the section, must be filed in the office of the governor.

Section 376 provides, among other things, for a notice to notaries public upon revocation of their commission.

Section 1281 of the code provides: "Any officer or board who has the approval of another officer's bond, when of the opinion that the public security requires it, upon giving ten days' notice to show cause to the contrary, may require him to give such additional security by a new bond, within a reasonable time to be prescribed."

In view of the power thus given to the governor by these provisions, and the responsibility thus placed upon him, it is my opinion, that whenever in his judgment the bond of a notary public becomes insufficient, for any reason, it is his duty to require of such notary a new bond.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

January 16, 1909.

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

BONDS—INVESTMENT BY FRATERNAL ORGANIZATION.—What securities may be purchased by fraternal societies under chapter 88, Acts of the Thirty-second General Assembly, discussed.

SIR: I beg to acknowledge receipt of yours of January 21st, in which you say:

> "I am transmitting herewith certain bonds in the amount of ten thousand ($10,000) dollars issued by the city of Paris, Texas, for street improvements; certain waterworks bonds in the amount of ten thousand ($10,000) dollars issued by the city of Fort Morgan, Colorado; certain school district bonds in the amount of seven thousand ($7,000) dollars, issued by the school district of Lancaster, state of Missouri, and certain sewer bonds in the sum of ten thousand ($10,000) dollars, issued by the city of Fort Smith, Arkansas, all offered to the auditor of state as securities under the provisions of chapter 88, acts of the thirty-second general assembly by the Modern

Brotherhood of America.

"The executive council desires your advice as to the legality of the various bonds offered and particularly as to whether all of these bonds are securities which should be, under the law, accepted. Your attention is particularly directed to the sewer bonds of Fort Smith, which are for a certain sewer district and may not be municipal bonds under our laws. There may be other defects in some of the securities offered.

"The auditor of state, being chargeable with the bonds, has indicated that he will call at your office for these bonds at the closing hour this evening and return the same to you tomorrow morning if you so direct."

In response thereto I submit the following:

Section 1 of chapter 88, acts of the thirty-second general assembly, in so far as it is material to your inquiry, provides as follows:

"Any fraternal beneficiary society, order or association organized under the laws of this state, accumulating money to be held in trust for the purpose of the fulfillment of its certificates or contracts, shall invest such accumulations in the following securities and no other.

"1. * * * .

"2. * * * .

"3. Bonds or other evidences of indebtedness of any county, city, town or school district within the state or any other state, or drainage bonds of any drainage district in the state of Iowa where such bonds or other evidences of indebtedness are issued by authority of and according to law and bearing interest, and are approved by the executive council."

Under these provisions investment of accumulations in securities of municipalities outside of Iowa is limited to county, city, town or school district bonds and no authority is given, either here or elsewhere in the statutes, for such investment outside of the state in bonds issued to cover district improvements.

It is my conclusion, therefore, without attempting in any manner to pass upon the value of any of these securities as an investment, or upon the legality of their issue:

First. That the bonds issued by the city of Paris, Texas, for street improvements, in amount, $10,000.

Second. The bonds of the city of Fort Morgan, Colorado, for waterworks, in amount $10,000, and,

Third. The school district bonds issued by the school district of Lancaster, state of Missouri, in amount $7,000, all come within the class or kind of securities in which the society offering these bonds may invest its accumulations.

Fourth. That the sewer bonds, issued under the authority of "The board of improvement of sewer district No. 2 of the city of Forth Smith," in amount $10,000, do not come within such classification. The society offering them is without authority to invest its accumulations in such bonds.

For your further information I forward herewith copy of opinion given to his excellency, the governor, on the 25th day of October, 1907.

And return to you herewith all of the bonds and other papers which accompanied your communication.

Respectfully submitted,

H. W. BYERS,
Attorney General of Iowa.

January 21, 1909.
A. H. DAVISON,
Secretary of the Executive Council.

BOARD OF EDUCATIONAL EXAMINERS—INSPECTION OF SCHOOLS AND COLLEGES—COMPENSATION AND EXPENSES.—The board of educational examiners may send a person to inspect a school and have compensation and expenses allowed under section 2634-a of code supplement.

SIR: I am in receipt of your letter of recent date in which you say:

> "Section 2634-a, supplement to the code, provides in part that the educational board of examiners 'shall have power to employ such persons as are necessary to assist in examinations and in reading answer papers and for clerical work and other necessary assistance. Persons so employed shall receive not to exceed fifty cents per hour for the time actually employed and actual traveling expenses to and from the place where their services are required.'
>
> "Section 2634-f, supplement to the code, empowers the educational board of examiners to accredit colleges maintaining courses of a prescribed rank.

"Has the educational board of examiners a right to send a person of their selection to inspect an institution claiming privileges under section 2634-f and pay the person so selected fifty cents per hour for such service and expenses, as provided in section 2634-a?"

In response thereto I have to say that in my opinion the educational board of examiners have authority to make the necessary investigation to ascertain the rank and standing of schools and colleges whose graduates are claiming the privilege granted by section 2634-f of the supplement to the code, 1907, and if to properly make such investigation it becomes necessary to send a person to make an inspection of the institution, then such person is entitled to be paid for such services and expenses as provided in section 2634-a, supplement to the code, 1907. Respectfully,

H. W. BYERS,
Attorney General of Iowa.

March 1, 1909.

HON. JOHN F. RIGGS,
Superintendent of Public Instruction.

STATE LIBRARY AND HISTORICAL DEPARTMENT—SUPPLIES—HOW AND BY WHOM DRAWN.—The state librarian should make all requisitions for supplies for state library and historical departments.

SIR: I beg to acknowledge receipt of yours of March 1st in which you say:

"It is desired on the part of the executive council that you determine who or in whose name supplies, including postage, may be drawn for the state library and historical department in the light of chapter 114, acts of the twenty-eighth general assembly; whether the historical department is consolidated with the library so that the name of the librarian should be used in drawing the supplies for both the library and historical department or whether the title created in section 2 of that act, "Curator of the museum and art gallery," is the historical department and entitled to draw stamps and supplies. Also whether the assistant to the librarian, in charge of the law library, named in section 2 is an officer in whose name requisitions may be made for supplies and stamps and in determining this, determine whether the authority of this officer

or officers in drawing supplies is confined to activities established by the statutes or whether the legislative reference work carried on by Mr. Brindley is such work that the acting curator of the historical department, or any other officer whom you may find authorized to draw stamps and supplies for the library or historical department, would be authorized to receive the same for his work.

"The secretary of the executive council is an officer charged with the supplies and postage furnished the several state officers and departments, and who is required by law to give a bond and who has taken an oath of office to perform his duties according to law; hence, it is desired to know whose requisitions can be accepted for all of this work and whether the work is confined to activities established by express statute."

In response thereto I submit the following:

Section 157 of the supplement to code, 1907, in so far as is material to your inquiry, provides:

"The secretary of the executive council shall perform the following duties and such others as are now or may hereafter be prescribed by law or directed by the executive council. * * * *."

9. He shall have charge of the supplies, postage and printing papers purchased for state uses and shall account for the same.

10. He shall give a bond to the state, in an amount to be determined and approved by the executive council, for the faithful discharge of his duties."

Section 168 of the supplement to code 1907, is as follows:

"The executive council shall take charge of all property purchased under the provisions of this chapter, and shall keep a full, accurate, complete and itemized account of all such property, with the cost and disposition thereof. The council shall supply the governor, secretary, auditor, treasurer, judges of the supreme court and clerk thereof, attorney-general, supreme court reporter, superintendent of public instruction, railroad commissioners, adjutant-general, the dairy commissioner, the historical department, the mine inspectors, the labor commissioner, the horticultural department, traveling library and Iowa library commission, the educational board of examiners and other officers entitled thereto by law, the general assembly, its committees, and the clerks, secretaries and

special and standing committees of either house thereof, with all such articles required for the public use, and necessary to enable them to perform the duties imposed upon them by law. Postage shall not be furnished to the general assembly, its officers, employes, or to any committee of either branch thereof. It shall also furnish the public printer with all papers required for the various kinds of public printing, in such quantities as may be needed for the prompt discharge of his duties. Supplies, including postage and stationery, shall be furnished to the officers and persons entitled thereto by law, only in the manner provided in this chapter."

Section 169 of the code 1897, in so far as it applies to the question under consideration is as follows:

"In order to draw supplies, each officer or person entitled thereto, or the chairman of the respective committees, shall make a written requisition on the secretary of the council, specifying the amount and kind that is necessary; and, upon presentation thereof to said secretary, he shall deliver the articles to the person entitled thereto, taking a receipt therefor, to be filed and preserved with the records of the council. The council shall keep an account so as to show the amount, cost and kind of supplies purchased, the amount and kind on hand, and the disposition of the balance. It shall keep an accurate itemized account with each office, board, commission, or person drawing supplies, charging thereto the several articles furnished at the cost price. * * * ."

Section 2881-a of the supplement to code 1907, provides as follows:

"That the board of trustees of the Iowa State library and the board of trustees of the Iowa historical department be, and the same are hereby empowered and directed to consolidate the miscellaneous portion of the Iowa state library (exclusive of the law section), or so much thereof as shall be regarded by said board as advisable, with the historical department: the aforesaid consolidation to take effect on the first day of January, nineteen hundred and one, or at any such later date as said trustees may direct; and that on and after January first, nineteen hundred and one, the board of trustees of the Iowa state library and the board of trustees of the Iowa state historical department shall cease to exist as such, and the aforesaid boards shall, by this act, become the board of trustees of

the state library and the historical department of Iowa, and the newly constituted board shall thereafter be charged with all the duties and responsibilities imposed upon the boards aforementioned and possess all the powers thereof."

Section 2881-b of the supplement to the code 1907, provides as follows:

"That after such consolidation the state librarian shall have general charge of the historical department and of the consolidated and law libraries. The curator of the museum and art gallery shall have charge of the museum, the art gallery, the newspapers, and historical periodicals. The assistant to librarian shall have charge of the law library, under the direction of the state librarian. The above officers shall serve out the terms for which they shall have been appointed, at the expiration of which their successors shall be appointed by the board of trustees, and shall hold their respective offices for the term of six (6) years. The state librarian shall submit to the governor biennially a report giving the history of said consolidated libraries for the preceding two years, accompanied by a like report by the curator of the museum and art gallery."

Considering these several provisions of the law, I conclude:

First. In the asbence of fraud and collusion the responsibility of the secretary of the executive council for supplies furnished to persons entitled under the law to draw the same ceases upon the delivery of the supplies upon a properly executed requistion.

Second. That since section 2881-b, above quoted, expressly provides that the state librarian shall have general charge of the historical department and of the consolidated and law libraries, thus making that officer the responsible head of both the library and the historical department, requistions for supplies for these departments should be signed by the state librarian.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

March 3, 1909.

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

CORPORATIONS—TELEPHONE COMPANIES—ISSUANCE OF STOCK IN EXCHANGE FOR PROPERTY—WHEN PERMISSABLE—DEALS IN RESTRAINT OF TRADE.

SIR: I beg to acknowledge receipt of your recent favor in which you say:

> "I am directed by the executive council to refer to you the application made by the Mutual Telephone Company of this city for authority to issue stock on account of property, in which the property they propose to take over is the capital stock, or part of it, of the Boone County Telephone Company, the executive council desires your opinion as to whether there is any legal objection to authorizing the issue of stock on account of this kind of property. I enclose herewith the papers filed by the company, also certain briefs which were filed in the Meadows Investment Company. I am requested by a representative of the Mutual Telephone Company to send these briefs, thinking it might assist you in looking up authorities."

In response thereto I submit the following:

In May 1908 a similar question was submitted to this department upon the application of the Farmers Lumber Company at Manson, Iowa. At that time my attention was called to the opinion of a former attorney general in which it was held that to permit one corporation to purchase and own the stock of another would be against public policy. It seemed to me at that time that this opinion was fully supported by the great weight of authority, and in the case then before me it was followed and the application refused.

Since then the question has arisen in several different forms and I have had time and opportunity to examine it with greater care, and have arrived at the conclusion that while the doctrine declared by General Mullen in his opinion is and ought to be the general rule, it is evident that the rule cannot and ought not to be applied in all cases; in other words, in many cases the reason for the rule does not exist, and hence the better practice for your body to follow would be to rest each decision upon the facts in the particular case rather than to attempt to apply a general rule to all cases, and this is especially true in this state in view of our constitutional and statutory provisions covering the organization of corporations.

Under these provisions the supreme court in at least a half dozen cases have refused to follow any "hard and fast" rule, and have approved what the applicants in this case are attempting to do.

Iowa Lumber Co., v. Foster, et al, 49 Iowa 25.

Calumet Paper Co., v. Investment Co., 96 Iowa 147.
Latimer & Inglis v. Citizens State Bank, 102 Iowa 162.
Rollins v. Shaver Wagon Co., 80 Iowa 380.
West v. Averill Grocery Co., 109 Iowa 488.
Trear v. Prospecting Co., 124 Iowa 107.

These cases, as General Mullan says in his opinion, state the exception to the general rule and emphasize the fact hereinbefore stated, that each case must stand or fall upon its own peculiar facts.

It will be admitted at once that one corporation ought not to be permitted by the purchase of stock in another to pursue a business entirely foreign to that for which the purchasing corporation was created; it will also be conceded that in every case where the effect of the purchase of stock by one corporation in that of another will be either in restraint of trade or have the effect of destroying competition, such purchase is contrary to public policy and should be probihited.

You will therefore, be safe in denying applications of the kind here being considered, (a) whenever the effect of the purchase would be to authorize one corporation by the purchase of stock in another to engage in a business wholly foreign to the purpose for which it was created; (b) whenever the effect of the transaction, if permitted, would be injurious to the public interest; (c) whenever such purchase would be either a fraud or an injustice upon the stockholders not joining in the application: and in granting the application in all cases where no such results would follow.

Under these rules the application of the Meadows Investment Company filed some months ago, and the application of the Mutual Telephone Company, referred to in your communication, should be granted.

I ought to say here that the decision made in the case pending before General Mullan in 1905, and the Manson Lumber Company case decided in May 1908, under the particular facts in those cases, was proper and should stand.

I am indebted to Mr. J. Carskaddan for his very clear and convincing brief, and am returning it with the other papers in the case.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

March 6, 1909.

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

MEMBERS OF GENERAL ASSEMBLY—COMPENSATION—TEST FOR PURPOSE OF PAYING.—Where certificate of membership in legislature is presented member is entitled to compensation.

SIR: I beg to acknowledge receipt of yours of March 10th in which you say:

> "I am herewith enclosing a voucher received on the 9th inst. from S. M. Corrie, which the officers of both branches of the legislature have endorsed, and covering the first half of compensation due Mr. Corrie as a member of the thirty-third general assembly from the fifty-ninth representative district of Iowa.
>
> As I think you know of the contest between Robert Baxter of Ida Grove and the said S. M. Corrie and which contest was decided in favor of Mr. Corrie after the first half of the appropriation due to members of the general assembly had been paid, I respectfully request that you give me your official opinion in regard to whether I will be justified in honoring this certificate of the officers of both branches of the General Assembly and issue a warrant for $275.00 covering the first half of the compensation.
>
> I am unable to find any law that covers this particular case, although I believe that under Attorney General Remley an opinion was rendered by him covering a similar case, but I thought best to have a later opinion and will thank you very kindly for giving the matter as early attention as possible, as Mr. Corrie seems anxious to receive the compensation."

In response thereto I submit the following:

Section 12 of the code, in so far as it effects your inquiry, provides as follows:

> "The compensation of the members of the general assembly shall be: to each member, for each regular session, five hundred and fifty dollars."

Under this provision the test is; is Mr. Corrie a member of the present general assembly? If he is then he is entitled to receive the same compensation, and to have it paid to him in substantially the same way as other members of the assembly, as the statute makes no provision for a division of the compensation where a member has been deprived of his seat for a portion of the session by contest. Mr. Corrie meets this test by presenting to you a proper certificate of his membership in the general assembly.

I am therefore of the opinion, that you will be entirely justified in issuing to Mr. Corrie warrant for two hundred and seventy-five dollars to cover the first half of his compensation.

I am returning you herewith the certificate referred to in your communication.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

March 10, 1909.

HON. JOHN L. BLEAKLY,
Auditor of State.

TAXATION—PRIVATE PROPERTY ON PUBLIC GROUNDS.—Private property located on public grounds is not exempt from taxation.

SIR: Replying to your recent favor in which you request an opinion as to whether or not private property located upon the Iowa State Fair and Exposition grounds is exempt from taxation I have to say, that I find nothing in the statute exempting such property.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

March 10, 1909.

HON. J. C. SIMPSON,
Secretary of Agriculture.

SCHOOL BUILDINGS—USE OF FOR PUBLIC LIBRARY—AUTHORITY OF SCHOOL BOARD.—School boards have exclusive control of all school property and may, in their discretion, grant use of building for library purposes.

MADAM: I beg to acknowledge receipt of your letter of the 12th instant in which you say:

> "I am confronted by a new question in local library administration, and that is as to the right of a local school board to grant the use of a room in a public school building, free, for the use of a public library, accessible to the entire community.
>
> This question has arisen in Williamsburg where a new school house has been erected in which will be two or three unoccu-

pied rooms that are very well suited for library purposes. As I understand from the statement of Mr. H. E. Hull of that town there are a considerable number of people there that are interested in starting a public library, and they feel that if they could secure the use of one or two of these basement rooms, having direct entrance, it would be possible to start a public library, and in conference with their school board they have learned that the board does not feel that they have the authority to grant this privilege. The movement for a public library in Williamsburg, which I would aid in any way possible, hinges at this time largely on the question of whether the school board has the right to grant the use of the room. If not asking too much of the legal department of the state, I would appreciate a statement from you as to the powers of the school board in this matter."

In response thereto I have to say, that the school board under the laws of this state has exclusive control of the school houses in its district, and it seems to me that there could be no objection to its granting the use of an unoccupied room in the school building for public library purposes, unless the voters under section 2749 of the code at their annual meeting have directed otherwise. If no action has been taken by the voters upon the matter then the board might be willing to grant the use of the room until the next annual meeting in March, at which time the question could be submitted to the voters as provided in the section above referred to.

Respectfully,

H. W. BYERS,

Attorney General of Iowa.

March 17, 1909.

MISS ALICE S. TYLER,

Secretary Library Commission.

REMOVAL OF OFFICERS—POWER OF GOVERNOR TO REMOVE APPOINTIVE OFFICER.—Where the term of an office is fixed by law the Governor has not power to remove, but where the Governor has power to appoint, no difinite term of service being fixed, that power carries with it authorty to remove.

SIR: I am in receipt of your communication of the 20th instant in which you say:

"Will you please furnish me with your official opinion as to whether, in the absence of any express statute providing therefore, the governor or any other state official is clothed with authority to remove an official appointed by him or any other officer or board for cause.

First. When the term of office is for a fixed period.

Second. When the term is indefinite.

An early reply would be appreciated."

In response thereto I submit the following:

Article IV of the constitution of the state, in so far as it is material to your inquiry, provides as follows:

"Section 1. The supreme executive power of this state shall be vested in a chief magistrate, who shall be styled the governor of the state of Iowa. * * * ."

"Sec. 8. He shall transact all executive business with the officers of government, civil and military, and may require information in writing from the officers of the executive department upon any subject relating to the duties of their respective offices.

"Sec. 10 When any office shall, from any cause, become vacant, and no mode is provided by the constitution and laws for filling such vacancy, the governor shall have power to fill such vacancy, by granting a commission, which shall expire at the end of the next session of the general assembly, or at the next election by the people."

Sections 19 and 20 of article III of the constitution are as follows:

"Sec. 19. The house of representatives shall have the sole power of impeachment, and all impeachments shall be tried by the senate. When sitting for that purpose the senators shall be upon oath or affirmation; and no person shall be convicted without the concurrence of two-thirds of the members present.

"Sec. 20. The governor, judges of the supreme and district courts, and other state officers, shall be liable to impeachment for any misdemeanor or malfeasance in office; but judgment in such cases shall extend only to removal from office, and disqualification to hold any office of honor, trust, or profit under this state; but the party convicted or acquitted shall nevertheless be liable to indictment, trial and punishment according to law. All other civil officers shall be tried for misdemeanors and malfeasance in office, in such manner as the general as-

sembly may provide."

In addition to the above provisions referring to the powers of the governor and to the impeachment and removal of officers, the following statutes authorize removal by the governor:

OIL INSPECTORS.

"It shall be the duty of the governor to remove from office any inspector who is incompetent or unfaithful in the discharge of his official duty, or, having knowledge of the violation of any of the provisions of this chapter, shall neglect or refuse to prosecute the offender. * * * ."

2509 code supplement.

CUSTODIAN.

"The term of office of the custodian of public buildings and property, appointed by the governor, with the advice and consent of the senate, for the biennial period commencing on the first day of April, 1906, shall expire on the 31st day of March, 1907. Thereafter his term of office shall be for two years, which shall expire on the 31st day of March of each odd-numbered year; but he may be removed at any time for cause by the governor. If a vacancy should occur in said office when the general assembly is not in session, it shall be filled by appointment by the governor, but the person so appointed shall hold his office only until the next general assembly shall have been permanently organized, when the vacancy shall be filled by appointment of the governor by and with the advice and consent of the senate, which appointment shall be for the unexpired portion of the term for which the appointment had been made."

Section 146, code supplement.

NOTARIES PUBLIC.

"The governor may appoint and commission one or more notaries public in each county and may at any time revoke such appointment. * * * ."

Section 373, code supplement.

COMMISSIONERS IN OTHER STATES.

"The governor may appoint and commission, in each of the United States and territories, one or more commissioners, to continue in office for the term of three years from the date of commission, unless such appointment shall be sooner revoked by the governor. * * * ."

Section 383 code.

COMMISSIONER OF LABOR STATISTICS.

"The bureau of labor statistics shall be under the control of a commissioner, biennially appointed by the governor by and with the advice and consent of the executive council, whose term of office shall commence on the first day of April in each odd-numbered year and continue for two years, and until his successor is appointed and qualified. He may be removed for cause by the governor, with the advice of the executive council, record thereof being made in his office; any vacancy shall be filled in the same manner as by the original appointment. * * * ."

Section 2469, code supplement.

MINE INSPECTORS.

"The governor shall appoint three mine inspectors from those receiving certificates of competency from the board of examiners hereinafter provided for, who shall hold their office for two years and until their successors shall be appointed and qualified, subject to removal by him for cause, their term to commence on the first Monday of April of each even-numbered year. Any vacancies occurring shall be filled in the same manner, the appointee to hold for the unexpired term only."

Section 2478 code.

INSPECTORS OF PASSENGER BOATS.

"The governor shall appoint one or more suitable persons as inspectors of passenger boats, to hold office for two years from the first Monday in May in each even-numbered year, unless sooner removed. * * * ."

Section 2511 code.

DAIRY COMMISSION.

"On or before the first day of April of each even-numbered year, the governor shall appoint a dairy commissioner, who shall have a practical knowledge of and experience in the manufacture of dairy products, and hold his office for two years from the first day of May following his appointment, and until his successor is appointed and qualified, subject to removal by the governor for inefficiency, neglect or violation of duty. * * * ."

Section 2515, code supplement.

VETERINARY SURGEON.

"The state veterinary surgeon shall be appointed by the gov-

ernor, subject to removal by him for cause, who shall hold office for three years. * * * ."

Section 2529, code supplement.

BOARD OF HEALTH.

"The state board of health shall consist of the attorney general and the state veterinary surgeon, who shall be members by virtue of their offices, one civil engineer and seven physicians to be appointed by the governor, each to serve for a term of seven years and until his successor is appointed; vacancies to be filled by the governor for the unexpired term. But no one of the seven physicians hereafter appointed shall be an officer or member of the faculty of any medical school, and the governor shall have the power to remove any member of said board for good cause shown. * * * ."

Section 2564, code supplement.

BOARD OF CONTROL.

"The governor shall, prior to the adjournment of the twenty-seventh general assembly, nominate and, with the consent of two-thirds of the members of the senate in executive session, appoint three electors of the state, not more than two of whom shall belong to the same political party, and no two of whom shall reside at the time of their appointment in the same congressional district, as members of a board to be known as a 'board of control of state institutions. * * * .' Said members shall hold office, as designated by the governor, for two, four and six years respectively. Subsequent appointments shall be made as above provided and except to fill vacancies, shall be for a period of six years. The board shall at all times be subject to the above limitations and restrictions. * * * The governor may, by and with the consent of the senate, during a session of the general assembly, remove any member of the board for malfeasance or non-feasance in office, or for any cause that renders him ineligible to appointment, or incapable or unfit to discharge the duties of his office, and his removal when so made shall be final. When the general assembly is not in session the governor may suspend any member so disqualified, and shall appoint another to fill the vacancy thus created subject, however, to the action of the senate when next in session. All vacancies on said board that may occur while the general assembly is not in session shall be filled by appointment of the governor, which appointment shall expire at the

end of thirty days from the time the general assembly next convenes, and vacancies occuring during a session of the general assembly shall be filled as regular appointments are made and before the end of said session."

Section 2727-a1, code supplement.

SUPERINTENDENT OF WEIGHTS AND MEASURES.

"A superintendent of weights and measures for the state, who shall possess sufficient learning and mechanical skill to perform the duties of the office, shall be appointed by the governor from the board of professors of the university, who shall hold his office during the pleasure of the governor. * * *."

Section 3019, code.

The following statutes give the governor power to appoint officers for definite terms, but contain no provisions for the removal of such officers:

BOARD OF CURATORS OF STATE HISTORICAL SOCIETY.

"The board of curators of the society shall consist of eighteen persons, nine of whom shall be appointed by the governor, and nine elected by the members of the society. Their term of office shall be for two years. * * * ."

Section 2883, code.

BOARD OF EDUCATIONAL EXAMINERS.

"The educational board of examiners shall consist of the superintendent of public instruction, president of the university, principal of the normal school, and two persons to be appointed by the governor, one of whom shall be a woman, the appointees to hold office for a term of four years."

Section 2628, code.

DIRECTOR OF WEATHER AND CROP SERVICE.

"The central station shall be at the seat of government, under the charge of a director and assistant, to be appointed by the governor for a term of two years, upon the recommendation of the board of directors of the state agricultural society; the assistant to be an officer of the United States weather bureau, if one shall be detailed for that purpose."

Section 1678, code.

FISH AND GAME WARDEN.

"There is hereby created the office of state fish and game warden. The warden shall be appointed by the governor, and hold his office for three years from the first day of April of the

year of his appointment. * * * ."

Section 2539, code supplement.

PHARMACY COMMISSIONERS.

"The commission of pharmacy shall consist of three competent pharmacists who have been for the preceding five years residents of the state and engaged in practicing pharmacy, one of whom shall be annually appointed by the governor and hold office for three years and until his successor is appointed and qualified. * * * ."

Section 2584, code.

BOARD OF DENTAL EXAMINERS.

"The board of dental examiners shall consist of five practicing dentists, who shall have been engaged in the continuous practice of their profession in this state for the period of five years preceding their appointment, one of whom shall be appointed annually by the governor, and hold office for the term of five years from and after the first day of August following his appointment, and until his successor is appointed. * * * All vacancies occurring in the board shall be filled in like manner, and the appointee hold office for the unexpired term of his predecessor. * * * ."

Section 2600-b, code supplement.

BOARD OF PAROLE.

"Prior to the adjournment of the thirty-second general assembly, the governor, with the advice and consent of the senate, shall appoint three electors of the state, not more than two of whom shall belong to the same political party, and one member of whom shall be a duly licensed attorney at law, as members of a board to be known as a board of parole. Said members shall hold office, as designated by the governor, for two, four and six years respectively; subsequent appointments shall be made as provided above, and shall be for a term of six years, except appointments to fill vacancies, which shall be for the unexpired term. * * * Appointments made when the general assembly is not in session shall be subject to the approval of the senate when next in session. * * * ."

Section 5718-a14, code supplement.

LIBRARY COMMISSION.

"The governor shall appoint four persons, at least two of whom shall be women, who, with the state librarian and superintendent of public instruction and president of the state

university, shall constitute a state library commission. The first members appointed by the governor shall be appointed for terms of two, three, four and five years from the first day of July, 1900, and all subsequent appointments shall be for terms of five years, except appointments to fill vacancies. * * *."

Section 2888-a, code supplement.

Summarized, the governor has the power to remove oil inspectors, the custodian of public buildings and property, notaries public, commissioners in other states, the commissioner of labor statistics, mine inpectors, inspectors of passenger boats, dairy commissioner, state veterinary surgeon, members of the board of health, members of the board of control and the superintendent of weights and measures.

As to the following officers no provision has been made by the legislature for removal: members of the board of curators of the state historical society, members of the board of educational examiners, the director of the weather and crop service, the fish and game warden, the pharmacy commissioners, members of the board of dental examiners, members of the board of parole and the members of the library commission.

The question under discussion has many times been before the courts of the country, and while the decisions are not in entire harmony the rules that must govern are fairly well settled.

In the case of *Honey v. Graham,* 39 Texas, 1, the governor had, during the absence from the state of the treasurer, declared the office vacant. The court, in passing upon the power of the governor to create a vacancy, says:

"The power of the governor to fill a vacancy, whenever one exists, is not disputed. The power to create a vacancy is denied by every authority except where the office is filled by the governor's choice of an incumbent, without concurrence of the senate or election by the people, and the term of office is undefined by law."

In *Hallgren v. Campbell,* Mich., 46 N. W. R., 381, it is said:

"We have not found any case where an officer who was appointed for a fixed term (and when the power of removal was not expressly declared by law to be discretionary), has been held to be removable except for cause, and, wherever cause must be assigned for the removal of an officer, he is entitled to notice and a chance to defend."

In *Ham v. Board,* 142 Mass., 90; 7 E. R., 540, the board of police were authorized to remove for cause. It was held that they had no power to remove until after notice and an opportunity by the official in question to be heard in his own defense.

In *State v. City of St. Luis,* 90 Mo.. 19; 1 S. W. R., 757, the statute authorized the removal of any elected officer of the city of St. Louis for cause. The court said: "When the removal is not discretionary, but must be for a cause, as is the case here, and nothing is said as to the procedure, a specification of the charges, notice, and an opportunity to be heard, are essential. This, we think, is the result of the authorities before cited. The proceedings in this case are wanting in all these requisites; for if, indeed, any charges were ever made against the relator at all, they were the product of the minds of the members of this committee, and by them kept from the knowledge of the accused."

In I Dill. Mun. Corp. (4th Ed.), Sec. 250, the author says that, where the right of removal is confined to specific causes, such power cannot be exercised until there have been formulated charges against the officer, notice thereof, and an opportunity for defense.

The following cases also support the principle of the foregoing:

Biggs v. McBride, 17 Ore., 640, 21 Pac. R., 878;

State v. Hawkins, 44 Ohio St., 98, 5 N. E. R., 228;

Hogan v. Carbery, (Cin. Super. Ct.), 4 Cin. Law B., 113;

where term of office is fixed.

The power to remove at pleasure, as an incident of the power of appointment which is conferred by a constitution where a duration of the office is not provided for therein, does not apply to an officer whose term of office is defined.

Trainer v. Board of County Auditors, Mich., 95. Case note 15, L. R. A.

Also *People v. Jewett,* 6 Cal., 291.

An officer cannot be removed without notice in the absence of express power to do so, where the statute fixes the term of his office.

Hallgren v. Campbell, 9 L. R. A., 408, 82 Mich., 255.

The grant of the executive power to a governor of a state is not regarded as giving him power to remove an officer.

Peyton v. Cabaniss, 44 Miss., 808;

Field v. People, 3 Ill., 79.

The doctrine that power to remove is incidental to power to appoint does not apply to governors of states. Their power of

removal is limited to particular cases, provided for by statutory enactment.

Dubuc v. Vess, 19 L. R. A., 210.

It is the almost universal rule that where the duration of an office is not prescribed by law the power to remove is incident to the power to appoint.

29 Cyc., 371;

Patton v. Vaughan, 39 Ark., 211;

Field v. People, 3 Ill., 79;

Keenan v. Perry, 24 Tex., 253;

State ex rel Redfield v. Cathburn, 63 Iowa, 659.

The principle that the power of removal is incident to the power of appointment, is applicable only in those cases where the office is held at the pleasure of the appointing power, and the tenure not fixed by law.

Collins et al. v. Tracey, 36 Texas, 546;

Ex parte Hennen, 13 Peters, 256;

Honey v. Graham, 39 Texas, 1.

The general rule is, that where a definite term of office is not fixed by law, the officer or officers, by whom a person was appointed to a particular office, may remove him at pleasure, and without notice, charges, or reasons assigned. * * * And it is conceded, in all cases, that where a fixed term is assigned to the office, the appointing power has no absolute power of removing. (Cases cited).

Throop, supra, section 354, page 352.

An appointment to office for a fixed term or to fill a vacancy cannot be revoked, although the official bond has not yet been given nor the official oath taken.

Am. & Eng. Enc. of Law, Vol. 23, Par. 3, page 433; 63 Iowa, 659.

The power to remove is incident to the power to appoint in the absence of some provision of law fixing the duration of the office and the mode of removal.

Supra paragraph 3, page 435.

"The power to remove is an incident to the power to appoint, as a general proposition. * * * ."

Sponogle v. Curnow, 136 Cal., 580-582.

There is a rule, universal in the United States so far as we know, that in the absence of constitutional or legislative restrictions, where no definite term of office is prescribed by law, the

power of removal is incident to the power of appointment. This has always been the law and the custom of the president and heads of departments under our federal government with reference to the numerous offices at their disposal. So in regard to the tenure of the clerk of the United States district court holding by appointment of the judge.

(A case involving the removal by a county judge of an oil inspector appointed by a preceding judge).

Patton v. Vaughan, 39 Ark., 211.

In the case of *State ex rel Redfield v. Cathburn*, 63 Iowa, 659, a vacancy occurred in the office of county sheriff and the board of supervisors filled the vacancy by appointment, and later attempted to remove the appointee, and passing upon the question this court held that when the board of supervisors made its first appointment, the appointment was for the unexpired term, hence for a definite period of time, and that the board had no authority to remove the officer at pleasure.

Cliff had been elected secretary of the senate; he was afterwards removed and Parsons elected to fill the vacancy. This proceeding was instituted by Cliff to test the right of the senate to remove an officer without preferring charges against him and giving him a hearing.

The court said:

> "Section 7 of article 3 of the constitution of Iowa is as follows: 'Each house shall choose its own officers and judge of the qualifications, election and return of its own members.' As to the right of removal it is well stated in 19 Am. & Eng. Enc., page 562-f, as follows: 'In the absence of constitutional provisions or statutory regulations, where the tenure is not fixed by law, and where the office is held at the pleasure of the appointing power, the power of removal is incident to the power of appointment; and it is well settled in such case that an officer may be removed without notice of hearing. The doctrine applies, however, where the office is held at the pleasure of the appointing power only. Where the tenure of the office is fixed by law, or where the concurrence of consent of a different body or officer is required to the removal, or where the right of removal can be exercised only for specified cause or for cause generally, the appointing power can not arbitrarily remove the officer; and, where the removal is to be had for cause, the power can not be exercised until the offi-

cer has been duly notified, and the opportunity given him to be heard in his own defense.' This statement of the law is well supported in the cases cited in the footnotes, and is not questioned in this case; therefore, we deem it unnecessary to make further citations. If nothing further appeared, it would hardly be questioned but that the senate can choose and remove is own officers at pleasure. * * * .''

''Our conclusions are that no term is fixed by law during which the secretary of the senate shall hold his office, that the power to appoint is exclusively in each senate, that the office is held during the pleasure of the senate appointing, and therefore the senate has power to remove without notice or hearing.''

Cliff v. Parsons, 90 Iowa, 665.

Keeping in mind the provisions of our constitution and statute covering the powers and duties of the governor and other state officers and boards, these decisions establish the following rules:

First. The term ''other state officers'' as used in section 20, article 3 of the constitution, who may be removed by impeachment proceedings, refers only to the state officers named or provided for in the constitution, and does not cover incumbents of state offices which have been created by statute.

Second. That neither the governor nor any other state officer or board may remove an official filling an office the term of which is fixed by law, unless the authority to do so is expressly given either in the constitution or the statute.

Third. The power of the governor, state officer or board to appoint, no definite term of service being fixed, carries with it the power to remove in all cases where the service to be performed pertains to or has to do with the business or government of the state.

Respectfully submitted,

H. W. BYERS,
Attorney General.

March 24, 1909.

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

LEGISLATION—SIGNING OF BILLS BY LIEUTENANT GOVERNOR OR SPEAKER.—Where a bill receives constitutional majority in both houses, properly enrolled and signed by the governor, failure of presiding officer of body to sign does not affect its validity.

SIR: I beg to acknowledge receipt of yours of April 15th in which you say:

> "Will you please favor me with your official opinion as to whether or not the failure of the lieutenant governor or the speaker of the house to sign a bill which otherwise seems to have passed both bodies in the regular form, is such a defect as to render the measure inoperative even though it should receive the signature of the governor?"

In response thereto I submit the following:

Section 15 of article 3 of the constitution dealing with the legislative department provides:

> "A bill may originate in either house, and may be amended, altered, or rejected by the other; and every bill having passed both houses, shall be signed by the speaker and president of their respective houses."

If this constitutional provision is mandatory, then the failure of the presiding officer of either house to sign a bill would be fatal to its validity; if, however, the provision is merely directory, the absence of the presiding officer's signature would not affect the validity of the act.

In the state of Kansas, where the constitution provides: "Every bill and joint resolution passed by the house of representatives and senate shall, within two days thereafter, be signed by the presiding officers and presented to the governor," the invalidity of an act was urged because of the failure of the president of the senate to affix his signature to the bill, and the court, speaking through Valentine, Judge, held:

> "The signatures of the presiding officers of the two houses of the legislature to an enrolled bill, are only portions of the many evidences of the due passage and validity of such bill; and courts must decide as to the passage and validity of a bill upon the whole of the legal evidence applicable in such cases. Therefore, where the enrolled bill of a certain act and the legislative journals, taken together, clearly show that the bill was duly passed by the legislature, and approved by the governor, and where all the intrinsic evidence having any

application to the case clearly shows the same thing, a bill should be held to be valid, although it may not have the signature of the presiding officer of the senate affixed to it."

Commissioners of Leavenworth County v. John Higgonbotham, 17 Kas., 62.

In Nebraska, with the constitutional provision as follows: "The presiding officer of each house shall sign publicly in the presence of the house over which he presides, while the same is in session and capable of transacting business, all bills and joint resolutions passed by the legislature," the supreme court of that state in an opinion written by Maxwell, Chief Justice, says:

"The signature of the presiding officer to a bill is a mere certificate to the governor that it has passed the requisite number of readings, and been adopted by the constituional majority of the house over which he presides. * * * And where it appears from the journal that a bill has passed by the requisite majority, and has been approved by the governor, the failure of the presiding officer to affix his signature thereto will not invalidate the act, as it will be presumed that the governor had sufficient evidence before him of the passage of the bill at the time he approved the same. The act is, therefore, of the same validity as though signed by the presiding officer of the senate."

Geo. Cottrell v. the State of Nebraska, 1 N. W. R.,. 1008.

To the same effect is *Taylor v. Wilson,* 22 N. W. R., 119.

Sutherland on Statutory Construction at section 51, lays down the rule that in states where the journals are not records and the act when passed and duly authenticated is conclusive as a record the constitutional provision requiring every bill to be signed by the presiding officers is mandatory; and in states where the vote on the passage of the bill is required to be entered on the journal, and where the legislative journals and files are records from which the passage of the bill may be proven, the constitutional provision for signing is not mandatory, and in such cases the author says:

"The signature of the presiding officer is in such cases only a certificate to the governor that the bill or resolution has passed the requisite number of readings, and been adopted by the constitutional majority of the house over which he presides."

And further:

"Where the vote must be determined by the journal the

absence of the signatures of the presiding officers is not fatal, if the governor has signed the bill, for it will be presumed that the governor had sufficient evidence, the assurance which the journal afforded to the court, of its passage at the time of his approval."

Our constitution requires an aye and nay vote to be taken and entered in the journal upon the passage of every bill, and the journal record is conclusive upon the question as to whether or not the bill received the requisite number of votes, thus making the rule laid down by Sutherland applicable in this state. There are, however, many states in the Union where the signatures of the presiding officers of the house and senate are necessary to the validity of a legislative act, but in practically all of them the constitutional provision is different from ours, and in most of them provides, as does the constitution of the state of Missouri, that "no bill shall become a law until the same shall have been signed by the presiding officer of each of the two houses in open session."

The exact question raised by your inquiry has never been before our supreme court so far as I have been able to discover. There are some statements in the case of *Koehler & Lange v. Hill,* decided by the supreme court of this state in 1883 in what has come to be known as the prohibitory amendment decision, which would seem to indicate that the court as then constituted was of the opinion that the signatures of the presiding officers of the two houses were necessary to the validity of an act passed by the general assembly; no such question, however, was involved in that controversy, nor did the proper disposition of that case involve in any sense either a decision or an argument upon the question here under discussion, so that what is there said by the court with respect to the signatures of the presiding officers is mere *dictum,* and I feel reasonably certain that when this question comes before the supreme court, if it ever does, it will not only not be bound by what the court in the Koehler case indicates the rule should be, but will follow the rule laid down in the Kansas and Nebraska cases above cited. In any event, until our court decides the exact question to the contrary I am inclined to agree with the Kansas and Nebraska cases. I come more readily to this conclusion because to hold otherwise would be to give to the presiding officer of either house of our legislature the absolute power to veto any measure which did not meet with his approval by simply refusing or neglecting to sign a bill.

I am therefore of the opinion that when a bill has received a

constitutional majority in both houses, been regularly and properly enrolled and signed by the governor, the absence of the signature of the president of the senate or the speaker of the house from the bill would not affect its validity.

Respectfully submitted,

H. W. BYERS,
Attorney General of Iowa.

April 16, 1909.
HON. B. F. CARROLL,
Governor of Iowa.

STATE INSTITUTIONS—EXAMINATION OF ACCOUNTS—LAW CONSTRUED.—Sections 159 and 160 of the code, providing for examination of accounts of state institutions and paying expense thereof, are still in force.

GENTLEMEN: I am in receipt of a communication from your secretary dated April 23d, in which he says:

> "At a meeting of the executive council held this day an order was entered directing secretary of the executive council to request your opinion in writing as to whether the provisions of code sections 159 and 160, providing for examinations of the accounts of state institutions and for paying the expense of the same, are yet operative or whether the same have been repealed in whole or in part, and to ask your opinion as to what institutions these sections apply, if to any."

In response thereto I have to say:

The twenty-seventh general assembly in section 2727-a9 of the supplement to the code, 1907, in what is known as the act creating a board of control for state institutions, provided among other things as follows:

> "The powers possessed by the governor and executive council, with reference to the management and control of the state penitentiaries, shall, on July 1, 1898, cease to exist in the governor and executive council, and shall become vested in the board of control; and the said board is, on July 1, 1898, and without further process of law, authorized and directed to assume and exercise all the powers heretofore vested in or exercised by the several boards of trustees, the governor, or the executive council with reference to the several institutions of the state herein named. The duties imposed on the executive council, by statute, to establish an uniform system of books and accounts for state institutions, and to cause the same to be examined annually by a skilled accountant, and

to annually require a settlement with the officers of each state institution, are transferred from said council to the board of control as to the institutions herein named."

Later the twenty-ninth general assembly repealed section 161 of the chapter containing the two sections referred to in the above communication, and enacted the following in lieu thereof:

"The executive council shall annually, and oftener in its discretion, make a full settlement between the state of Iowa and all state officers, commissioners, boards, departments and all persons receiving, handling or expending state funds except institutions under the control of the board of control.

"For that purpose, an expert accountant at a salary not exceeding six ($6.00) dollars per day, and an assistant at a salary not exceeding four ($4.00) dollars per day, may be employed to examine the records and accounts of all of said state officers, commissioners, boards, persons and departments. The expert accountant so appointed shall report in writing to the executive council the facts found, with suggestions as to improvements in methods of bookkeeping and shall also report the facts as to any practices in administration, not authorized by statute or contrary to good business methods.

"The executive council shall have authority to direct the manner in which the records and accounts of state departments shall be kept, when the statute does not prescribe the same; to require a compliance with the provisions of law when the statute prescribes duties as to methods and accounts and to require the keeping of the necessary records and accounts to enable said officers to make all reports required of them by law."

Section 161-a, supplement to the code, 1907.

I have been unable to find any other provisions in the law anywhere changing or modifying in any respect sections 159 and 160 of the code.

It is therefore my opinion that both of said sections are still operative and apply to all state institutions, if there are any such, which are not under the supervision and control of the board of control, and for which no other specific provision is made for the examination of its books, accounts, vouchers, expenditures, etc.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

April 24, 1909.

TO THE HON. EXECUTIVE COUNCIL
Of the State of Iowa.

STALLIONS—"GRADE STALLIONS"—HOW ADVERTISED.—A criminal action cannot be maintained against a person who advertises his stallion in a newspaper without using the word "grade."

SIR: I beg to acknowledge receipt of your favor of the 26th ultimo requesting an opinion as to whether or not it is a violation of the law if the word "grade" is not used in connection with the advertising in a newspaper of a stallion for which no state certificate has been issued.

Replying to your letter I have to say that since the statute requiring owners and keepers of stallions kept for public service for which a state certificate has not been issued to advertise said horse or horses by having printed handbills, etc., in which handbills the term "grade stallion" should be used, and providing a penalty for failure to so advertise, is in the nature of a criminal statute it must be strictly construed, and since no provision whatever is made for advertising in a newspaper nor limiting the character of the advertisement if one is put in the newspaper, it is my opinion that a criminal action could not be maintained against a person who advertises his stallion in a newspaper without using the word "grade."

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

May 8, 1909.

HON. J. C. SIMPSON,
Secretary of Agriculture.

UNFAIR DISCRIMINATION.—Amendment to section 5028-b of the supplement to the code, 1907. Chapter 222, acts of the thirty-third general assembly prohibits the discrimination in prices in different parts of the state for the purpose of destroying competition or of creating a monopoly. This is true even though the difference in price is paid by the indirect method of fraudulently misreading the butter fat test.

Enforcement of the act is specifically enjoined upon the county attorney and the attorney general.

SIR: I am in receipt of your communication of the 3d instant, requesting an interpretation of Senate File No. 105, which amends section 5028-b of the supplement to the code, 1907, relating to unfair discrimination. You request to be advised specifically:

First. As to whether the act requires a purchaser of cream to pay the same price to all persons throughout the state on the same day.

Second. In the case of a cream purchasing agent, buying cream in the locality where there is a local creamery, is the cream purchasing agent permitted to pay a higher price in that locality than is paid by his employer elsewhere, and if so to what extent.

Third. If the purchaser raises the test on butter fat above what is actually shown by the test, would this constitute a violation of the act?

Fourth. Is the food and dairy department charged with any responsibility in the enforcement of this statute?

First and *Second.* Your first and second questions are so closely related that they may be answered jointly.

The purpose of the act was to prohibit any person, firm, company association or corporation doing business in this state and engaged in the business of buying milk, cream or butter-fat for the purpose of manufacture, or of buying poultry, eggs or grain for the purpose of sale or storage, from destroying the business of a competitor or creating a monopoly by paying different prices in different parts of the state for the same grade and quality of the article purchased after making due allowance for the difference in transportation from the point of purchase to the point of manufacture, sale or storage. The thing prohibited by the act is the discrimination in price for an illegal purpose, viz.: for the destroying of competition or the creating of a monopoly. The act itself, however, permits the paying of a different price in one place than is paid generally by the same person at different points throughout the state, provided the change in price is made in good faith to meet competition in a particular locality.

Third. The payment of a different price than that generally paid throughout the state for the same article, considering the difference in cost of transportation, by the indirect method of fraudulently reading the butter fat test is as clearly illegal and a violation of the act as though a different price were paid in the regular way, provided that this is done for the purpose of destroying the business of a competitor or creating a monopoly.

Fourth. The enforcement of this act is by section 5028-e of the supplement to the code, 1907, especially enjoined upon the county attorney and the attorney general.

I conclude, therefore, that the only duty incumbent upon you

in reference to this act is that which necessarily results from the nature of the act and its relation to your department.

Considering that complaints for violations of this act will constantly be presented to your department, I suggest that you refer all such complaints to the county attorney of the county where the law is violated, and also to the department of justice.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

June 4, 1909.

H. R. WRIGHT,
State Food and Dairy Commissioner.

PHARMACY COMMISSION—ASSISTANT'S CERTIFICATE—TO WHOM ISSUED.

SIR: I am in receipt of your communication of the 4th instant requesting an opinion as to whether the commission of pharmacy may issue an assistant's certificate to an applicant of two years' experience, under the provisions of section 2589-b of the supplement to the code, 1907.

It is my opinion that an assistant's certificate may only be issued by the board of pharmacy pursuant to the provisions of section 2589-c of the supplement to the code, 1907, and that said section only contemplates the issuing of such certificates to persons between the age of eighteen and twenty-one years.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

June 12, 1909.

MR. C. W. LARSON,
Secretary Pharmacy Commission.

FISH AND GAME—DESTRUCTION OF SEINES USED BY FISHERMEN ALONG MISSISSIPPI RIVER—SUPERVISION OF STATE OVER WATERS OF MISSISSIPPI.

SIR: I have your favor of the 9th inst. in which you ask for an opinion on section 2547 as amended by the thirty-third general assembly. You state that the river fishermen along the Mississippi

river refuse to take out licenses under said section, and propose to contest the constitutionality of the law.

You ask, also, whether or not the nets and seines of fishermen within ten rods of the Mississippi river are liable to seizure and destruction as provided in section 2540, and whether arrests can be made for violation of the law until such evidence is in your possession to prove that such fishermen have taken fish with nets or seines from said river.

The act of congress of March 3, 1845, for the admission of the state of Iowa to the Union provides, in part, as follows:

> "Sec. 2. And be it further enacted, That the following shall be the boundaries of the said state of Iowa, to-wit: Beginning at the mouth of the Des Moines river, at the middle of the Mississippi, thence by the middle of the channel of that river to a parallel of latitude. * * *"
>
> "Sec. 3. And be it further enacted, That the said state of Iowa shall have concurrent jurisdiction on the River Mississippi, and every other river bordering on the said state of Iowa, so far as the said rivers shall form a common boundary to said state and any other state or states now or hereafter to be formed or bounded by the same; such rivers to be common to both; and that the said River Mississippi, and the navigable waters leading into the same, shall be common highways, and forever free, as well to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impose or toll therefor, imposed by the said state of Iowa."

The boundaries of Iowa were changed by act of congress August 4, 1846 (See page 66, Iowa Official Register, 1907-8), but the eastern boundary still continued to be the middle of the main channel of the Mississippi river.

The extent of the power of the legislature to exercise supervision over the waters of the Mississippi must be determined by the supreme court: I would suggest that you secure positive evidence of violation of the new law and make arrests in order that the law may be properly tested, but I think it would be unwise for you to destroy nets and seines under the circumstances set forth in your letter until there is a judicial determination of the constitutionality of the act amending section 2547.

Very truly,

H. W. BYERS,
Attorney General of Iowa.

June 15, 1909.
HON. GEO. A. LINCOLN,
State Fish and Game Warden,
Cedar Rapids, Iowa.

VETERINARY MEDICAL EXAMINERS — PUBLICATION OF OFFICIAL REGISTER OF DEPARTMENT EXPENSES.—The board is entitled to such expenses as are necessary to carry out the purpose of its existence.

GENTLEMEN: Some time ago your secretary submitted to this department the question,—May the board of veterinary medical examiners prepare and issue an official register of all veterinarians holding certificates issued by the board, and charge the expense thereof to the state; and, further, whether the executive council is authorized to audit any other expenses of this board and its secretary than the actual necessary traveling expenses?

In response thereto I have to say, that an examination of chapter 14-A of the supplement to the code, 1907, convinces me that if the publication of such a register is essential to the proper enforcement of the provisions of the chapter (and such necessity should be left to the determination of the board), the board may properly issue the same provided the fees collected will warrant the necessary expenditure; and the executive council is fully authorized by law to audit not only the actual necessary traveling expenses of the members of the board, but all other legitimate and proper expense made by the board in carrying out the purpose of its existence, the only limitation upon the board in incurring the expense being:

(a) That the expenditure be a legitimate and necessary one.

(b) That the total expense of the board, including *per diem* and necessary traveling expenses of its members do not exceed the fees collected.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

June 23, 1909.

TO THE HONORABLE EXECUTIVE COUNCIL
of the State of Iowa.

GAME—SHIPMENT—AFFIDAVIT.—It is unlawful for a person to transport game fish for purpose of sale without making statement under oath that same was not unlawfully taken.

SIR: I have your favor of the 16th inst. asking for an opinion upon the following propositions:

"*First.* Can a party transport game fish in a baggage car if he is on the same train, without affidavit, either checked as baggage or just thrown in with his name and address on same?

"*Second.* Can a party transport non-game fish boxed up up so they cannot be examined, same marked bullheads or some other kind of non-game fish, without affidavit, and what authority has the transportation company to receive them not knowing whether they are game fish or not without affidavit?

"*Third.* As I understand it, the word 'transport' means 'to carry,' and if fish are carried in any manner without affidavit it becomes unlawful. Take this up at once, as this question is causing this department a great deal of trouble."

Replying thereto I have to say:

First. That under section 2540 as amended by the thirty-third general assembly, all game fish transported in a baggage car, either checked as baggage or otherwise, should be accompanied with an affidavit as contemplated in said section.

Second. The law in reference to the transportation of fish as found in sections 2540 and 2557 applies only to game fish, and non-game fish may be shipped as any other property without affidavit.

Third. Section 2540, which is doubtless the section you have in mind, is in part as follows:

> "It shall be unlawful for any person, firm or corporation to offer for transportation or to transport to any place within or without this state for purposes of sale, any game fish taken from the inland waters of the state. Any person, firm or corporation desiring the shipment or transportation of any game fish, shall deliver to the common carrier, express or transportation company, a statement under oath in duplicate. * * * *."

Under the section above quoted it would be unlawful for one to transport game fish for the purposes of sale in any manner whatsoever, but it was not the legislative intent to require an affidavit unless the game fish were delivered to a common carrier, express or transportation company of some kind. That is to say, it was not the legislative intent to require a person to make an affidavit in order that he himself might convey the fish from the point of capture to his own home.

Very truly,

H. W. BYERS,
Attorney General of Iowa.

June 23, 1909.

HON. GEO. A. LINCOLN,
State Fish and Game Warden,
Cedar Rapids, Iowa.

BONDS—MUNICIPAL—OPINION AS TO CLASS OF BONDS.—Certain bonds held to be municipal bonds.

SIR: I beg to acknowledge receipt of your favor of the 1st inst. in which you say:

> "I am directed by the executive council to request of you an opinion in writing as to whether district bonds; as, for example, bond No. 164 of Sewer District No. 1, city of Cedar Rapids, Iowa, are municipal bonds under the provisions of code section 1839-1. Auditor of State Bleakly will deliver to you for examination bond No. 164 of Sewer District No. 1, city of Cedar Rapids, upon a call for same."

In response thereto I submit the following:

Section 1839-1 of the 1907 supplement to the code provides, in part, as follows:

> "Any fraternal beneficiary society, order or association organized under the laws of this state, accumulating money to be held in trust for the purpose of the fulfillment of its certificates or contracts, shall invest such accumulations in the following securities and no other.
>
> "*Third.* Bonds or other evidences of indebtedness of any county, city, town or school district within the state or any other state, or drainage bonds of any drainage district in the state of Iowa where such bonds or other evidences of indebtedness are issued by authority of, and according to law and bearing interest, and are approved by the executive council."

Upon examination of bond No. 164, I find it to be an obligation of the city of Cedar Rapids, payable only out of the district sewer fund of Sewer District No. 1 of the city of Cedar Rapids, comprising the whole of the real property within the corporate limits, and the money derived from the collection of the special tax levied upon the whole of the real property within said district and said money can be used for no other purpose. The bond states that all acts, conditions and things required to be done precedent and in the issuing of the bond have been done and performed in due form, "and for the assessment, collection and payment thereon of said special tax in accordance with law to the amount necessary for the complete discharge and payment of this bond and interest when due the full faith and diligence of the city of Cedar Rapids are hereby irrevocably pledged." The bond is signed by the mayor and city clerk.

I am of the opinion that the bond is a "city bond" as contemplated in the section referred to.

Respectfully submitted,

H. W. BYERS,
Attorney General of Iowa.

July 7, 1909.
HON. A. H. DAVISON,
Secretary of the Executive Council.

STATE MILITIA—HOW PAID WHEN ON DUTY.—Auditor may issue warrant to adjutant general for an amount sufficient to cover pay of regiment.

SIR: I am just in receipt of your communication requesting an opinion "as to whether the auditor of state is authorized to issue warrant to the adjutant general of the state for an amount in full to cover the entire pay for regiment for a tour of camp duty, the pay-rolls which are signed by each member of the organization being filed as vouchers with requisition for money."

In response thereto I have to say, that upon the facts stated in your letter, and what you have heretofore stated with reference to the manner in which the individual members of the guard are paid when on duty, I am of the opinion that the auditor has ample authority to issue a single warrant to cover the entire pay for a regiment. Any other holding would entail upon the auditor's office endless work in issuing separate warrants for each individual member, and put the state to great and unnecessary expense. The law requiring the auditor to issue warrants in the name of the individual to whom the money is due does not apply, in my judgment, to the case you present. Respectfully,

H. W. BYERS,
Attorney General of Iowa.

July 16, 1909.
HON. GUY E. LOGAN,
Adjutant General of Iowa.

INEBRIATES—ESCAPE FROM STATE HOSPITAL—EXPENSES OF RECAPTURE—PUNISHMENT.—An escaped inebriate may be returned to hospital to serve sentence pending investigation by grand jury. Expense of prosecution should be paid by executive council out of state treasury.

GENTLEMEN: I have your favor of the 6th instant as follows:

"We desire your opinion on the following questions:

"*First.* If a patient escape from the State Hospital for Inebriates and give bond for his appearance before the grand jury for the escape, or, having been indicted therefor, give bond for his appearance for trial, and in either case is released on his bond, can he be returned to the hospital for confinement during the unexpired term and before the grand jury acts or the trial is had, the legality of his commitment not having been questioned?

"*Second.* If an escape be confined in jail awaiting trial is the time he spent in jail to be deducted from the term of his confinement?

"If he give bond for appearance before the grand jury or for trial and is released, is the time he was so under bond to be deducted from the term of his confinement?

"In each of these cases the legality of the commitment is to be considered as unquestioned or as having been sustained.

"Your attention is called in this connection to the opinion of the attorney general of November 20, 1905, under chapter 93, acts of the twenty-ninth general assembly."

The conclusions reached in the opinion of November 20, 1905, above referred to, are applicable to your propositions above set forth.

Section 2310-a20 of the 1907 supplement to the code provides that an inebriate who has escaped from the hospital shall be guilty of a misdemeanor, punishable by imprisonment for not less than thirty nor more than ninety days, the costs of prosecution and maintenance of such escaped inebriate to be paid by the board of control.

Section 2310-a30, amended by section 3, chapter 133, acts of the thirty-third general assembly, provides that in the case of escape of any inebriate from the hospital all necessary expenses incurred in the recapture and commitment of such patient shall be paid out of any funds of the state treasury, etc.

Section 2310-a31 provides that whenever any person shall have been committed to the state hospital for inebriates * * * he shall be subject to prosecution for any public offense committed against the penal statutes of the state and he shall, at all times, be subject to arrest notwithstanding such commitment. Such person shall, when discharged, be returned to said hospital at the expense of the county in which such prosecution was pending and concluded.

I am of the opinion that your first proposition should be answered in the affirmative, and that neither the time spent by an escape in jail nor while under bond for appearance before the grand jury or for trial should be deducted from his term of confinement.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

July 21, 1909.

TO THE HONORABLE BOARD OF CONTROL
of State Institutions.

CORPORATIONS—ISSUING STOCK IN EXCHANGE FOR PROPERTY—INTOXICATING LIQUORS.—The executive council may grant leave to a corporation to issue stock in exchange for intoxicating liquors.

SIR: I acknowledge receipt of your communication of the 20th instant in which you say:

> "By direction of the executive council I am sending you the application of Nels Olson & Son, a corporation organized under the laws of Iowa, asking for authority to issue stock on account of property, for your opinion as to the authority of the executive council under the law, to approve of the issue of stock to a corporation on account of property which consists of intoxicating liquors."

In response thereto I submit the following:

Section 1641-b of the supplement to the code, 1907, provides in part as follows:

> " * * * If it is proposed to pay for said capital stock in property or in any other thing than money, the corporation proposing the same must, before issuing capital stock in any form, apply to the executive council of the state of Iowa for

leave to do so. Such application shall state the amount of the capital stock proposed to be issued for a consideration other than money, and set forth specifically the property or other thing to be received in payment for such stock. Thereupon, it shall be the duty of the executive council to make investigation, under such rules as it may prescribe, and to ascertain the real value of the property or other thing which the corporation is to receive for the stock; and shall enter its finding, fixing the value at which the corporation may receive the same in payment for capital stock; and no corporation shall issue capital stock for the said property or thing in a greater amount than the value so fixed and determined by the executive council."

I am of the opinion that under the above section, the executive council may, at its discretion, grant leave to an existing corporation to issue its stock in exchange for property consisting of intoxicating liquors, but nothing herein contained is to be construed as contrary to the conclusions reached in my opinion to you dated April 23, 1908, in reference to the Co-Operative Company of Sioux City, Iowa.

I herewith return the application,

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

July 29, 1909.

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

OPTOMETRY—RIGHT OF PHYSICIAN TO PRACTICE WITHOUT EXAMINATION.—Physicians may fit glasses without becoming registered as an optometrist.

SIR: I am in receipt of your communication of the 21st ultimo requesting an opinion as to whether chapter 167, acts of the thirty-third general assembly, should be construed to apply to physicians legally registered as such and residing in the state of Iowa.

Section 2579 of the code provides that any person shall be held as practicing medicine, surgery or obstetrics, or to be a physician, within the meaning of the chapter relating to the practice of medicine, who shall publicly profess to be a physician, surgeon or obstetrician, and assume the duties, or who shall make a practice

of prescribing or of prescribing and furnishing medicine for the sick, or who shall publicly profess to cure or heal.

It follows from the provisions of section 2579 of the code, and the interpretation of the same by our supreme court, that the prescribing and fitting of glasses for the relief or cure of any ailment or disease is included as a part of the practice of medicine.

Section 2576 of the supplement to the code, 1907, provides in part that the certificate, granted to physicians under the provisions of said chapter, while in force, shall confer upon the holder the right to practice medicine, surgery and obstetrics, and be conclusive evidence thereof.

It was not the intention of the legislature in the passage of chapter 167, acts of the thirty-third general assembly, to repeal the provisions of section 2576 of the code supplement and section 2579 of the code,—hence physicians may under the sections above cited continue to fit glasses so long as the same is done for the purpose of alleviating pain or curing any disease or ailment, without complying with the provisions of chapter 167, acts of the thirty-third general assembly. Yours very truly,

H. W. BYERS,
Attorney General of Iowa.

August 3, 1909.

DR. LOUIS A. THOMAS,
Secretary State Board of Health.

OPTOMETRIST—RESIDENCE.—Where a man practiced optometry in Iowa exclusively for five years and claimed Iowa as his home, although under agreement his wife and family lived in Chicago, he is a resident of this state within provisions of chapter 167, acts of thirty-third general assembly.

DEAR SIR: I have your favor of the 6th inst., with which you submit a proposition of J. G. McMasters, president of the board of optometry examiners, which is substantially as follows:

"An optometrist and his family resided in Cedar Rapids some ten years ago for about six months, when the wife and family moved to Chicago to reside under an agreement between the husband and wife that the former should pay the latter a stipulated sum per week for the support of the family, and that the husband would remain in Iowa. That arrange-

ment has been carried out since that time, the husband practicing as an optometrist in Iowa exclusively, claiming Cedar Rapids as his residence and visiting that city every Sunday. During the past five years he has not voted either within or outside of the state. You inquire whether or not the said optometrist is a resident of the state of Iowa as contemplated in the optometry law passed by the thirty-third general assembly."

Replying thereto I submit the following:

Section 6, chapter 167 of the acts of the thirty-third general assembly, in reference to the examination and registration of optometrists, provides in part as follows:

"But any person who is a *bona fide* resident of Iowa, who shall have been continuously engaged in the practice of optometry for more than five years in the state prior to the passage of this act, shall (upon submitting proof of same), be entitled to receive from said board a license to practice and a certificate of exemption from examination."

In the case of *Scholes v. Murray Iron Works Co.,* 44 Iowa, 190, the court said:

"Where a man's residence becomes established in a state, if his wife afterwards removes to another state, and he does not follow her except to visit her, but continues in the state where his residence had become established, without any intention of removing therefrom, he does not cease to be a resident of that state by reason of the removal of his wife to another."

See also the case of *Schlawig v. DePeyster,* 83 Iowa, 323.

Under the facts and circumstances set forth in your proposition the optometrist would have little difficulty in convincing any court that he is a *bona fide* resident of the state of Iowa as contemplated in the act above referred to.

Very truly,

H. W. BYERS,
Attorney General of Iowa.

August 10, 1909.

DR. LOUIS A. THOMAS,
Secretary State Board of Health.

INFRINGEMENT OF PATENT—STATE COLLEGE.—State college not liable to Cameron Septic Tank Company for infringement of Septic process patents.

SIR: Referring again to your communication of July 27th, submitting to me the question as to whether the Iowa State College of Agriculture and Mechanic Arts is indebted to the Cameron Septic Tank Company for infringement of septic process patents, I have to say, resting my opinion solely on the statement of facts and conclusions reached by Mr. A. Marston, college engineer, and the other documents and papers accompanying your letter submitting the question to me, that the Iowa State College of Agriculture and Mechanic Arts is not, in my opinion, under any legal liability to the Cameron Septic Tank Company for infringement of septic process patents.

I am enclosing you herewith all papers in the case.

Respectfully submitted,

H. W. BYERS,
Attorney General of Iowa.

August 14, 1909.

MR. W. R. BOYD,
President Finance Committee.

BOARD OF EDUCATION—DISPOSITION OF FUNDS.

SIR: Referring again to your communication of several days ago, submitting to me certain legal questions suggested by Prof. Stanton in paragraph four of his letter to you of July 17th, I have to say that I had an opportunity a day or two ago to go over this entire matter with Prof. Stanton, and it is my opinion the $4,000 referred to in the paragraph above mentioned should be dealt with exactly as though the suits in which Judge Lee made the order to retain this amount had never been brought, and it should be added to the $1,587.28, about which there is no controversy.

I am enclosing you herewith all papers in the case.

Respectfully submitted,

H. W. BYERS,
Attorney General of Iowa.

August 14, 1909.

MR. W. R. BOYD, *President Finance Committee,*
Iowa State Board of Education.

EXECUTIVE COUNCIL—CLERICAL HELP.—Council may pay for stenographic and clerical help out of appropriation.

SIR: I am in receipt of your communication of the 17th instant requesting an opinion as to the authority of the executive council, under section 30 of chapter 241, acts of the thirty-third general assembly, to pay for extra stenographic assistance and other clerical work necessarily incident to the duties of the executive council, and for which no other provision is made.

It is my opinion that section 30 aforesaid clearly covers such items of expense, and that it would therefore be legal for the executive council to audit claims for the cost of such services.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

August 23, 1909.
HON. A. H. DAVISON,
Secretary Executive Council.

STATE ENTOMOLOGIST—ASSISTANTS—EXPENSES PAID.—Expense of postage and printing should be paid out of fund appropriated for maintenance of department.

SIR: I am in receipt of your communication of the 17th instant advising that the state entomologist has presented bills for postage and printing incurred in the discharge of the duties of his office, and also bills for assistants or deputies appointed pursuant to the provisions of chapter 16-f, title 12, supplement to the code, 1907.

You request an opinion as to whether the executive council may lawfully audit these bills and pay the same out of the funds appropriated for this department.

Section 2575-a51 of the code supplement seems to place a limitation upon the expenses which are to be incurred by the state entomologist, but it is a cardinal principle of statutory construction that the whole chapter relating to a particular question or subject matter shall be construed together.

Construing chapter 16-f of the code supplement as a whole, the objects to be attained by the passage of this act and also chapter 246 acts of the thirty-third general assembly, I am of the opinion that the items detailed by you are proper items of expense to be audited and allowed by the executive council out of the fund appropriated for this department.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

August 24, 1909.
HON. A. H. DAVISON,
Secretary Executive Council.

OPTOMETRY—PRACTICE OF BY PHYSICIAN—WHO ENTITLED TO CERTIFICATE.—Any person whether a practicing physician or not who furnishes proof of time of practice, residence, etc., is entitled to a certificate exempting him from examination.

SIR: I am in receipt of your communication of the 23d instant requesting an opinion as to whether a regularly licensed physician holding a certificate from the Iowa state board of medical examiners authorizing him to practice in this state, who makes application in due form and in the time specified in chapter 167 acts of the thirty-third general assembly to the board of optometry and furnishes satisfactory proof to such board that he is a bona fide resident of Iowa, and has continuously engaged in the practice of optometry for more than five years prior to the passage of chapter 167 aforesaid, is entitled to a license to practice optometry in this state and a certificate of exemption from examination.

Chapter 167 acts of the thirty-third general assembly provides that any person who is a bona fide resident of Iowa who shall have continuously engaged in the practice of optometry for more than five years in the state prior to the passage of this act shall (upon submitting proof of same) be entitled to receive from said board a license to practice and a certificate of exemption from examination.

It is further provided in said act that "every person entitled to a certificate of exemption from examination as herein provided must make application therefor and present the evidence to entitle him thereto on or before six months after the passage of this act, or he shall be deemed to have waived his right to such certificate."

It is my opinion that any person of good moral character who makes application for a license to practice optometry and a certificate of exemption from examination is entitled to receive the same, provided he can furnish to the board of optometry satisfactory evidence that he is a bona fide resident of this state, and that he has continuously engaged in the practice of optometry for more than five years in this state prior to the passage of chapter 167 acts of the thirty-third general assembly.

These are the only requirements of the act, and the fact that the applicant for a license and a certificate of exemption from examination is a regular practicing physician, or has some other

profession does not in any manner affect the situation or add to or take from the requirements of the act.

I return you herewith enclosures.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

August 26, 1909.

DR. LOUIS A. THOMAS,
Secretary State Board of Health.

PHARMACY COMMISSION—SECRETARY AND TREASURER—OFFICE—MEMBER OF GENERAL ASSEMBLY—RIGHT TO HOLD OTHER OFFICE—STATE OFFICIAL—APPROVAL OF BONDS BY GOVERNOR.—The office of secretary and treasurer of Pharmacy Commission is a "lucrative office" under section 22 of article III of State Constitution, and a person cannot hold that office and be a member of the legislature. Deputy game wardens are state officers and their bonds are approved by governor.

SIR: I am in receipt of a communication from your secretary in which he says:

> "I am directed by the governor to state, that we have on file in our office the resignation of Ed. J. Moore as member of the legislature from the 18th Representative District, should it be necessary for him to resign in order to accept the position of secretary and treasurer of the pharmacy commission.
>
> "Will you kindly advise us upon this point.
>
> "I have also a matter relating to the approval of bonds of the deputy fish and game wardens under the new fish and game law.
>
> "Does the approval of these bonds rest with the Governor?"

In response thereto I submit the following:

First. Section 22 of article III of the constitution provides:

> "No person holding any lucrative office under the United States, or this state, or any other power, shall be eligible to hold a seat in the general assembly. But offices in the militia, to which there is attached no annual salary, or the office of justice of the peace, or postmaster, whose compensation does not exceed one hundred dollars per annum, or notary public, shall not be deemed lucrative."

The office of secretary and treasurer of the pharmacy commission is now an office within the meaning of this section and is also a lucrative one, but there is nothing in the section that would in any manner disqualify Mr. Moore or prevent his accepting the position; his acceptance, however, would make it impossible for him to hold a seat in the general assembly while filling the position of secretary and treasurer of the pharmacy commission; in other words, if the general assembly was to convene next week Mr. Moore would be compelled to either resign his office as secretary and treasurer or lose his seat in the general assembly.

Second. Section 2 of chapter 75, acts of the thirty-third general assembly provides, among other things, that bonds given by state and district officers shall be approved by the governor.

Section 9 of chapter 153, acts of the thirty-third general assembly provides, among other things, that all deputy fish and game wardens shall give bonds conditioned for the faithful performance of their duty in such amount as may be fixed by the state executive council.

Deputy wardens are state officers within the meaning of section 2 of chapter 75, above referred to, hence under these provisions the executive council fixes the amount of the bond required of deputy fish and game wardens, but the approval of bonds is to be by the governor, as provided in section 2 of chapter 75.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

August 30, 1909.

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

DRAINAGE, WATERWAYS AND CONSERVATION COMMISSION—EXPENSE OF MEMBERS.—Expenses of members of commission should be allowed and paid out of appropriation.

GENTLEMEN: I am in receipt of communication from your secretary requesting a written opinion as to whether or not chapter 249 acts of the thirty-third general assembly provides for the payment of expenses of members of the state drainage, waterways and conservation commission.

In response thereto I have to say that while the act is not as

specific as it might be with reference to the expenses of the members of the commission there is enough in it to justify the conclusion that it was not the intention of the legislature to require the commission to not only give their time to the work without compensation, but in addition thereto to pay their own expenses.

Section 4 among other things requires the secretary to submit to the auditor of state itemized account of the expenses and salary of his assistants *"in the same manner as directed for members of the commission."*

Section 5 makes an appropriation of twenty-five hundred ($2500.00) dollars per annum for the purpose of carrying into effect the provisions of the act.

Under these provisions, and the general terms of the whole act, I am of the opinion that the expenses of the members of said commission may properly be allowed and paid out of the appropriation covered by section 5 of the act.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

September 16, 1909.

TO THE HONORABLE EXECUTIVE COUNCIL,
of the State of Iowa.

INSURANCE—AUTOMOBILE ACCIDENT INSURANCE—EMPLOYERS' LIABILITY INSURANCE.—Insurance indemnifying automobile owners against judgments for damages for injuries by assured's automobile cannot be written under the general accident clause of subdivision 5, section 1709 of the code unless the assured comes within the term "employer."

SIR: On July 23d you forwarded to this department a communication in which among other things you say:

"Subdivision 5 of Section 1709, Code of Iowa, authorizes the writing of four branches of insurance, viz.:

(a) Health.
(b) Personal injury or death by accident.
(c) Loss through accidental discharge of sprinklers.
(d) Liability of employers for acts of employes.

"This latter clause, known as 'Employers' Liability Insurance, as amended from time to time, reads as follows:

"Insure employers against loss in consequence of accidents or casualties of any kind to employes or other persons, or to property resulting from any act of an employe, or any accident or casualty to persons or property, or both, occurring in or connected with the transaction of their business, or from the operation of any machinery connected therewith.

"Certain casualty insurance companies authorized to write insurance in this state under subdivision 5, have sought under cover of the employers' liability clause (d) to write policy contracts indemnifying the owner of an automobile against loss by any judgment of common law or statutory liability, for damages sustained by the person or property of others through the operation of the assured's automobile.

"The question which we desire to submit for your consideration and official opinion is, is the writing of such an insurance contract warranted by the provisions governing employers' liability insurance as contemplated by said subsection 5?

* * * * * * * * * * * *

"In refusing to admit such indemnity policies, the department has been guided largely by decision of Attorney General Mullan, Report Attorney General, 1906, page 204, same, page 162."

In response thereto I submit the following:

General Mullan in his opinion at page 162 of his report for 1906, says:

"Section 1709 of the Code, as amended by the acts of the twenty-eighth and twenty-ninth general assemblies, specifically names and describes all of the casualties, contingent events and risks against which incorporated companies may insure. The legislature, having thus specifically defined the character of risks against which companies may write insurance, has thereby, under the well known maxim of law: 'Expressio unius est exclusio alterius,' withheld from such company the right to insure against casualties, contingent events and risks not specified in the section referred to. That is, insurance companies organized under the laws of this state are permitted to insure only against the casualties, contingent events and risks named in section 1709 of the Code."

The section here referred to has been amended since General Mullan's opinion was written, but there is nothing in any of the amendments that would in any respect modify or change the rule as thus expressed by him; hence, the authority to write the kind of risks referred to in your letter, if it exists at all, must be found in some

of the provisions of section 1709 of the 1907 Supplement to the Code.

Subdivision 5 of that section, in so far as it is material to the questions involved in your inquiry, reads:

"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 accidents or casualties of any kind to employes or other persons, or to property resulting from any act of an employe, or any accident or casualty to persons or property or both, occurring in or connected with the transaction of their business, or from the operation of any machinery connected therewith."

The two branches of insurance provided for in this section involved in a right decision of the question raised by your inquiry are, (a) accident insurance, (b) liability insurance.

It is claimed by the representatives of the companies desiring to write so-called automobile insurance:

First. That such insurance is authorized and covered by the provision permitting insurance against personal injury or death by general accident.

Second. If this be not true that then such insurance may be written under the so-called employers' liability insurance clause.

In support of the first proposition the case of Employees' Liability Assurance Corporation vs. Merrill, Insurance Commissioner of Massachusetts, 29 N. E. 526, is cited.

If the accident and liability insurance laws of Iowa and Massachusetts were exactly similar, then the authority cited would not only be persuasive but would support a ruling in favor of the insurance companies' contention. A careful reading, however, of the Massachusetts case will convince the reader that that court in order to meet the changing demands of society, and the new instrumentalities and conveniences of trade and commerce adopted a definition of accident insurance entirely new, and one which is hardly justified by the language of the Massachusetts statute.

At any rate, our legislature, in so far at least as insurance against personal injury or death is concerned, has defined liability insurance, and limited it to the so-called employers' liability; in other words, by separating accident insurance into two separate and distinct branches, the one covering what has always been known as purely accident insurance, and the other branch liability insur-

ance, it has in effect, in view of the other provisions of the statute, limited liability insurance to the so-called employers' liability clause in subdivision 5 of section 1709.

In view of the earnestness with which the representatives of the several companies interested have presented their case, we have given to this opinion a great deal of time and investigation but have been unable to satisfy ourselves that liability insurance could be written in this state under the general accident clause of subdivision 5 above referred to.

It is suggested that to hold otherwise will be a great hardship to automobile owners in this state. We are unable to see any very great importance in the suggestion for the reason that under a liberal construction of the employers' liability clause (and the clause should have a liberal construction) the automobile owner may be indemnified against almost every possible liability except in the case of accidents occurring while the owner is operating his machine for pleasure; in all such cases, as the law now stands, the owner of the machine must carry his own risk and protect himself against loss by the exercise of care and caution in operating his machine. To require this cannot be said to be a hardship, the safety of the public in its use of the streets and highways demands upon the part of the driver of an automobile the highest degree of care and caution, and it is only when injury results from the lack of such care and caution that liability follows.

Our conclusion, therefore, is that casualty insurance companies may make such insurance contracts as you refer to in your letter only in cases where the person seeking such insurance comes within the term "employer" as used in the so-called employers' liability clause and in determining this question the broadest and most liberal construction should be put upon the term "employer."

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

October 12, 1909.

HON. JOHN L. BLEAKLY,
Auditor of State.

BOARD OF EDUCATION—FINANCE COMMITTEE—ENTITLED TO TRAVELING EXPENSES.—(See also opinion dated March 3, 1910.)

GENTLEMEN: I am in receipt of your secretary's communication of the 11th instant, in which he says:

> "I am directed by the executive council to request of you your opinion as to whether the members of the finance committee of the Iowa state educational board would, under the provisions of chapter 170, acts of the thirty-third general assembly, be authorized to charge expenses incurred in traveling to and from their homes and whether their living expenses in the city of Des Moines are to be included as traveling expenses. Your attention is called to the fact that section 8 of the act provides for the furnishing of the members of the finance committee of offices which seems to be practically as the offices of the board of control and state officers which are furnished by law.
>
> "This finance committee has filed claims for living expenses while in the city of Des Moines which are not paid for members of the board of control or other state officers. Under the provisions of the last two sentences of section 11, the traveling expense of members of the finance committee seems to be covered by statutory provision. The members of this committee are charging traveling expense to and from their homes which are not at the location of state institutions under their control.
>
> "Your opinion is desired as to whether the provisions of the statute are broad enough to warrant the executive council in auditing claims for such expense. The executive council having before it claims covering such items requests that you give this matter your earliest convenient attention."

In response thereto I submit the following:

Section 6 of the Act in question is as follows:

> "The said board of education shall appoint a finance committee of three from outside of its membership, and shall designate one of such committee as president and one as secretary. The secretary of this committee shall also act as secretary of the board of education and shall keep a record of the proceedings of the board and of the committee and carefully preserve all their books and papers. All acts of the board relating to the management, purchase, disposition, or use of lands or other property of said educational institutions shall be en-

tered of record, and shall show who are present and how each member voted upon each proposition when a roll call is demanded. He shall do and perform such other duties as may be required of him by law or the rules and regulations of said board. Not more than two members of this committee shall be of the same political party, and its members shall hold office for a term of three years unless sooner removed by a vote of two-thirds of the members of the state board of education."

Section 8 provides for an office at the seat of government, and is as follows:

"The board and the finance committee shall be provided by the executive council with suitably furnished offices, at the seat of government, and shall be also furnished with all necessary books, blanks, stationery, printing, postage, stamps and such other office supplies as are furnished other state officers."

The compensation and expenses of the board and the finance committee are covered by Section 11, which provides 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 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."

From these provisions, when considered with the entire act, I am convinced that it was contemplated by the legislature that the members of the finance committee would have their headquarters in the office at the seat of government, and that when not occupied in visiting the educational institutions covered by the act they would be engaged in the work of the department in the office at Des Moines, and it is my opinion that the members of the finance committee are only entitled to traveling expenses, which, of course,

would include hotel bills, when visiting the different institutions and other places in the state on official business.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

October 13, 1909.

TO THE HONORABLE EXECUTIVE COUNCIL,
of the State of Iowa.

INSURANCE—BANK DEPOSITS.—Insurance covering the "safe-keeping" of moneys, stocks and bonds is lawful.

SIR: I am in receipt of your communication submitting proposed articles of incorporation of the Iowa Bank Deposit Insurance Company, whose object is defined by its articles to be "to insure the safe-keeping of books, papers, moneys, stocks, bonds and all other personal property belonging to persons, firms and corporations and deposited with state, national and private banks and trust companies and to receive them on deposit," with the provision in said articles that no policy shall be issued until such bank or trust company has been examined by the company's examiner and the same approved.

You request an opinion as to whether such insurance is authorized under the provisions of paragraph three of section 1709 supplement to the code 1907.

After careful consideration, I am of the opinion that such insurance is fairly covered by the language of said section, that the same is not against public policy and is, therefore, lawful.

In a former opinion given by this department, it was held that a company could not be lawfully organized for the purpose of insuring individual depositors against losses by reason of bank failures. That opinion rested upon the proposition that the money of the depositor, when placed in the bank, became the property of the bank and hence, the individual depositor had no insurable interest in such deposit.

The further reason for such holding was that to authorize such insurance would tend to unsettle business and be against public policy for the reason that the volume of insurance written would depend upon the suspicion and distrust which the company would be able to create in the individual depositor.

These objections are obviated by the plan now under consideration, the insurance being taken by the bank and not by the depositor.

The further objection usually urged against the insuring of bank deposits that it compels the solvent, careful banking institutions to pay the losses of the careless and insolvent institutions does not obtain in this case for the reason that each bank is to be carefully examined before its risk is taken by the company and for the further reason that the insurance is voluntary on the part of the bank and is not made compulsory by statutory enactment.

Respectfully submitted,

H. W. BYERS,
Attorney General of Iowa.

October 27, 1909.
HON. JOHN L. BLEAKLY,
Auditor of State.

HOG CHOLERA SERUM—ESTABLISHMENT OF LABORATORY TO MANUFACTURE—CITY ORDINANCES GOVERNING.—Where such laboratory is established a considerable distance from dwellings and kept sanitary there would be no violation of ordinances.

SIR.—I am in receipt of your communication of the 27th inst., enclosing plat of leased premises upon which it is proposed to establish laboratory and other necessary equipment for the manufacture of hog cholera serum pursuant to the provisions of chapter 151, acts of the thirty-third general assembly.

You advise that the land while lying within the incorporated limits of Des Moines, has heretofore been used for farm purposes and that the buildings would be established a considerable distance from any dwelling house or the property of another. You request an opinion as to whether the establishment of this laboratory would be in violation of the ordinances of the city of Des Moines.

It is my opinion that if the laboratory is established at the place indicated by you in your plat and if the same is thereafter conducted in a careful and sanitary manner, it will not be in violation of any ordinance of the city of Des Moines.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

October 29, 1909.
DR. PAUL O. KOTO,
State Veterinary Surgeon.

HUNTERS' LICENSE FUND—FISH AND GAME—USE OF FUND.—The fish and game fund may be used to repair a dam in a lake to prevent escape of fish and to provide shelter for persons caring for dam.

GENTLEMEN.—I am in receipt of the communication of your secretary of date October 29, 1909, in which he says:

"I am directed by the executive council to request your opinion, in writing, as to whether under the provisions of section 7, chapter 154, acts of the thirty-third general assembly, the executive council would be authorized to audit accounts for the expense of erecting a small house, which would accommodate an employe of the state acting as deputy game warden, at the outlet of Okoboji lake and for the expense of keeping in repair the dam at said outlet and the removing of moss and other obstructions that may gather upon screen placed across said outlet to prevent the escaping of fish.

"It has been represented to the executive council that the dam at said outlet has repeatedly been blown out by violators of the law; that there is no place for the deputy game warden to live near said outlet; that the presence of some person at the outlet a considerable part of the time is necessary to protect the dam; that to prevent the fish escaping from the lake it is necessary to maintain a screen over said dam; that to place a screen across said outlet without arrangements for having the same kept clean of moss and other obstructions would result in holding back the water until the same would flow over the screen allowing the fish to escape and also holding back the water so as to raise the water above the high water mark upon the lands of abutting property owners, contrary to law; that there seems no way to accomplish the ends sought except for the state to provide a small building for the residence of a deputy game warden to perform such service.

The Okoboji Protective Association has at its own expense, following the refusal of the board of supervisors of Dickinson county, to comply with the provisions of chapter 258, acts of the thirty-third general assembly, erected at the outlet of Okoboji lake a substantial dam and has paid the entire cost of said dam except the sum of one hundred sixty-five and 20-100 ($165.20) dollars, which the game warden of the state is willing to certify as expenses under the provision of the statute

first above cited, if the law authorizes the same. Does the law authorize this?''

In response thereto I have to say that section 5, chapter 154, acts of the thirty-third general assembly, provides:

> ''An applicant for a license shall fill out an authorized application blank and subscribe and swear to it before the county auditor, or a notary or justice of the peace. Before the license is issued, the applicant, if a resident of the state of Iowa, shall pay the county auditor the sum of one dollar ($1.00) as a license fee, and if a non-resident of the state of Iowa, shall pay him the sum of ten dollars ($10.00) as a license fee. These fees the county auditor shall pay at the end of each month to the state treasurer, who shall place them to the credit of a fund known as the fish and game protection fund.''

Section 7 of the same act makes provision as follows:

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

These provisions, when considered with the general fish and game laws of the state, make both the items referred to by your secretary a legitimate and proper charge against the fund collected under said chapter 154, and your body has ample authority to audit and approve expense bills covering the items referred to.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

November 2. 1909.

TO THE HONORABLE EXECUTIVE COUNCIL,
of the State of Iowa.

RAILROAD RATES.—Railroads having two routes between given points may charge transportation rates for shorter route to patrons traveling the longer route.

GENTLEMEN: I am in receipt of a communication from your secretary of date November 9th, in which he says:

> "A question has arisen before this board upon which they desire your opinion. A railway company has two lines of railroad between two given points. By one line the distance is 101 miles. By the other line the distance is 110 miles. Recently the routing of some of the trains has been changed to the longer line. This was done, as is alleged by the railway company, for the better accommodation of the traveling public and quicker service. People are complaining that the trains they desire to take now are run by the longer route for which they are required to pay extra mileage. The question upon which the board desires your opinion is this: Can the railway company make the charge for passenger and freight service by its longer line between two points the same as by its shorter line between the same points without violating the Iowa statute?"

In response thereto I have to say, if there is nothing else involved in your question except the charge between two points served by a given railway company, assuming, of course, that the rate charged for transportation over the shorter line does not exceed the legal charge for the distance covered, I know of nothing in the law of this state that would prevent the carrier from charging the same rate over its longer line between the same points.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

November 13, 1909.

TO THE BOARD OF RAILROAD COMMISSIONERS.

MINERS—ESCAPE SHAFT.—The law makes it mandatory upon mine operators to furnish means of ingress and egress to employees at all times.

SIR: I am in receipt of your communication of the 6th instant advising that some of the mines of the state are equipped with hoisting apparatus at the escape shaft instead of stairs, and in such cases the hoisting appliance is only ready for use at certain times of the day. You therefore submit the following question:

Has the mining company the right to determine arbitrarily the time the escape shaft shall be utilized as an outlet to the employees of the mine, or must this escape shaft be ready at all times for ingress and egress to the employees while the mine is in operation?

Section 2486 of the code provides in part as follows:

> "The owner or person in charge of any mine operated by shaft, or one having a slope or drift opening in which five or more men are employed, shall construct and maintain at least two distinct openings for each seam of coal worked, which in shaft mines shall be separated by natural strata of not less than one hundred feet in breadth and in slope or drift mines not less than fifty feet in breadth, through which ingress and egress at all times shall be unobstructed to the employees, and in slope or drift mines shall be provided with safe and available traveling ways; all traveling ways and escapes to be kept free from water and falls of roof. All escape shafts not provided with hoisting appliances as hereinafter provided shall have stairs at an angle of not more than sixty degrees in descent, kept in safe condition, with proper landings at easy and convenient distances apart. He shall provide all air shafts where fans are used with working fans for ventilation, and those used for escapes with suitable appliances for hoisting underground workmen, at all times ready for use while the men are at labor, and no combustible material shall be allowed to be or remain between any escape shaft and hoisting shaft, save as it may be absolutely necessary in the operation of the mine."

In my opinion this section, properly construed, makes it mandatory upon the mine operators to furnish a means of ingress and egress at all times to the employees while the mine is in operation.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

November 23, 1909.

MR. EDWARD SWEENEY,
State Mine Inspector.

SCHOOLS—AUTHORITY OF BOARD TO FIX DAYS OF ATTENDANCE FOR PUPILS.—A school board does not have authority to arbitrarily require pupils to attend school on Saturday instead of Monday.

SIR: I am in receipt of your communication of the 16th instant in which you state that a school board by resolution has declared that Tuesday, Wednesday, Thursday, Friday and Saturday should be and constitute the school days of each week in all the schools under its jurisdiction, and therefore submit the following question:

Has the school board the right to declare these days as the days upon which the schools under its jurisdiction shall be maintained; if so, can the board enforce the provisions of sections 2823-a to 2823-h against those who obsereve Saturday rather than Sunday as the day of worship.

The statute does not specifically name the days upon which schools shall be held. In a number of places, however, it states that school shall be held during five days each week.

It has been the universal custom in our public schools, especially in all departments up to and including the high school, to hold school for five consecutive days each week commencing with Monday.

If a school board is authorized to designate that schools shall be permanently held upon Saturday, instead of some other secular day of the week, it would result in a permanent discrimination against persons who observe Saturday as the day of worship. If the board may arbitrarily designate that all schools under its jurisdiction shall be permanently held on Tuesday, Wednesday, Thursday, Friday and Saturday, it may also designate Monday, Tuesday, Wednesday, Friday and Saturday, thereby having a vacation in the middle of the school week; or make any other arbitrary arrangement so long as school is held upon five secular days of each week.

This being true, I am of the opinion that it is not within the power of a school board to arbitrarily designate different days upon which school shall be permanently held in the schools under its jurisdiction.

I am of the opinion, however, that it would be entirely lawful and proper for a school board to designate any five secular days in the week as the days upon which school shall be held in case of emergency, temporary in its nature, or in the event that special circumstances or contingencies arise making it advisable so to do.

The board would clearly have no authority to compel any person to attend school upon Saturday who observes such day as a day of worship.

Respectfully submitted,

H. W. BYERS,
Attorney General of Iowa.

November 24, 1909.

HON. JOHN F. RIGGS,
Superintendent of Public Instruction.

TELEPHONE COMPANY—ASSESSMENT OF PROPERTY.—Where a building is not used exclusively for telephone business but partially leased for other purposes it should be assessed same as other property.

SIR: I am in receipt of your communication of the 16th instant enclosing correspondence of J. G. Holmes relative to the assessment for taxation of a certain building owned by a telephone company, and requesting an opinion as to whether said building should be assessed as property used for telephone purposes exclusively by said company, or whether said assessment is governed by the provisions of section 1330-e code supplement 1907.

Section 1330-e provides as follows:

> "Land, lots and other real estate and personal property belonging to any telegraph company or telephone company not used exclusively in its telegraph or telephone business shall be subject to assessment and taxation on the same basis as other property of individuals in the several counties where situated."

In view of the provisions of this section, the only question for determination is whether the building in question is actually used exclusively for the telephone business.

It appears that two families live in the upper story of the building; that the foreman of the telephone company occupies rooms in the building for living purposes in order to be in easy access to his work; but that the remaining rooms used for living purposes are leased to an ordinary tenant who has no connection with the telephone company or its business.

In my opinion the leasing of a building to a person for hire who is not in the employ of the telephone company and who has no connection therewith, negatives the idea that the same is used ex-

clusively for telephone business, and therefore, the assssment of said building so long as it is not used exclusively for telephone business should be governed by the provisions of section 1330-e supplement to the code, 1907.

This is clearly the doctrine announced by our supreme court in the case of *Chicago, Burlington & Quincy Railway Company v. Rhein*, 135 Iowa, 404.

I return herewith the correspondence.

Yours very truly,

H. W. BYERS,
Attorney General of Iowa.

December 24, 1909.

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

INSANE PATIENTS—LIABILITY OF COUNTY COMMITTING PATIENTS WHERE THEIR LEGAL RESIDENCE IS IN ANOTHER COUNTY.—Counties committing a patient should pay expense of commitment, care, etc., and collect amount from county of patient's residence.

SIR: I am in receipt of your communication of the 27th instant requesting an opinion as to the duty devolving upon a county committing an insane person to the state hosiptal for the insane to pay the expenses incurred in the investigation and commitment, including the cost of care of the patient in the state hospital, in the event that the legal settlement of the patient is found to be in another county.

In my opinion the county commiting an insane patient, where the patient's legal settlement is in another county, should pay the expenses of investigation and commitment of the patient, including the care of such patient in the hospital, in the first instance, and then proceed as by law prescribed to recover from the county where such insane patient has a legal settlement, the amount expended by the county in making the commitment.

Respectfully submitted,

H. W. BYERS,
Attorney General of Iowa.

December 29, 1909.

HON. JOHN L. BLEAKLY,
Auditor of State.

SHORT COURSE—RIGHT TO RECEIVE STATUTORY AMOUNT FROM STATE TREASURY.—By complying with all the provisions of chapter 109, acts of the thirty-third general assembly, a "short course" is entitled to $75.00 in addition to the appropriation of $200.00.

SIR: I am in receipt of your communication of the 7th instant requesting an opinion as to whether you as auditor "will be justified in issuing warrant on request of the citizens of any county holding a 'short course' where the officers of said 'short course' hold they are entitled to forty per cent of the amount paid by them in premiums and limited at $200 plus the $75 as provided in section 1675 supplement to the code, 1907."

Whenever one hundred citizens of any county in the state that does not have a county or district fair receiving state aid shall organize what is known as a "short course" in the manner prescribed by section 1, chapter 109, acts of the thirty-third general assembly, and shall thereafter comply with all of the conditions of said section, said "short course" is entitled to receive from the state treasurer a sum equal to forty per cent of the amount paid in premiums, but not to exceed the sum of $200. In any county not holding a regular farmers' institute where a "short course" is held, the said "short course" may, in addition to the sum heretofore mentioned, receive the sum of $75 as specified in section 1675 supplement to the code, 1907, by complying with all of the provisions of chapter 109, acts of the thirty-third general assembly.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

January 11, 1910.
HON. J. L. BLEAKLY,
Auditor of State.

REPORT OF EMPLOYEES.—Institutions under board of control not required to report under sections 2474 and 2475 of code.

GENTLEMEN: I am in receipt of your letter of the 10th instant in which you say:

> "Max E. Witte, superintendent of the Clarinda state hospital at Clarinda, Iowa, has sent us a blank received by his engineer from the commissioner of labor of this state, and marked employee's statistician blank. This in terms requires a

report under sections 2474 and 2475 of the code.

As this is the first request of the kind called to our attention and there are many employes of different classes in the state institutions under our control,—heads of institutions, assistants, medical officers, stewards, storekeepers, bookkeepers, stenographers, pharmacists, cooks, bakers, attendants, nurses, cleaners, engineers, electricians, firemen, farmers, farm hands, shoemakers, tailors, carpenters, guards, gardners and dairymen, we desire your opinion upon the following points:

1. Do the sections specified apply to any state institution under our control?

2. If they do to what classes of employes do they apply, and what are our duties?''

In response thereto I have to say, that in my opinion neither of the sections referred to apply in any respect to any state institution under the control of your board.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

January 11, 1910.
TO THE HONORABLE BOARD OF CONTROL
of State Institutions.

TAXES—UNPAID TAXES A LIABILITY IN LATER ASSESSMENT.—Taxes become a liability on December 31st although not payable until the day following, and may be listed among liabilities of an insurance company.

SIR: I am in receipt of your communication of the 17th instant requesting an opinion as to whether an insurance company rendering the usual annual statement to the auditor of state of its financial standing at the close of business December 31st, 1909, should treat the tax levy of 1909, payable on and after January 1, 1910, as a liability.

It is my opinion that the liability for the tax for the year 1909 being definite and certain on the 31st day of December, 1909, that the same should be treated as a liability in the annual statement even though it is not payable until the day following, to wit: January 1, 1910.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

January 20, 1910.
HON. J. L. BLEAKLY,
Auditor of State.

GOVERNMENT BONDS—PURCHASE BY BANKS—DEDUCTION IN TAXATION.—Where bonds are purchased in good faith and not for the purpose of avoiding taxation the bonds should be deducted from taxable property.

SIR: I am in receipt of your communication of the 17th instant advising that the records of some of the state and savings banks operating under the laws of Iowa reveal the fact that such banks during the last days of December issue certificates of deposit, and in some cases, their notes to certain individuals connected with national banks, or to the bank itself located in Chicago, for amounts running from one-half to the entire amount of their capital stock; that said certificates or notes are sent to Chicago and the banks are supposed to be credited on the books of the Chicago banks. The Chicago bank in turn issues the receipt to the Iowa bank to the effect that it has on deopsit in Chicago government bonds to the amount of the certificate or note, the bonds never being in the possession of the bank. These bonds are deducted from the assessment of the Iowa bank. You submit the following questions:

"*First.* Is it a legal transaction for a state or savings bank to borrow money for the purpose of buying government bonds?

"*Second.* Is it a bona fide transaction for a state or savings bank to purchase these bonds as stated in the first question and not receive them to hold as an asset of the bank?

"*Third.* Is it legal for the said state or savings bank to deduct bonds so purchased from their liabilities for assessment purposes."

For the sake of brevity, I shall answer generally.

There is nothing in the law which prohibits a bank from investing in government bonds. If this may be done at one time, it may be done at another. As to whether the amount invested in government bonds may be deducted for the purpose of taxation, is to be determined therefore by the nature of the transaction in question. If there is an absolute good faith purchase by the bank of the government bonds, the deduction may be made even though the purchase is not made until in December; but if there is no real purchase, but only a pretended investment accomplished by a form of bookkeeping, no deduction should be made because the law will not sanction an evasion of this nature.

Yours very truly,

H. W. BYERS,
Attorney General of Iowa.

January 31, 1910.

HON. JOHN L. BLEAKLY,
Auditor of State.

LOAN AND TRUST COMPANIES—CAPITAL STOCK PAID UP.—Loan and trust companies must have capital stock paid up in the amount as specified in section 1843 of code supplement.

SIR: I am in receipt of your communication of recent date requesting an opinion as to whether or not a loan and trust company must have its capital stock fully paid.

It is my opinion that a loan and trust company must have a paid up capital as specified in section 1843, supplement to the code, 1907, of not less than ten thousand dollars in cities, towns or villages having a population of ten thousand or less; and a paid up capital of not less than fifty thousand dollars in cities having a greater population.

If this section of the law is complied with, however, I am of the opinion that there is no provision of the law prohibiting such companies from having an authorized capital in excess of that which is fully paid.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

February 1, 1910.

HON. JOHN L. BLEAKLY,
Auditor of State.

SAVINGS BANK RESERVE—WHERE RESERVE MAY BE DEPOSITED.—The auditor of state does not have the authority to direct where savings banks may deposit their reserve.

SIR: I am in receipt of your communication requesting an opinion as to whether your department has the authority to direct the manner and place in which state and savings banks may deposit their reserve; that is to say, you desire to be advised as to whether you have the authority to prohibit a savings bank from depositing its reserve in a national bank.

It is my opinion that the supervision and authority of the auditor is not sufficiently comprehensive to permit him to direct the place where the reserve of savings banks shall be deposited, unless he has reason to believe that the bank in which the reserve is deposited is in an unsafe or questionable condition, in which event, he may direct that it be deposited in some safe place.

Where savings banks deposit reserve in national banks and your

department desires to ascertain the condition of the national bank, I suggest that you take the matter up with the federal bank examiners and co-operate with them in the matter of examination for the purpose of ascertaining such facts as may be necessary for you to act advisedly in the premises.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

February 1, 1910.
HON. JOHN L. BLEAKLY,
Auditor of State.

RESCUE HOME SOCIETY OF DUBUQUE—RIGHT TO APPROPRIATION.—The Rescue Home Society is entitled to unexpended balance any time after date fixed in appropriation act and executive council may audit bills against such fund.

GENTLEMEN: I am in receipt of your communication of January 21st, in which you say:

> "I am sending herewith correspondence which has passed between the Rescue Home Society of Dubuque and the auditor's office relative to an unexpended balance of seven hundred ninety-three and 87-100 (793.87) dollars, of the appropriation made for that institution and which the institution greatly desires to draw at this time. The executive council is not certain that it has a right to audit bills at this time against the fund. Please advise us whether this unexpended appropriation died or whether it is still available for the purpose for which it was appropriated."

In response thereto I have to say, that under the act making the appropriation for the Rescue Home Society of Dubuque, and of which there remains an unexpended balance as stated in your communication of $793.87, the fund so appropriated may be drawn at any time after the dates fixed in the act, and therefore the unexpended balance is still available and the executive council has the right to audit bills at this time against such fund.

I am returning you herein the papers forwarded to me.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

February 10, 1910.
TO THE HONORABLE EXECUTIVE COUNCIL
of the State of Iowa.

STATE BOARD OF AGRICULTURE—COMPENSATION OF SECRETARY—SECRETARY MAY ACT AS CLERK OF EXECUTIVE COMMITTEE.—Where the secretary of board of agriculture acts as clerk of executive committee having charge of state fair, he may receive in addition to his salary as secretary the amount allowed for clerk of council.

SIR: I am in receipt of your communication of some weeks ago in which you say:

"At a meeting of the state board of agriculture on February 21st, 1908, the following resolution was uanimously adopted:

'Resolved, That the general management of the Iowa state fair and exposition be delegated to the executive committee as provided in section 1657-i, chapter 3, of the supplement to the code of Iowa, and the said executive committee be and they are hereby authorized to employ a secretary or clerk at a salary or not to exceed twelve hundred dollars ($1200.00) per year, said salary to be paid from the receipts of the state fair and exposition.'

"At a meeting of the executive committee on the same date J. C. Simpson was named as clerk to the executive committee and his compensation for such service was fixed at $1200.00 per annum, payable monthly by warrant drawn upon the treasurer, and that the time of beginning said service to date from February 1st, 1908.

"Does the statute under which the Iowa state fair is held warrant the above action by the board and executive committee?"

In response thereto I submit the following:

Section 1657-i, supplement to the code, in so far as it is material to the inquiry here provides:

"The board shall have full control of the state fair grounds and improvements thereon belonging to the state, with requisite powers to hold annual fairs and exhibits of the productive resources and industries of the state. They may prescribe all necessary rules and regulations thereon. The board may delegate the management of the state fair to the executive committee and two or more additional members of the board; and for special work pertaining to the fair they may employ an assistant secretary and such clerical assistance as may be deemed necessary. All expenditures connected with the fair including the per diem and expenses of the managers thereof,

shall be recorded separately and paid from the state fair receipts. * * * * ''

Section 1657-k provides, among other things, for the election by the state board of agriculture of a secretary who is required to perform the duties of that office under the direction of the board, and the section in addition prescribes certain specific duties which must be performed by him, but does not require him to devote his whole time to the work of the office of secretary.

Section 1657-n of the supplement to the code, among other things, fixes the salary of the secretary at not to exceed eighteen hundred ($1800) dollars per annum.

When this question was first suggested I was strongly of the opinion that the state board of agriculture through its executive committee could not legally authorize the payment to its secretary of this additional twelve hundred ($1200) dollars for acting as clerk of the executive committee in charge of the state fair. At that time, however, I was laboring under the impression that all of the receipts of the state fair and exposition were covered into the state treasury, and that this extra clerk hire was to be drawn therefrom. Upon a more careful examination of the several provisions of the law creating the state board of agriculture and authorizing the holding of a state fair and exposition I find that no part of the receipts of the fair and exposition are turned into the state treasury, but are held by the treasurer of the state board of agriculture, and, except in payment of premiums, is paid out on warrants signed by the president and secretary thereof. The board's power with respect to the employment of clerical assistance seems to be without limitation, and the amount of the compensation of clerical assistance is left wholly within its discretion.

These facts, when considered with the fact that the law does not in terms require the secretary of the board to give his whole time to the work of that office, warrant the conclusion that under existing statutes the state board of agriculture was within the law in passing the resolution referred to in your communication, and the action of the executive committee is not open to legal objection. I would suggest, however, that because of the question that might easily arise as to the propriety of this action of the board and executive committee, notwithstanding its legality, that the legislature at its next session be asked to amend the statute making

the authority to appoint the secretary clerk of the executive committee, and his right to accept such position and the salary that goes with it, entirely clear; thus putting the whole matter beyond controversy or just criticism.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

March 3, 1910.

MR. J. C. SIMPSON,
Secretary State Board of Agriculture.

BOARD OF EDUCATION—FINANCE COMMITTEE—EXPENSES TO BE ALLOWED BY EXECUTIVE COUNCIL.—The executive council may properly allow expenses of members of finance committee when going from their homes to state institutions and other places on official business.

GENTLEMEN: I am in receipt of the communication of your secretary in which he says:

> "I am directed to say to you that the executive council has received through your special counsel, Mr. George Cosson, a communication addressed to you by the secretary of the state board of education, with reference to an opinion rendered the council by you as to expense allowance of the members of the finance committee of the board. The board through its secretary recites certain facts as to the board of control law and the law governing the state board of education and submits resolutions adopted by the board and asks you to take the matter up again and consider the question of expense allowance of the finance committee in the light of the suggestions contained in the communication.
>
> "The council has no desire other than to be right in the matter under discussion and being advised by your special counsel that since the former opinion was rendered to the executive council you prefer not to review it except upon request of the executive council, therefore, in order that the wishes of the state board of education as to further consideration of the matter may be complied with you are requested to review the entire subject and instruct us as to what if any modification you may deem it proper to make of the opinion already rendered."

In response thereto I have to say, that in the opinion referred to I held that the legislative act creating the Iowa state educational board contemplated that the members of the finance committee would have their headquarters in the office of the seat of government, and that when not occupied in visiting the educational institutions covered by the act they would be engaged in the work of the department in the office at Des Moines, and would only be entitled to traveling expenses and hotel bills when visiting the different institutions and other places in the state on official business.

Since writing the above opinion the board at one of its meetings passed a resolution in which among other things it is shown that the business of the finance committee can be more conveniently and more effectively transacted from the homes of the members of the committee than from the office at the seat of government and at less actual cost to the state, and said resolution accompanied by a communication from the secretary of the board was forwarded to this department for the purpose of securing a modification of the opinion referred to.

At the time the opinion was written this department was without any information as to the character of the work to be done by this committee and as to how it could most efficiently and economically be carried on, and while I adhere in a general way to the opinion given to your body on October 13th, 1909, I have no doubt that under the general powers of the executive council, when considered with the provisions creating the Iowa state educational board, it would be legal and proper for your body, if in its judgment the best interests of the state and the institutions under this board warrant it, to audit and allow traveling expenses and hotel bills while such members are away from their homes visiting the different institutions, and other places in the state on official business.

I am returning papers in the case.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

March 3. 1910.

TO THE HONORABLE EXECUTIVE COUNCIL
of the State of Iowa.

INSURANCE—FUNERAL BENEFIT ASSOCIATION—COMPLIANCE WITH STATUTES COVERING LIFE INSURANCE.—A company organized for the purpose of paying funeral expenses of members must comply with the statutes regulating life insurance.

SIR: I beg to acknowledge receipt of your favor of March 17th in which you say:

> "I quote you the following paragraphs from the governing laws of the Harrison Burial Association of Keokuk, Iowa, and request an official opinion as to whether or not this and similar organizations may operate in Iowa, without becoming amenable to the statutes governing insurance, more especially chapter 7 of title IX, code of Iowa:
>
> "Article 2. The object of this association shall be *to provide a plan* for the payment, *by assessment,* of the funeral expenses of each member to the amount of *one hundred dollars* for each member ten years of age or over, and *fifty dollars* for each member under ten years of age.
>
> "Article 14. The benefits herein provided are for the *purpose* of furnishing respectable funeral and burial services for deceased members, and the benefits provided *are to be paid to the undertaker furnishing such services* and *not* to surviving relatives and friends as death benefits."

In response thereto I have to say, that with the information furnished me as to the methods and practices of this association and the manner in which its business is conducted, I am of the opinion that this association, if authorized to do business in this, state at all, must comply in so far as possible with the statutes of this state covering life insurance.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

March 25, 1910.

HON. JOHN L. BLEAKLY,
Auditor of State.

FEES—SECRETARY OF BOARD OF HEALTH—HOW DETERMINED—DISPOSITION OF WHEN COLLECTED—AMOUNT CHARGED COLLEGES FOR DEAD BODIES.—The secretary of board of health may charge such fee as is allowed other officers under section 1291 of code for issuing certificate under seal, such fees to be turned into state treasury. He may require colleges to deposit a

certain fixed amount to defray expense of shipment of bodies to such schools and refund any money unused.

SIR: I am in receipt of your communication in which you request an opinion—

First. As to what, if any, charge should be made by the secretary of the state board of health for filling out blanks showing the grades of a certificate holder in this state, who desires to be admitted to the practice of medicine in another state under a reciprocal method, and certifying to the same.

Second. As to what disposition should be made of the fee if any is to be collected.

Third. As to whether or not there is any provision of the law authorizing the collection of a five dollar fee from medical colleges or schools receiving dead bodies, as provided in section 4946-b of the supplement to the code.

Fourth. If the collection of a fee is authorized, what disposition should be made of such fee.

Fifth. If there is any authority for collecting the fee, what should be done with the funds now in the hands of the secretary derived from such a source.

Sixth. What amount should the colleges or schools receiving bodies under section 4946-b of the supplement to the code, pay as expenses for such distribution, and to whom should the payment be made.

In reply to your first question, I will say that there being no statute requiring the secretary of the state board of health to issue a certificate to a person entitled to practice medicine in Iowa for the purpose of enabling such person to be admitted to practice in another state under a reciprocal arrangement, no fee is fixed by law for such certificate; and if the secretary is entitled to fees, it would be such fees as are provided by the general statute.

Section 1291 of the code reads as follows:

"Any officer legally called on to perform any of the following services, in cases where no fees have been fixed therefor, shall be entitled to receive:

1. For drawing and certifying an affidavit, or giving a certificate not attached to any other writing, twenty-five cents;

2. For affixing his official seal to any paper, whether the certificate be under seal or not, thirty-five cents;

3. For making out a transcript of any public papers or records under his control for the use of a private person or

corporation, or recording articles of incorporation, for every one hundred words, ten cents."

It is our opinion that under the above section, the secretary may make a charge of ten cents for every one hundred words contained in the instrument furnished by him, and a fee of thirty-five cents for attaching the certificate to which he has affixed his official seal.

Your second question relates to the disposition of the fees that may be collected as above set out.

Section 170-d of the supplement to the code provides:

"That all boards, commissions, departments and officers of state, elective and appointive, shall turn into the state treasury on or before the fifteenth day of each month all fees, commissions or moneys collected or received during the preceding calendar month with an itemized statement of sources from which received; and shall also file with the auditor of state a duplicate of such statement; provided, however, that the provisions of this act shall not apply to the state agricultural society, regents of the state university, trustees of the state college of agriculture and mechanic arts and of the state normal school, horticultural society, supreme court reporter and inspector of passenger boats."

Under this section all fees collected or received by any state officer for services rendered while acting in his official capacity, other than those officers excepted by the statute, must be turned into the state treasury accompanied by an itemized report.

The wording of section 1291 of the code directing that officers "shall be entitled to receive" certain fees might easily mislead an officer in believing that he might retain such fees, when received, but there is no legal distinction between the direction that an officer shall be entitled to receive fees, and a direction that an officer shall charge and collect certain fees; and while there is no law requiring the officer to make such certificate as is furnished in these cases, and while the right of the state to recover such fees from the officer collecting the same might be open to doubt, yet in view of the evident intent of the legislature in the enactment of section 170-d to in so far as possible abolish the fee system with all its attending evils and to require an accounting for all fees received by such officer, it is our desire to establish by this opinion a rule for future guidance applicable to all state departments, that all fees for services rendered in an official capacity coming into the hands of the officers of such departments as are covered

by section 170-d above quoted, must be accounted for and turned into the state treasury as therein provided.

In answer to the third, fourth, fifth and sixth questions contained in your communication referring to the provisions of section 4946-b of the supplement to the code, relating to the distribution by the board of health of dead bodies among medical schools and colleges, it is our opinion that this section should have such a broad and liberal construction as to make the statute workable.

While the statute provides that the schools receiving dead bodies shall pay the expense of distribution, and this would mean the actual expense incurred by the board and the expense of the party sending the body, yet I believe that the board would be authorized to name an amount which they might require a school or college to deposit for the purpose of defraying any expense incurred by the board in handling these matters, and enough money belonging to any one school should be on deposit with the board, or such officer as they may designate to have charge of the funds, to cover the expense of complying with requests from the school for bodies. The secretary should keep a separate account with each school so that a refund might be made to such school of any unused money belonging to it in the hands of the board or officer of the board having charge of such fund; and we believe it would be in keeping with the spirit of the statute for the board to handle this matter upon such a plan as we have suggested.

Any money now on hand in this fund received from medical institutions may be retained by the board, and such amount placed to the credit of each school as the records of the board show such institution to have paid in over and above any amount actually expended by the board in furnishing bodies to such school. If no separate account has been kept with each school, then the board should make such a division of the funds as may seem just and equitable, and place in separate accounts the credit to which each school is entitled, and retain such amount to meet the expense of future transactions with such institutions.

Yours respectfully,

H. W. BYERS,
Attorney General of Iowa.

April 14, 1910.

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

EXPENSE OF STATE EMPLOYEES—BANK EXAMINERS—WHAT INCLUDED IN EXPENSE ACCOUNT.—Such items as street car fare when leaving city and meals taken in city when going out or returning should be allowed.

SIR: I am in receipt of your communication of the 4th instant asking our opinion as to whether a bank examiner is entitled to such items of expense as street car fare when leaving and returning to the city, and occasional meals taken at Des Moines at times when his business requires him to leave on an early train or return on a late train.

That part of section 1875 of the supplement to the code, as amended by chapter 115, acts of the thirty-third general assembly, so far as material to this question, reads as follows:

> "The auditor of state and examiners shall be entitled to actual and necessary expenses incurred in the examination of banks, and loan and trust companies, which shall be audited by the executive council and paid by the treasurer of state upon warrants drawn by the auditor of state, but the total amount of such expenses and the salaries of examiners shall not in any one year, exceed the amount of fees collected from such banks and loan and trust companies."

It is our opinion that the items mentioned by you are such items as may properly be classed as "actual and necessary expenses" within the meaning of this statute, and that the officers may properly include such items as these in their expense accounts and they should be allowed by the executive council.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

April 14, 1910.

HON. JOHN L. BLEAKLY,
Auditor of State.

RAILROADS—POWER OF RAILROAD COMMISSION—AS TO ROUTING TRAINS WHERE COMPANY HAS MORE THAN ONE ROUTE BETWEEN TWO POINTS.—The board of railroad commissioners has authority to compel a railroad company to charge its short line rate over the longer line where it has two routes differing in mileage between two points.

GENTLEMEN: I have before me the communication of your sec-

retary in which he says.:

"I am directed by the board to refer to you the enclosed file of papers in case D 69, complaint of F. J. Tishenbanner, Gilmore City, vs. M. & St. L. R. R. Co., in relation to excess passenger fare, and to call your attention to your opinion rendered on November 13, 1909, having a bearing upon the questions raised in this correspondence. You will note by reference to your letter of November 13, 1909, referred to, you say:

'I know of nothing in the law of this state that would prevent the carrier from charging the same rate (short line rate) over its longer line between the same points.'

"Acting upon this opinion, the Board wrote Mr. W. G. Bierd, general manager of the M. & St. L. R. R. Co., on December 22, 1909, as shown in the files. In this letter the board used the following language:

'You will please, therefore, re-arrange your tariff schedules in accordance with this opinion of the attorney general and advise the commission when the same is done. It is respectfully suggested that this should be done at once.'

"Considerable correspondence has followed in this matter, and you will note by letter received from the passenger traffic manager of the M. & St. L. R. R. Co., Geo. J. Charlton, dated February 21, 1910, that his company declines to re-arrange the tariffs on the basis proposed.

"Will you please look over these papers and advise the board whether it would have authority, under the law, to make an order compelling the railroad company to charge its short line rates between points north of Tara and Des Moines, although the train upon which the passengers may ride is routed via Fort Dodge and Angus, the longer line? If the board has such authority please advise whether, in your opinion, in compelling the railroad company to charge the short line rates between the points mentioned, this would have any effect upon rates to Des Moines from Fort Dodge and points south? In other words, would the railroad company be permitted to charge its regular passenger rate between all points on its line and Des Moines, via the Fort Dodge routing, regardless of the fact that the passenger rate from points north of Tara to Des Moines should be figured upon the short mileage?

"The commissioners desire to proceed in this matter as soon as possible, and would thank you for your opinion in this case

at your earliest convenience."

In response thereto I submit the following:

The Minneapolis & St. Louis Railroad Company, hereafter referred to as the M. & St. L., was organized, as I understand it, under the general laws of the states of Minnesota and Iowa on or about the 1st day of February, 1895, and since that date has been operating a line of railway between the city of Minneapolis, Minnesota, and Angus, Iowa, via Fort Dodge. The corporation owns the line from Minneapolis to Angus.

During the year 1905, the M. & St. L. took over under a lease the line of the Des Moines & Fort Dodge Railroad company which was at that time being operated by the C. R. I. & P. Ry. Company from Ruthven, Iowa, to Des Moines, a distance of 137.01 miles; during the same year it also secured trackage rights over the Illinois Central Railroad between Tara and Fort Dodge, a distance of 6.07 miles, thus making it possible to route passengers going from points north of Tara to Des Moines via Fort Dodge, and passengers going from points north of Fort Dodge on the Minneapolis line to Des Moines via Tara.

The Des Moines and Fort Dodge Railroad Company and its lessees has been operating its line between Gilmore City and other points north of Tara and Des Moines via Tara and Angus for a period of more than twenty years, the distance from Gilmore City to Des Moines over this direct route being one hundred and one miles, the fare since the adoption of the so-called two cent rate law being $2.01; the accommodations, the time schedule and service being generally satisfactory to the traveling public, it can also be stated that the track and road bed from Tara to Des Moines was in good condition; thus the citizens of Gilmore City may be said to have had fair railroad accommodations over a direct route from that city to Des Moines.

Some time during the year 1909, the exact date not appearing in any of the data furnished this department, the M. & St. L. on its own motion, and for its own convenience, began to operate its through trains from Minneapolis to Fort Dodge over its own line, thence from Fort Dodge to Tara over the Illinois Central line, thence to Des Moines over the old Des Moines & Fort Dodge Railroad, and at about the same time, and without other reason, began to run its regular trains from Ruthven south to Tara, then, instead of continuing over the direct line south to Angus and Des Moines the trains are run over the Illinois Central to Fort Dodge, thence

south over the old line to Angus, and from Angus to Des Moines over the Des Moines and Fort Dodge line, thus making the distance from Gilmore City to Des Moines about ten miles farther, increasing the rate for the trip from $2.01 to $2.21, and subjecting the passengers from all points north of Tara to all the inconveniences of a longer route as well as the dangers of a poorer track and road-bed.

There is nothing in the record so far as we have been able to find furnishing a satisfactory reason for these changes in the routing of trains from Minneapolis and Ruthven to Des Moines, it was, however, stated by the complainants on the hearing before this department that the trains from Minneapolis to Des Moines were in the nature of through trains carrying more and heavier coaches than the trains from Ruthven to Des Moines, and that these heavier trains were routed via Fort Dodge and Tara because of the better and safer track and road-bed from Tara south; that the trains from Ruthven south being local trains largely, hauling but one or two light coaches, could be run over the poorer track and road-bed from Fort Dodge south with less danger and at much less expense to the company.

In view of these statements and such other information as I have been able to secure I am inclined to adopt the above statements as the reasons for the change in routing these trains, in any event, it clearly appears that the changes were made for the sole convenience and benefit of the M. &. St. L.

The complaint of the citizens of Gilmore City and the other towns north of Tara is that it takes more time to go to Des Moines via Fort Dodge than it does to go over the more direct route from Tara south to Des Moines; that it costs forty cents more for the round trip; that the track and road-bed from Fort Dodge south is in such condition that it is unsafe to operate trains thereover, and the demand of the complainants is that if the passenger trains from Gilmore City and other towns north of Tara are to be routed via Tara and Fort Dodge to Des Moines, that then passengers from Tara north be carried at the short line rate, and that the M. & St. L. be required to keep its track and road-bed in a safe condition from Fort Dodge south to Angus, and give to them substantially the same service in other respects as they have enjoyed over the shorter line for twenty years or more, and the question you submit is, does the board of railroad commissioners have the authority under the law "to make an order compelling the railroad

company to charge its short line rates between the points north of Tara and Des Moines, although the trains upon which the passengers may ride are routed via Fort Dodge and Angus, the longer line, and if the board has such authority whether in compelling the railroad company to charge the short line rates between the points mentioned would have any effect upon rates to Des Moines from Fort Dodge and points south."

The question goes to the very heart of the power of the board of railroad commissioners and involves substantially every question that might be raised as to the scope and the extent of that power.

On the one hand it is claimed that the board is without the authority; first, because the railroad company has the right to control the routing of its trains without any interference from the commission, subject only to its obligation to furnish good service; second, that to give the complainants the benefit of the short line rate when carried over the longer line would be a violation of section 2126 of the code, which is known as the long and short haul section.

On the other hand, it is contended: first, that under the law creating the board of railroad commissioners and defining its powers and duties the commission is given ample power, and in fact, that it is its duty to supervise the routing of all trains, and to make such reasonable rules with respect thereto as will promote the safety and the convenience of the traveling public, and to compel obedience to such rules and orders; second, that section 2126, the long and short haul section, has no application whatever to this controversy.

It will thus be noticed that the parties are in direct conflict as to the powers and duties of the board of railroad commissioners, and as to the scope and effect of the long and short haul sections of the law regulating carriers.

Fortunately for the public the law is now so well settled with respect to the right of the state to exercise all reasonable regulation and control over this class of transportation companies that little difficulty will be found in reaching a safe conclusion upon the questions raised by these conflicting claims.

At the start it must be conceded that there is no longer any doubt about the power to regulate and control, and that this power under proper legislative sanction may be exercised by a properly constituted board or commission. The only limitation now recognized by the courts upon that power is that the regulation and control should be reasonable.

To meet the first objection made by the railroad company we, must ascertain, first, just what power the legislature has given to the commission, and just what duties have been enjoined upon it; second, whether the order requiring the railroad company to carry passengers from Tara and points north over their long line at the short line rate would be a reasonable order under all the circumstances of this case.

Section 2113 of the supplement to the code as amended by chapter 127, acts of the 33d general assembly, in so far as the same is material to the inquiry here, provides:

> "It (the board of railroad commissioners) shall from time to time carefully examine into and inspect the condition of each railroad, its equipment, and the manner of its conduct and management with regard to the public safety and convenience in the state; make semi-annual examination of its bridges, and report the condition thereof to the company to which they belong; and if found by it unsafe it shall immediately notify the railroad company whose duty it is to put the same in repair, which shall be done by it within ten days after receiving such notice. If any corporation fails to perform this duty the board may forbid and prevent it from running trains over the same while unsafe.* * * * When, in the judgment of the board, any railway corporation fails in any respect to comply with the terms of its charter or articles of incorporation or the laws of the state; or when in its judgment any repairs are necessary upon its road; or any addition to its rolling stock, or addition to or change in its stations or station houses, or the equipment thereof for the health and convenience of the public, *or change in its rates of fare for transportating freight or passengers, or change in the mode of operating its road or conducting its business, is reasonable and expedient in order to promote the security, convenience, and accommodation of the public, the board shall serve a notice upon such corporation, in the manner provided for the service of an original notice in a civil action, which notice shall be signed by its secretary, of the improvements and changes which it finds to be proper,*" *etc.*

Section 2119 as amended by chapter 129, acts of the 33d general assembly, provides a method for the enforcement of the orders of the commission.

It will be noticed that under section 2113, as amended, the only limitation upon the power of the commission to interfere in the operation of the railroad's business and to regulate and control that business in all of its departments is that the interference must be *to promote the security, convenience, and accommodation of the public.* In other words, the power is so broad and so general that under it the commission has the authority not only to require the railroad company to keep its railroad in a safe condition for the transportation of passengers and property, but it may determine how many trains must be operated over a given line each day, what connections these trains must make at junction points or at crossing points. It may require the running of a passenger train where the company is operating a mixed freight and passenger train; it may within certain limitations determine the speed at which these trains must be run; in fact, it may under the powers here granted do any and everything that is reasonable to promote the security, convenience and accommodation of the public, and the legislature within its rights in authorizing the commission to exercise such power.

In an early case reported in the 94 U. S. at page 125 Chief Justice Waite, after citing the act of the Illinois legislature under consideration, and commenting upon the laws of numerous states covering the same and other like subjects, says:

> "This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what is without its operative effect. Looking, then, to the common law, from whence came the right which the constitution protects, we find that when private property is 'affected with a public interest, it ceases to be juris privato only.' This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise De Portibus Maris, 1 Harg. Law Tracts, 78, and it has been accepted without objection as an essential element in the law of property every since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing

the use; but, so long as he maintains the use, he must submit to the control."

In the *Atlantic Coast Line Railroad Company v. North Carolina Corporation Commission,* reported in 206 U. S. page 1, where the commission of the state made an order requiring a railroad company to so arrange its schedule so as to make connections with other trains, Mr. Justice White in his opinion at page 19, says:

"The elementary proposition that railroads from the public nature of the business by them carried on and the interest which the public have in their operation are subject, as to their state business, to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not be successfully questioned in view of the long line of authorities sustaining that doctrine."

Citing:

Chicago, B. & Q. R. Co. v. Iowa, 94 U. S. 155;
Peik v. Chicago & N. W. R. Co., 94 U. S. 164;
Chicago, M. & St. P. R. Co. v. Ackley, 94 U. S. 179;
Winona & St. Peter R. Co. v. Blake, 94 U. S. 180;
Stone v. Wisconsin, 94 U. S. 181;
Ruggles v. Illinois, 108 U. S. 347;
Stone v. New Orleans & Northeastern R. Co., 116 U. S. 352;
Dow v. Beidelman, 125 U. S. 680;
Charlotte C. & A. R. Co. v. Gibbs, 142 U. S. 386;
Chicago & Grand Trunk R. Co. v. Wellman, 143 U. S. 339;
Pearsall v. Great Northern R. Co., 161 U. S. 646-655;
Louisville & N. R. Co. v. Kentucky, 161 U. S. 677-695;
Wisconsin M. & P. R. Co. v. Jacobson, 179 U. S. 287;
Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257;
Minneapolis & St. L. R. Co. v. Minnesota, 193 U. S. 53;
Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561-584;
Atlantic Coast Line v. Florida, 203 U. S. 256;
Seaboard Air Line v. Florida, 203 U. S. 261.

In this case the rule is laid down that the power to regulate is absolute and unquestioned, and the only thing the court will concern itself about is as to whether or not the order of the commission is a reasonable one under all the circumstances, and the order of the North Carolina commission directing the railroad company to schedule its trains between certain points so as to make connections with through trains was upheld.

To the same effect is a decision in a very recent case decided by the United States court and reported in 216 U. S., page 1, decided February of this year. In this case the railroad commission of the state of Kansas made an order directing the Missouri Pacific Railway company to run a regular passenger train over a certain part of its line instead of a mixed passenger and freight train.

The order was made under a statute of Kansas very similar to our own and which provided:

> "Whenever in the judgment of the railroad commissioners it shall appear that any railroad corporation or other transportation company fails in any respect or particular to comply with the terms of its charter or the laws of the state, or whenever in their judgment any repairs are necessary upon its road, or any addition to its rolling stock, or any addition to or change of its stations or station houses, or any change in its rates for transporting freight, or any change in the mode of operating its road and conducting its business, is reasonable and expedient in order to promote the security, convenience and accommodation of the public, said commissioners shall inform such corporation of the improvement and changes which they adjudge to be proper, by a notice thereof in writing, to be served by leaving a copy thereof, certified by the commissioner's secretary, with any station agent, clerk, treasurer or any director of said corporation; and if such orders are not complied with, the said commissioners, upon complaint, shall proceed to enforce the same in accordance with the provisions of this act as in other cases."

Mr. Justice White, after quoting from the Atlantic Coast Line case above cited, wherein the doctrine of state regulation is reiterated, says:

> "Coming to apply the principles just stated to the order in question, and considering it generically, it is obvious that it exerted a lawful state power. Its commands were directed to a railroad corporation which, although chartered by other states, were also chartered by Kansas, and concerned the movement of a train on a branch road wholly within the state which had been built under the authority of a Kansas charter although the road was being operated by the Missouri Pacific under lease. The act commanded to be done was simply that a passenger train service be operated over the branch line, within the state

of Kansas. Unless then for some reason, not manifested in the order, intrinsically considered, it must be treated as such an arbitrary and unreasonable exercise of power as to cause it to be, in effect not a regulation, but an infringement upon the right of ownership, or considering the surrounding circumstances, as operating a direct burden upon interstate commerce, it is clear that, within the doctrine previously stated, no error was committed in directing compliance with the order."

The order of the Kansas commission requiring the Missouri Pacific to substitute a regular passenger train for its mixed train was held to be reasonable, even though it appeared the train would be run at a loss to the company, and the action of the board was upheld.

The Iowa statute hereinbefore quoted, and these decisions puts the question of the power of the board of railroad commissioners of this state to deal with the situation complained of here and to make the orders requested, beyond controversy, and the only remaining question is, is there anything in section 2126 of the code, the so-called long and short haul section, which in any degree limits or restrains the exercise of that power, or which would justify the railroad company in refusing to comply with the order of the commission.

In disposing of this question it would be well to consider briefly the conditions prevailing just prior to the enactment of chapter 28, acts of the 22d general assembly, and the evils sought to be remedied by the enactment of section 5 of the chapter, which is now section 2126 of the code, and known as the long and short haul section.

At that time the practice on the part of common carriers to carry one passenger for less than another under like circumstances and conditions, to charge a greater compensation in the aggregate for the transportation of passengers or a like kind of property for a shorter than a longer distance where the short haul was included within the longer, and other similar practices were common and had been carried to such a point that it became intolerable, and demand came from every part of the state to the legislature for some relief against these practices, and in response to this demand chapter 28, acts of the 22d general assembly was passed, and in this chapter was inserted the so-called long and short haul section, the provisions of which were intended by the legislature to put all persons

on a given line of railroad on an equality and to prevent *unjust* discrimination. Later, in 1897, when the code was revised this section with the chapter on the board of railroad commissioners was carried forward into the revision and became a part of the general body of the laws governing the operation of railroads in this state, and a correct and intelligent interpretation of the section can only be made when the section is considered together with the provisions of the chapter creating the board of railroad commissioners, and remembering that it was the intention of the legislature in re-writing the railroad law of this state to not only make a workable system for the regulation and control of common carriers, but to clothe the commission with the necessary power to adjust every controversy that might arise between the public and the railroads in such a way as to promote the public good. It never was the intention of the legislature to make any of the provisions of the law in this general system so rigid and inflexible that harm might come where good was intended, and it was to avoid this very contingency that the powers of the commission were made so general and so broad.

Let us take a concrete case for illustration:

Here are two important commercial points in this state connected by two separate and independent railroad lines. The distance over one line is one hundred thirty miles, the track and road bed is the best that can be made, the equipment and accommodations on the trains are first class in every particular and the service the best that can be rendered; the distance over the other road is only a hundred miles but the road is a weak one, its trains and road bed in poor condition, its equipment and accommodations not first class, the speed of its trains much slower and the number of trains fewer; the fare between the two points on this line is $2.00 and over the better line at two cents a mile would be $2.50. Now if the construction that is contended for here is to be put upon this long and short haul section, then the traveling public who desire to be transported between these two points in question must suffer the inconveniences, delays, and risk the dangers of the shorter and poorer line or pay fifty cents more to ride over the longer but better line, and this notwithstanding no one is justly benefited by such an arrangement. The people at the intermediate points on the long line neither gain nor lose by it. Such a construction results in everybody's harm and nobody's benefit, it suspends the natural law of competition and makes this section an instrument of harm rather than good.

This was never the intention of the legislature. It is suggested that there are some decisions of our supreme court indicating a strict construction of this and other sections, but the decisions referred to were made some fifteen or twenty years ago when the field of railroad regulation was new and little trodden and courts were moving forward timidly, and I am confident that our court at this time will take an entirely different view, not only as to this section but many of the other provisions in the law regulating railroads; at any rate, it is my own judgment that the time has come when this section as well as others in this chapter, should be limbered up so that the public and the up to date common carrier may have that full measure of protection that the legislature intended, therefore, upon this branch of this controversy my conclusion is:

First. That the long and short haul section has no application to the situation here for the reason that the points on the M. & St. L. line from Fort Dodge south are not included in any part of the haul of the passengers from Tara and points north as contemplated in that section. That the Ruthven and Gilmore City trains are routed via Tara and Fort Dodge for the sole convenience and benefit of the railroad company, and there is nothing in this practice that in any manner affects the rights or interests of the people at the intermediate points south of Fort Dodge. The people at Gilmore City are just one hundred miles from Des Moines by railroad; when they pay $2.00 to be transported from their homes to Des Moines they are on an equal footing with the people from Fort Dodge south who pay but two cents a mile.

Second. That even if the section was applicable a reasonable and proper construction of it when considered with the whole body of the railroad laws of the state would authorize the commission to proceed as requested, and on the whole controversy I hold that, upon the facts in this case, your commission has ample authority to compel the M. & St. L. Railroad Company to charge its short line rates between points north of Tara and Des Moines while routing its trains via Fort Dodge and Angus, the longer line, and that such order will have no effect whatever upon rates to Des Moines from Fort Dodge and points south.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

April 15, 1910.

TO THE BOARD OF RAILROAD COMMISSIONERS,
State House.

FREE PASS—FREE TRANSPORTATION—WHAT INCLUDED IN TERM—FILING OF SWORN STATEMENT BY RAILWAY COMPANIES AS TO LIST OF PASSES ISSUED.—The name of very person to whom transportation is furnished, except employees who are paid wages, should be included in sworn list.

GENTLEMEN: I beg to acknowledge receipt of the communication of your secretary under date April 15th, in which he says:

> "I am directed by the executive council to request of you a definite statement as to what free transportation, free passes, free tickets, etc., are required to be reported to the executive council under the provisions of section 5, chapter 112, acts of the thirty-second general assembly, and what free transportation, free passes and free tickets may be omitted from such report, referring to you as exhibits certain reports already filed by common carriers with the executive council.
>
> "In filing these reports carrier companies are apparently construing the law in many cases so as to require no list and in others a very extended list. If either be correct the other must be wrong. I am sending herewith the reports filed for the year 1909 by the Chicago, Anamosa & Northern Ry.; the Illinois Central Ry.; Chicago, Rock Island & Pacific Ry.; Chicago, Burlington & Quincy Ry.; Chicago & Northwestern Ry.; Iowa Central Ry.; Chicago, Milwaukee & St. Paul Ry.; the Great Northern Ry.; Atchison, Topeka & Santa Fe Ry.; Wabash Ry. and Chicago, St. Paul, Minneapolis & Omaha Ry., which illustrate, it is believed, the extremes in variation of the several reports."

In response thereto I submit the following:

Section 1 of chapter 112, acts of the thirty-second general assembly, in so far as it is material to your inquiry, provides:

> "The words 'free ticket,' 'free pass,' 'free transportation,' as used in this act shall include any ticket, pass, contract, permit or transportation issued, furnished or given to any person, by any common carrier of passengers, for carriage or passage, for any other consideration than money paid in the usual way at the rate, fare or charge open to all who desire to purchase."

Section 5 of the act is as follows:

> "Every common carrier of passengers within the provisions of this act, shall on or before the first day of February of each

year, file with the executive council of the state of Iowa, a sworn statement showing the names of all persons within this state to whom, during the preceding calendar year, it issued, furnished or gave a free ticket, free pass, free transportation or a discriminating reduced rate, except wage earners of common carriers in their ordinary employment and families of such wage earners, and disclosing such further information as will enable the council to determine whether the person to whom it was issued, was within the exception of this act."

Under these provisions it is the duty of every common carrier of passengers covered by the chapter to file with your body a sworn statement of the names of all persons to whom such carrier has issued, furnished or given during the preceding calendar year a ticket, pass or transportation of any kind for any other consideration than cash paid in the usual way, and for the same rate of charge that is open to all who desire to purchase, except wage earners and their families; in other words, the name of every person to whom such transportation was furnished should appear on the list of names except such employees as are regularly employed by the carrier and paid wages as distinguished from salary, and the statement should contain all the necessary information from which the council might determine for itself whether the transportation was properly issued or not.

Respectfully,
H. W. BYERS,
Attorney General of Iowa.

April 16, 1910.

TO THE HONORABLE EXECUTIVE COUNCIL
of the State of Iowa.

FUGITIVES FROM JUSTICE—COST OF RETURNING TO STATE—WHEN PAID.—Where there has been no trial the governor may order the costs of returning fugitives paid when in his judgment they should be allowed.

SIR: I am in receipt of your communication of the 19th instant requesting my interpretation of that part of section 5169 of the code relating to the payment of expenses incurred by an agent in returning a fugitive from justice to this state where requisition has been made by the governor for his return, and where the cause

against such fugitive has been dismissed without trial.

That part of section 5169 of the code, which is material to the determination of this question, reads as follows:

> "The governor, in any case authorized by the constitution and laws of the United States, may appoint agents to demand of the executive authority of another state or territory or from the executive authority of a foreign government, any fugitive from justice charged with treason or felony, and the accounts of the agent appointed for that purpose must be audited by the auditor of state and paid out of the state treausry. * * * *but the state shall in no case pay the cost of returning the fugitive if he has not been tried, unless it is shown to the satisfaction of the governor that a failure of trial has not occurred by any fault or neglect on the part of those interested in the prosecution.*"

I believe that under the wording of the statute, the governor may allow and order paid the expenses of an agent who has returned a fugitive from justice to this state, although the cause against such fugitive is dismissed without trial. The legislature evidently intended to leave the question of the advisability of paying the cost in each particular case to the discretion of the governor, and where he can determine to his satisfaction that the failure of trial has not occurred through the fault or neglect of those interested in the prosecution, he should allow these costs.

I would interpret the phrase "those interested in the prosecution" as used in the section above quoted, as meaning the officers who by law are charged with the duty of prosecuting persons who are accused of the commission of an offense.

The question of the sufficiency of the showing in any particular case is one that this department does not have the statutory right to pass upon, as it has been left entirely with the governor to determine whether the showing made is such as satisfies him that he is justified in ordering the costs paid. In order that the governor may arrive at a proper decision in any case, he may require the submission of such evidence as he deems will be of assistance to him in determining whether there has been any neglect or failure to prosecute on the part of those who are interested in the prosecution.

In connection with this same matter I would respectfully refer you to the opinion of former Attorney General Charles W. Mullan under date of December 29, 1906, addressed to Governor Albert B.

Cummins, in which he placed practically the same interpretation upon this statute as is here given.

Respectfully submitted,

H. W. BYERS,
Attorney General of Iowa.

April 21, 1910.

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

PRINTING AND BINDING—STATE OFFICERS TO ORDER PRINTING AND BINDING FOR THEIR DEPARTMENTS—SECRETARY OF STATE TO CERTIFY AS TO COMPENSATION OF PRINTER WHERE AMOUNT IS NOT FIXED BY STATUTE.—State officers may order such printing as is necessary for use in their offices to properly carry on the work of their department and cost of such printing certified to by secretary of state where the price is not fixed by statute.

SIR: I am in receipt of your communication of recent date in which you request my opinion on the following questions:

First: Do state officers, boards and commissioners have the power under existing statutes, to order from the state printer in addition to the printing of reports, pamphlets and blanks expressly mentioned by law, such other printing as they deem necessary for the carrying on of the business of their departments, such as circular letters, letter heads, envelopes, postal cards, leaflets, pamphlets and various kinds of blanks, including those to be bound in book form as fee, receipt, record or similar books.

Second: In case the said state officers, boards and commissioners have the power above mentioned, do they also have the authority under existing statutes to instruct or direct the state binder to bind the pamphlets, blanks, receipt and other blank books and publications so ordered from the state printer and not expressly provided by statute, in the style of binding they deem best for use of their respective departments?

Third: In case the said officers, boards and commissioners have the power to order the printing and binding above mentioned, does the secretary of state have the power under section 120 of the 1907 supplement to the code, to allow what to him seems reasonable compensation for those classes of printing and binding not covered by the present statutory schedule of prices?

Fourth: If in your opinion the practice followed has not been proper, will you kindly indicate such other method as in your judgment would be proper and legal?

For the sake of brevity and to avoid repetition we will answer all of your questions without referring to any particular one.

Section 117 of the code, referring to the duties of state binder and printer, in so far as it is material to this question, reads as follows:

> "They shall keep their respective offices at the seat of government, and sufficiently equipped to enable them promptly to print and bind the laws, journals, reports, and do all other printing and binding required for the state officers, boards or commissioners having their offices at the capitol, or by or for the general assembly."

The language of this section in directing the state printer and binder to equip their respective offices in such a manner as to be prepared to do, "The printing and binding required for all state officers, boards or commissioners having their offices at the capitol or by or for the general assembly," in the absence of any express statute, making it the duty of any particular officer or department to order such printing and binding as the different officers may need to carry on the business of their offices, seems to me to leave the plain inference that the various officers and departments may order done by the state printer such work as in their judgment may be necessary to enable them to carry on successfully, expeditiously and in a business like manner the business of their different offices and departments. The clause of the statute "and do all other printing and binding required for the state officers," was certainly intended to cover other printing, than that class particularly enumerated in that statute, leaving the discretionary power with the different officers to determine just what printing and binding other than the classes named might be required by their office or department; and it is my opinion that the different state officers, boards and commissioners have the authority to order printed such pamphlets, blanks, circular letters, letter heads, envelopes, postal cards, receipt and fee books and such other printing, as in their judgment is necessary to properly conduct the business of their office or department.

In view of the fact that they have the right to order the necessary printing for their offices, it is my opinion that under the

same construction of the statute, state officers have the right to order the different printed articles and publications bound, where binding is essential for the convenience of the office in handling the different receipts, records, books, etc., and for the proper preservation of the records, files and business of the office.

When the printing and binding above referred to is finished by the state printer and binder it is the duty of the secretary of state, under section 120 of the code supplement, to ascertain the amount to which the officer doing the work is entitled and certify that amount to the department having the work done, and where the statute does not expressly provide the amount to be paid for any particular article printed or bound, I believe the secretary should allow and certify such an amount as may seem to him reasonable and just compensation for such work as compared with the amount fixed by statute for other work.

Respectfully submitted,

H. W. BYERS,
Attorney General of Iowa.

May 4, 1910.

HON. W. C. HAYWARD,
Secretary of State.

BOARD OF OPTOMETRY EXAMINERS—APPROPRIATION FOR EXPENSES. —It is not necessary for board to turn into treasury money which they have set apart to meet running expenses of department for the following year.

SIR: I am in receipt of your letter of the 25th ultimo, in which you request an opinion as to whether the board of optometry examiners can legally appropriate a sum out of the funds now in their hands sufficient to meet the expenses of the department from July 1, 1910, to July 1, 1911, and retain that amount when accounting for the funds to the state treasury at the time directed by the statute.

Section 13 of chapter 167, acts of the 33d general assembly, being a part of the chapter creating the optometry board and defining their powers and duties, reads as follows:

> "All unappropriated funds arising under this act shall be accounted for and turned into the state treasury on June 30th of each year."

Undoubtedly from the language of the statute, it is not intended that the board shall include in their annual report any part of the funds of the department which has been appropriated and set apart by them to meet the actual and necessary expenses of running the department for the year following. All money not thus appropriated must be turned into the treasury.

Yours truly,

H. W. BYERS,
Attorney General of Iowa.

May 5, 1910.

DR. GUILFORD H. SUMNER,
Secretary Board of Optometry Examiners.

COUNTY SUPERINTENDENT—QUALIFICATION OF CANDIDATE AT PRIMARY—PROVISIONAL CERTIFICATE.—A person must possess the qualifications prescribed by statute for holding office of county superintendent to have name printed on primary ballot. One holding only a provisional certificate is not qualified to hold office of county superintendent.

SIR: I am in receipt of your letter of the 3d inst., in which you request my opinion as to whether the holding of a provisional certificate, the issuance of which is provided for by section 2734-s of the code supplement, qualifies one to take the oath required of a candidate for county superintendent in order that he may have his name printed on the primary ballot and if so, does such a certificate qualify him to hold the office of county superintendent.

In order for one to truthfully subscribe to the oath which he is required to make, that he may have his name printed on the primary ballot as a candidate for county superintendent, I believe he should possess the qualifications and credentials prescribed by the statute for one holding the office of county superintendent, and it is my opinion that one holding a provisional certificate is not qualified to hold the office of county superintendent.

Yours truly,

H. W. BYERS,
Attorney General of Iowa.

May 16, 1910.

HON. JOHN F. RIGGS,
Superintendent of Public Instruction.

OSTEOPATHS—LICENSE TO PRACTICE OPTOMETRY.—Osteopaths meet requirements of chapter 167, acts of 33d general assembly to practice optometry.

SIR: I am in receipt of yours of the 6th inst., requesting my opinion as to whether osteopaths legally licensed under our state law are required to obtain a certificate from the board of optometry examiners in order to practice optometry.

It is my opinion that an osteopath may practice optometry only upon compliance with the provisions of section 6 of chapter 167, acts of the 33d general assembly.

Respectfully submitted,

H. W. BYERS,
Attorney General of Iowa.

May 17, 1910.

DR. GUILFORD H. SUMNER,
Secretary Board of Optometry Examiners.

SOLDIERS' HOME—SOLDIER'S WIDOW ENTITLED TO ADMISSION.—The fact that the husband did not serve in an Iowa regiment does not bar his widow from admission to home.

GENTLEMEN: I am in receipt of your communication of the 10th instant advising that Mrs. Martha Underwood applies for admission to the Soldiers' Home at Marshalltown as the widow of Isaac Underwood, deceased; that her husband moved from Ohio to Missouri in 1856, lived there until 1859 when they moved to Appanoose county, Iowa, and lived there until the spring of 1861; that he was a voter in Appanoose county. In the spring of 1861 the family moved to Missouri and in July of that year Underwood enlisted in Co. D, 18th Missouri Inf. and served until the fall of 1864 when he was killed at the battle of Snake Creek Gap; that his widow continued to live in Missouri until 1867 or 8 when she moved back to Iowa and has continuously resided here since such time. That there is no evidence to show the intention of Underwood as to residence when he moved to Missouri. It is admitted that Mrs. Underwood is the widow of Isaac Underwood and that she is dependent.

You request an opinion as to whether under the facts above stated, she is entitled to be admitted into said home, the objection being raised that her husband did not serve in an Iowa regiment or battery and was not accredited to the state of Iowa.

Section 2601 of the code provides in part:

"The Iowa soldiers' home, located at Marshalltown, shall be maintained for dependent honorably discharged Union soldiers, sailors and marines, their dependent widows, wives and mothers, and dependent army nurses."

Section 2602 of the supplement to the code, 1907, provides:

"All persons named in section 2601 of this act, not having sufficient means for his or her own support, who are disabled by disease, wounds, old age, or otherwise, who served in Iowa regiments or batteries, or were accredited to the state of Iowa, or who have been residents of the state for three years next preceding the date of application, shall be eligible to admission into said home," etc.

It is my opinion that under the facts above stated, all of the conditions for admission have been met; that is to say, Mrs. Underwood is the widow of an honorably discharged Union soldier who served in the Union army; she is disabled and dependent and she is and has been for over forty years last past a resident of the state of Iowa.

An examination of the original act, which is found in chapter 58, acts of the twenty-first general assembly, discloses the fact that if the residence is sufficient, it is not necessary for the person applying for admission to have served in an Iowa regiment or to be accredited to the state of Iowa, assuming of course that the other conditions of the act have been complied with.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

June 16, 1910.

HONORABLE BOARD OF CONTROL
of State Institutions.

BOARD OF EDUCATION—RIGHT TO EMPLOY PERSON TO EXAMINE COURSE OF STUDY OF HIGH SCHOOLS.—The board of education may hire such employees as are necessary and pay them out of the fund at their disposal.

GENTLEMEN: I beg to acknowledge receipt of the communication of your secretary of date June 16th, in which he says:

"The Iowa state board of education has employed a person

to make examination of the courses of study of the various high schools, etc., for the purpose of establishing uniform requirements, etc., for entrance to the three state educational institutions. Heretofore, similar work has been done by the university at its own expense.

The board of education seeks to have the expense of this inspection charged to the state of Iowa, under the provisions of chapter 170, acts of the 33d general assembly, which the executive council has been inclined to believe has not been contemplated by such statute, the view being taken that the statute contemplates employees for the board and finance committee as an office, and not for the institutions.

The executive council desires your opinion in writing as to whether such chapter 170 acts of the 33d general assembly authorizes such employment at the expense of the state under the provisions for paying for assistants and expenses."

In response thereto I have to say that chapter 170, acts of the 33d general assembly, in creating the state board of education places the responsibility for the proper government and control of all the institutions covered by the act upon that board, and the provisions of the act should have such liberal construction as will make it possible for the board to fully and completely meet that responsibility.

Section 4 of the act, in so far as it is material to your inquiry, authorizes the board to elect all the necessary officers and employees for the educational institutions, to fix their compensation and to make all necessary rules and regulations for the government of said institutions.

In addition to this general power it is provided in section 9 that the board may hire such employees as may be found necessary to assist the finance committee in the performance of its duties.

The powers thus given to the board are so broad and so general that I have no doubt about the authority of the board to make the employment referred to in your letter, and have the person so employed paid out of the same fund and in the same way that the other employees and assistants covered by the act are paid.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

June 22, 1910.

TO THE HONORABLE EXECUTIVE COUNCIL
of the State of Iowa.

SCHOOLS—NEW DISTRICT—EXTENSION OF CITY LIMITS—SCHOOL CENSUS—TAX LEVY—PLACE OF ATTENDING SCHOOL—DIVISION OF ASSETS AND LIABILITIES.—Where a member of school board after change of boundary moves out of old territory into the newly acquired territory his status is same as before. All taxable property included in city as extended should be included in current levy. School registration should include all persons of school age residing in territorial limits as extended and children residing in the extension have a right to attend school in the independent district immediately upon the extension being made. Each school district affected by extension has a right to appoint an arbitrator to settle disputes as to the assets to which it is entitled.

SIR: I am in receipt of your communication of the 30th ultimo advising that the incorporated city of Iowa City extended its corporate limits in February, 1910. Prior to said extension the corporate limits of Iowa City were co-extensive with the independent school district of Iowa City. The extension to the city included a part of two adjoining townships and also a part of two adjoining schoool districts.

In view of these facts you submit the following questions:

"1. Does the fact that a member of the board of directors of said independent school district of Iowa City, after the vote of the people extending the city limits, removes outside of the limits of the old district but upon the territory included in the new limits, create a vacancy in the office of director?

"2. Should the school census, or register of persons of school age, for the year 1910, include the children of school age residing in the new territory embraced in the extension of the city limits?

"3. Should sums estimated in the year 1910, under section 2806 of the supplement to the code, as amended by chapter 182 of the acts of the 33d general assembly, be raised by the levy provided for under section 2807 of the code upon all taxable property within the territorial limits of Iowa City as extended?

"4. Do the children of school age residing in the territory taken in by the extension of the city limits have the right to attend school in the independent school district of Iowa City in the year 1910, and is there an obligation resting upon the

independent school district of Iowa City to educate the children residing on the territory taken in during the year 1910?

"5. In the event that the boards of directors representing the newly formed districts cannot agree upon an equitable division of all the assets and liabilities of the corporations affected, and it is necessary to appoint arbitrators under section 2802 of the supplement to the code, how many arbitrators should be appointed, and will one board of arbitrators pass upon the division to be made among the three districts?"

First. Considering that the member of the board of the original district of Iowa City did not change his residence until the extension of the district, and that after the change he still remained in the new district, his status is the same as though no change in residence had been made by him.

Second: In my opinion the school census or register of persons of school age for the year 1910 should include all of the children of school age residing in the new territory embraced in the extension of the city limits.

Third. In making the estimate of taxes levied for school purposes for year 1910, all taxable property within the territorial limits of Iowa City as extended should be included.

Fourth. The children of school age residing in the territory embraced in the extension of the corporate limits of Iowa City have the right to attend school in the independent school district of Iowa City in the year 1910.

Fifth. In the event that the board of directors of the various school districts affected by the extension of the independent school district of Iowa City are unable to agree upon an equitable division of the assets and liabilities affecting the corporations, and it becomes necessary to appoint arbitrators under section 2802 supplement to the code, 1907, each school coporation affected has the right to appoint its arbitrator to determine the dispute in which it alone is concerned.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

July 8, 1910.

HON. JOHN F. RIGGS,
Superintendent Public Instruction.

INFORMATIONS—SALE OF FISH UNLAWFULLY TAKEN—FEES OF JUSTICE OF THE PEACE.—Each single sale of fish should be stated in one count of information. Where an information contains several counts the justice is entitled to but one fee for docketing the case.

SIR: I beg to acknowledge receipt of your letter of the 25th instant in which you say:

"Section 2559—Prosecutions: In all prosecutions under this chapter, any number of violations may be included in the information, but each one shall be set out as a separate count.

"Section 2543—Buying and selling; No person shall knowingly buy, sell, offer for sale, have in possession for sale or transportation or for any other use or purpose, any fish unlawfully taken under the provisions of this chapter.

"Under the above two sections, if parties are arrested for knowingly selling fish unlawfully taken, cannot the information be drawn in as many counts as each fish sold, and on separate counts, can a justice of the peace docket each separate count, and in your opinion when an information is drawn in separate counts, can a justice of the peace docket each separate count as a case and charge the statutory fees as costs on each one?"

In response thereto I have to say:

First. The information may properly contain a separate count for each sale of fish unlawfully taken as provided in the chapter from which the above sections are quoted. If a number of fish are included in a single sale the sale should be covered by a single count in the information; on the other hand, if the sale is of each fish separately then it would be proper to include in the information as many counts as there were fish sold.

Second. Section 4597 of the code covering fees of justice of the peace in so far as material to your inquiry provides:

"Par. 1. For docketing each case in each action except in garnishment proceedings, fifty (50) cents."

Under this provision the justice of the peace would be entitled to charge but fifty (50) cents for docketing the case here covered by your information even though the information contains several counts, and the same rule would apply as to all other fees and costs.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

July 26, 1910.

HON. GEO. A. LINCOLN,
State Fish and Game Warden.

INTOXICATING LIQUOR—CORPORATIONS MAY SELL AT WHOLESALE.—A corporation which complies with all requirements of the mulct law may sell liquors at wholesale.

SIR: I am in receipt of your communication of the 30th ultimo advising that the executive council has before it the application of the Co-operative Company of Sioux City for authority to issue stock in exchange for property listed.

This is a corporation organized for the purpose of engaging in the sale of intoxicating liquors at wholesale.

In view of the decision of *State v. Delahoyde,* 126 N. W., page 330, I am of the opinion that a corporation which otherwise complies with all of the conditions of the mulct law may engage in the sale of intoxicating liquors at wholesale, but chapter 143, acts of the 33d general assembly prohibits a corporation from engaging in the retail sale of intoxicating liquors.

My former opinion should be so modified as to conform with the views herein expressed.

I return herewith enclosures.

Yours very truly,

H. W. BYERS,
Attorney General of Iowa.

August 12, 1910.

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

SCHOOL BOARD—MAINTAINING SCHOOLS—FURNISHING TRANSPORTATION.—It is mandatory upon a school board to either continue school in home districts or transport pupils to adjoining school. They may pay for more than six months tuition in adjoining district.

SIR: I am in receipt of your communication of the 27th ultimo submitting the following questions.

First. Can a school board be compelled to transport children who reside more than two miles from the school, when the school in the home district is closed?

Second. Does the board of the district in which the school is closed have authority to provide for more than six months of school in the adjoining district, provided said district maintains its school for a greater time?

Third. May a school board arrange with an adjoining school district for pupils within the district, and also provide for the transportaton of such pupils to such adjoining school even though the home school is maintained?

First. It is my opinion that it is mandatory upon the school board to either continue the school in the home district or transport the children to an adjoining school.

Second. The board has authority to make provision for sending pupils to an adjoining school for more than six months, provided the school is maintained for a greater time. The board is of course limited by the statutory amount of school taxes which may be raised with reference to these matters.

Third. Section 2774 of the code provides among other things that when the board is released from its obligation to maintain its school, or when children live at an unreasonable distance from its own school, the board may contract with boards of other school townships or independent districts for the instruction of children, etc., and may also arrange for the transportation.

It follows therefore that if the board is either released from its obligation to maintain a school, or the children live at an unreasonable distance from their own school, the board may contract with boards of other schools for such pupils, and also provide for their transportation to and from such school.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

September 19, 1910.

HON. JOHN F. RIGGS,
Superintendent Public Instruction.

PHARMACY BOARD—CONDUCTING EXAMINATION.—A person who has been registered in another state not entitled to be registered here without examination.

SIR: I am in receipt of your communication of the 2d instant requesting to be advised as to whether the board of pharmacy may register a man in Iowa by simply looking over and approving his examination given by the board of another state; or would the applicant be compelled to pass a satisfactory examination before the Iowa board.

Section 2589-a, supplement to the code, 1907, provides:

> "The commission at such times and places as it may select and in such manner as it may determine shall conduct an examination for all persons desiring to engage in and conduct business as registered pharmacists," etc.

This section in my opinion contemplates that your board shall actually conduct an examination for all persons desiring to engage in the business of pharmacy as registered pharmacists. Registering a man who has taken an examination in another state is not "conducting an examination."

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

September 21, 1910.

MR. H. E. EATON,
President Pharmacy Commission.

INSANE PATIENT—CHARGE UPON STATE—LEGAL SETTLEMENT.—No legal settlement can be obtained in a county under sections 2224 and 2226 of code unless residence is had for one year with intent to remain.

SIRS: I am in receipt of your communication advising that Mrs. Etta Sloan and her husband resided in Minnesota prior to the 12th day of May, 1909; that at said time she was in the state hospital at Fergus Falls. On the date named she was released on parole from the hospital and was at once brought to this state. She was later discharged from the hospital although not as cured. The family first stopped in Bremer county but a little later the mother took her to Wapello county as an insane patient to care for her. The husband went to Wapello county about September, 1909, procured employment and established a home there. His stay in Waverly for about four months was in the nature of a visit with his sister; that he left Minnesota with the intention of making his home in Iowa, and that a few days after he had been in this state one year, his wife was adjudged to be insane and committed to the state hospital where she now is.

Upon the facts stated you request an opinion as to "whether this patient should be held as a charge to the state; and if not, whether she should be held as a charge to Bremer or Wapello county."

Under sections 2224 and 2226 of the code and *County of Cerro Gordo v. County of Wright,* 50 Iowa, 439, and other decisions of our supreme court, no legal settlement could be obtained in either of the above named counties unless the person resided therein for the period of one year with the intention of making that his or her residence.

I am therefore of the opinion that Mrs. Etta Sloan gained no legal settlement in either Bremer or Wapello county, and hence she should properly be held as a charge to the state of Iowa.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

October 5, 1910.

HONORABLE BOARD OF CONTROL
of State Institutions of Iowa.

BUILDING AND LOAN ASSOCIATIONS—FILING ARTICLES.—Are not required to file their articles of incorporation in office of secretary of state nor pay filing fees as required by other corporations.

GENTLEMEN: I am in receipt of a communication of the 15th instant from your secretary requesting an opinion in writing as to whether domestic building and loan associations are, under the laws of Iowa, properly incorporated unless the articles of said corporation are filed in the office of the secretary of state; and also, whether if the law required the same to be filed in said office, the approval contemplated by said statute to be made by the executive council should be given before said filing with the secretary of state.

The first branch of your question has been before the department for consideration, and on the 9th day of October, 1908, I gave a written opinion in which I then held that chapter 13 of title 9 of the code provided for the incorporation and organization of building and loan associations, and section 1913 of said chapter provided for the payment of fees of such corporations; and that, therefore, such associations were not required to file their articles with the secretary of state and pay the fee required by section 1610 of the code. I still adhere to the position therein taken.

I am of the opinion, however, that if such associations desire to file their articles with the secretary of state, it will be necessary for them to pay the fee required by section 1610 of the code and

amendments thereto. In other words, if such associations desire on their own motion to file their articles with the secretary of state, these articles will be governed the same as any other articles, both with reference to the payment of fees and with reference to the approval contemplated by law.

Respectfully,

H. W. BYERS,
Attorney General.

October 7, 1910.

HONORABLE EXECUTIVE COUNCIL
of the State of Iowa.

BOARD OF HEALTH—APPROPRIATION FOR OFFICE EXPENSE.—The board may use a part of appropriation provided under section 2575 to pay clerical help necessary to the work of the office.

SIR: I beg to acknowledge receipt of your communication of November 30th, in which you say:

> "Owing to the excessive and extra amount of work to be done in the office of the State Board of Health, the Secretary finds that he will be without funds from extra clerical appropriation with which to pay clerk hire; therefore the Secretary desires to know whether it would be legal to pay clerk hire from the appropriation authorized in section 2575 of the code.
>
> "Will you kindly give me a written opinion in this matter in order that we may proceed according to law?"

In response thereto I have to say, that upon an examination of the several acts appropriating money for the use of your office I find nothing that would prohibit the use of part of the general annual appropriation for your office covered by section 2575 in the payment of such temporary help as might be required to keep up the necessary work of the office. Such use of the fund would clearly come within the term "contingent expenses of the Secretary's office."

Respectfully,

H. W. BYERS.
Attorney General of Iowa.

December 3, 1910.

DR. GUILFORD H. SUMNER,
Secretary Iowa State Board of Health.

INSURANCE RATES—FRATERNAL SOCIETIES.—Under a contract for consolidation of two societies any increase as to rates over that stipulated in contract is illegal and void.

SIR: In response to your request for an opinion as to whether or not the acts of the American Patriots of Springfield, Illinois, in advancing the rates upon the policies of the members who formerly belonged to the Knights and Ladies of Golden Precept is legal and binding upon such members, I have to say, that, after a careful examination of the memorandum forwarded with your communication and the contract of consolidation, the increase in rates, in my opinion, is in direct violation of that part of the contract in which the American Patriots binds itself to continue in force the contracts of insurance of the members of the Knights and Ladies of Golden Precept at the rates which said members were paying prior to the consolidation, and for that reason is illegal and void.

I return herewith the papers in the case.

Respectfully,

H. W. BYERS.
Attorney General of Iowa.

December 9, 1910.

HON. JOHN L. BLEAKLY,
Auditor of State.

IOWA STATE DRAINAGE, WATERWAYS AND CONSERVATION COMMISSION—USE OF FUNDS FOR EXPENSES OF OFFICE.—Under Chapter 249, acts of thirty-third general assembly, after paying salaries of secretary and assistant out of the fund created, the balance of the appropriation may be expended for other legitimate expenses of office.

GENTLEMEN: I beg to acknowledge receipt of your secretary's communication in which my opinion is requested as to whether or not "chapter 249, sections 4 and 5, laws of the thirty-third general assembly, contemplate a transfer of funds from the secretary's salary appropriation, in event that such appropriation is not fully expended, to the expense fund of such account."

There is no such thing as a secretary's salary appropriation in chapter 249. That chapter, by section 5, appropriates the lump sum of $2,500.00 per annum for all purposes out of which the

commission, by section 4, is authorized to pay a secretary not to exceed $1,500.00 per annum. If the commission is able to secure the services of a secretary for less than $1,500.00, it may do so; in fact, it is its duty to do so, thus increasing the amount available out of the appropriation for other legitimate expenses; in other words, for illustration, if the secretary's salary is fixed at $1,200.00 a year and the salary and expense of other assistants should not exceed $1,000.00, the two items making a total of $2,200.00, the commission would have $300.00 left, out of which amount it would have the right to pay any other legitimate expense incurred in accomplishing the purpose of the act; in doing this, however, there is no question of transfer of funds involved.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

January 2, 1911.

IOWA STATE DRAINAGE WATERWAYS AND CONSERVATION COMMISSION, STATE HOUSE.

INSURANCE—ALLOWING AN AGENT COMMISSION ON A POLICY WRITTEN UPON HIS OWN LIFE.—To allow an agent a commission on a policy of insurance on his own life is not a violation of section 1782 of the supplement to the code.

SIR: I beg to acknowledge receipt of your communication of December 27th in which you request an opinion as to whether or not a life insurance company would be violating the provisions of section 1782 of the 1907 supplement to the code in allowing one of its own agents the usual commission upon a policy written upon his own life, the commission to be the same allowed him in case the risk had been taken on the life of another.

The section referred to provides:

> "No life insurance company or association shall make or permit any distinction or discrimination between persons insured of the same class and equal expectancy of life in the amount or payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms or conditions of the contract it makes; nor shall any such company or association or agent thereof make any contract of insurance agreement, other than as plainly expressed in the policy issued;

nor shall any such company or association or agent pay or allow, directly or indirectly, as an inducement to insurance, any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement whatever, not specified in the policy or contract of insurance."

This section prohibits:

First. Any distinction or discrimination as to (a) the amount or payment of premiums or rates charged; (b) as to the dividends or other benefits payable on the policy; (c) as to any other of the terms or conditions of the contract.

Second. It requires the entire contract to be plainly expressed in the policy.

Third. It prohibits the payment or allowance as an inducement to insurance, (a) of any rebate of premium payable on the policy; (b) of any special favor or advantage in the dividends or other benefits that accrue thereon; (c) of any value, consideration or inducement whatever not specified in the policy on account of insurance.

It will at once be seen that this section has no application whatever to legitimate commissions allowed to agents for procuring policies of insurance. The whole purpose of the section is to prevent discrimination by the manipulation of premiums, rates, dividends or rebates, and has application only to the conduct of the company and its agents in dealing with policy holders, and it is difficult to see how the allowance of the regular commission to an agent for an application for policy on his own life would be a discrimination either in favor of or against any other policy holder; in fact, to deprive the agent of this commission would be an unjust discrimination against him and in favor of the company.

I am therefore of the opinion that there is nothing in this section nor any other that would prevent the allowance of a bona fide agent of a life insurance company of the regular commission on a policy on his own life, and to pay or allow such commission to an agent would not be a violation of this statute, notwithstanding the agent's contract with his company might prohibit the allowance to him of a commission upon policies on his own life.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

January 2, 1911.

HON. JOHN L. BLEAKLY,
Auditor of State.

PRACTICE OF MEDICINE—REVOCATION OF CERTIFICATE.—Where a doctor is convicted of an offense and is afterward pardoned, such pardon does not restore his right to practice medicine where the revocation of his certificate does not rest alone upon his conviction in the case.

SIR: In response to your request for an opinion as to whether or not the pardon of Dr. J. W. Crofford by the governor restored or revived the license or certificate to practice medicine which had been revoked by your board, I have to say that I have examined the statement of facts furnished me carefully, as well as the statement of the record made by the board with respect to the doctor's certificate, and, while the question is not free from doubt, I am of the opinion that under all the circumstances of this case the board is warranted in refusing to recognize the doctor's right to practice medicine in this state.

If the action of the board in revoking the doctor's certificate rested solely upon the conviction in the case in which the governor has granted a pardon, and nothing had developed subsequent to the conviction and pardon that affected the doctor's professional integrity and fitness to practice medicine, I would be inclined to advise the restoration of his certificate. It appears, however, from the record that the revocation of his certificate does not rest alone on his conviction in the case in which pardon has been granted.

Under these circumstances it seems to me the wise and proper thing for the board to do would be to give the doctor an opportunity to make a showing with respect to the matters upon which the revocation of his certificate rested, and if by such showing the board is satisfied that the doctor is a fit and proper person to practice medicine in this state, the order revoking his certificate should be set aside and his right to practice recognized. To require this showing will work no injustice to the doctor, and the public will be fully protected.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

January 2, 1911.

DR. GUILFORD H. SUMNER,
Secretary State Board of Health.

MINING—INTERPRETATION OF TERM, "MINE FOREMAN" OR "PIT BOSS."—Ruling of state mine inspector upheld.

SIR: In the matter of the ruling made by the state mine inspectors on or about December 12th last, viz., "That the term, 'mine foreman' or 'pit boss,' in chapter 9 of the code is interpreted to mean any person hiring or discharging men or to whom the care or the operation of a mine or part of a mine, and the safety of the men employed therein is entrusted," and the legality or propriety of which ruling was submitted to me some days ago, I have to say, that, after the most careful consideration, I have come to the conclusion that I ought not to interfere with this ruling.

The matter is so clearly one of good sense and judgment upon the part of the inspectors that I am sure interference by a ruling from this department would simply confuse and further complicate matters; I venture, however, to suggest that the ruling should be used for the sole guidance of the inspectors in the performance of their duties, and that great care should be exercised in the enforcement of the rule in order that no injustice may be done to either side in this controversy, and in order that unnecessary friction and trouble between miners and mine owners may be avoided in so far as possible.

Respectfully,

H. W. BYERS,
Attorney General of Iowa.

January 2, 1911.
HON. EDWARD SWEENEY,
State Mine Inspector.

SCHEDULE "H"

JUSTICE OF THE PEACE.—Duty to deposit with his successor his official docket and other official papers in his possession at the expiration of his term of office.

Des Moines, January 7, 1909.

Mr. Chas. Jones, J. P.,
Sanborn, Iowa.

Dear Sir: Yours of the 31st ultimo at hand. I understand therefrom that you have been elected justice of the peace to succeed James W. Dow, and that one C. E. Foley was at the same time re-elected justice of the peace in the same township, and that a proposition has been made to you that the books and dockets formerly under the charge of Mr. Dow be turned over to Mr. Foley, and that Mr. Foley turn over to you the books and dockets which have been under his charge as justice of the peace during his prior term of office, and that you wish to know whether such a transaction would be a proper and legal one.

In reply thereto I have to say that if the facts of the case are as above set forth, it would be improper to make such an exchange of books.

Code section 4584 provides in substance, that a justice of the peace, upon the expiration of his term, must deposit with his successor his official docket and other official papers, as well as those of his predecessors, which may be in his custody, there to be kept as public records.

As Mr. Foley succeeds himself, it would appear to be his duty to retain the dockets which have been in his possession.

Yours very truly,

CHARLES S. WILCOX.
Special Counsel.

CLERK OF DISTRICT COURT.—Duty to give board of parole information requested concerning prisoner.

Des Moines, January 8, 1909.

Mr. P. H. Healey,
Clerk of District Court,
Newton, Iowa.

Dear Sir: Replying to yours of the 31st ultimo in reference to the collection of a clerk's fee for the record mentioned in section 20 of chapter 192 of the acts of the 30th general assembly, I have to say that said section 20 expressly provides that it is the duty of the clerk to furnish such record to the board of parole and that section 21 of said chapter makes it the duty of every public officer to whom inquiry may be addressed by the board of parole concerning any prisoner, to give said board all information possessed or accessible to him which may throw light upon the question of the fitness of the said prisoner to receive the benefits of parole. No fees could be collected against the board of parole under item 21 of section 296 of the code.

Yours very truly,

CHARLES S. WILCOX.
Special Counsel.

TOWN COUNCIL—VACANCIES TO BE FILLED BY MEMBERS OF THE COUNCIL.—Duty of mayor to declare candidate who has majority of votes elected.

Des Moines, January 27, 1909.

Mr. A. J. Byerly, Mayor,
Coggan, Iowa.

Dear Sir: I have your favor of recent date in which you submit the following:

Coggan is an incorporated town of 500 inhabitants. March, 1907 we elected three new councilmen and three held over; one councilman has resigned, and his resignation has been accepted. In filling this vacancy I want your opinion:

First. If three councilmen vote for and two against said candidate for councilman is said candidate elected councilman if the mayor approves of the election?

Second. In the above circumstances is the candidate elected councilman if the mayor does not approve of the election?

Third. With only four councilmen present and three votes for and one against a certain candidate, can the mayor decide there is an election or no election as he chooses?

In reply I herewith submit the following:

Section 1272 of the Supplement to the Code, so far as it is material to the questions under consideration, provides:

> "Vacancies * * * in all town offices shall be filled by the council at its first regular meeting after such vacancy occurs or as soon thereafter as practicable."

Section 658, paragraph 5, provides:

> "He (the mayor) shall be presiding officer of the council with the right to vote only in case of a tie."

In response to your first question will say that under the conditions you state the candidate for councilman would be elected councilman whether the mayor approved of the election or not; this also answers your second question.

Replying to your third question I have to say that with four councilmen present, three voting for and one against a certain candidate, the candidate should be declared elected by the mayor. He has no discretion in the matter.

Yours very truly,

CHARLES W. LYON,
Assistant Attorney General.

COURT HOUSE GROUNDS.—Board of supervisors may authorize the erection of a temporary structure thereon for a public purpose provided it will not interfere in any manner with the public business transacted in the court house.

Des Moines, Iowa, February 6, 1909.

JOSEPH H. EGERMAYER, COUNTY ATTORNEY,
Marshalltown, Iowa.

DEAR SIR.—I have your favor of January 26th addressed to the attorney general in which you submit the following proposition:

> Can the board of supervisors or the county auditor grant an evangelistic committee of your city which is promoting what are called the "Sunday Meetings" the right to use a portion of the court house grounds for the purpose of erecting a tabernacle thereon to be used for the evangelistic meetings from

February 1, 1909, to June 1, 1909; the deed to the county conveying the court house grounds containing no restrictions whatsoever as to the use for which such real estate was originally acquired except that a court house was to be built thereon costing a certain sum of money.

You also ask for an interpretation of paragraph 9, section 422, page 88, of the 1907 Code Supplement.

Replying to your letter I have to say that I have found some authorities which might seem to indicate that such a privilege could not be properly granted and the following brief may aid you in further investigation of authorities supporting that theory of the proposition:

Paragraph 9, Section 422, of the 1907 Code Supplement, is as follows:

> "To purchase, for the use of the county, any real estate necessary for the erection of buildings for county purposes; to remove the site of, or designate a new site for, any county buildings required to be at the county seat, when such site shall not be beyond the limits of the town, village or city at which the county seat is located, and to permit any person, persons, or corporation to use any prtion of the lands owned by the county for ornamental or art purposes, or for the erection of any monument or fountain under such restrictions and regulations as the board of supervisors may from time to time enact, provided that such use does not interfere with the use for which such real estate was originally acquired by the county."

Paragraph 11, Section 422, of the code supplement gives the supervisors 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 shall be made."

Paragraphs 9 and 11 of said section 422 of the supplement are the only provisions that I can find which bear upon the power of the supervisors to grant the privilege requested.

A county is a political corporation invested with certain limited and specified powers, which are divided among and are to be exercised by a class of agents or county officers appointed for that purpose. Their duties are not only defined, but the mode of performing them is often prescribed by law, and this being done, the power must be exercised precisely as it is given.

Hull vs. Marshall County, 12 Iowa, 142.

The above case involves the legality of bonds issued for the erection of a court house in Marshall county in the year 1861.

Counties are in fact municipal corporations. In the case of *McPherson vs. Foster Bros.*, 43 Iowa, 48, the court said:

> "The city, as all other municipal corporations, can exercise no power not conferred by law; upon the law, from which its existence is derived, it depends for all authority. It is a creative and positive enactment and all the city's powers flow therefrom. Of course we will not be understood as intimating that the means and manner of the exercise of power must be prescribed by express enactment, but that the power itself depends thereon."

State of Indiana vs. Hart, 33 L. R. A., 118, holds that: "A lease of rooms in a court house to be used for private purposes cannot be lawfully made by county commissioners in the absence of statutory authority."

See also editor's notes to said case, citing several cases in point.

> "When the city or town buildings are let to private parties such use is a private and not a public use under the laws in this state. The land upon which the court house is erected is purchased, and held only for such purpose, which is a public purpose, and under all the authorities can be used for no other purpose. * * * We think it clear, both upon principle and authority, that the boards of commissioners in this state have no power to rent the court house, or any part of it, for private use, and that the relation of landlord and tenant cannot exist between the county and any private person as to the court house, or any part thereof, under the laws now in force. There is no statute in this state authorizing the boards of commissioners to rent the court house, or any part thereof, for private use."

Page 122 of the opinion in *State of Indiana vs. Hart*, supra.

In Minnesota the statute provides that the board of county commissioners "shall have the care of the county property and the management of the county funds and business except in cases otherwise provided for; but shall exercise no other powers than such as are given by law."

The case of *Borough of Henderson vs. County of Sibley*, 28 Minn., 515, 11 N. W. 91, holds that counties may not erect buildings for the use of other municipal corporations or for any third party nor improve it for the accommodation of third parties, nor enter into

contracts by which it shall bind itself to hold it for the benefit of third parties. "Such objects are foreign to the purposes for which counties are organized, and, if permitted, would open the door to entanglements and abuses against which the public should be, and is, by law protected."

The above case was one involving the validity of a contract by a county with the Borough of Henderson for the use of a part of a county courthouse for a city hall, and it was held that the contract was beyond the powers of the county commissioners. (I have noticed that the basement of the Marshall county courthouse is used for the offices of the mayor and other city officials of the city of Marshalltown.)

Public ground in the ordinary sense is ground in which the general public has a common use and it would not accord with the common understanding of the language used to say that land devoted to the use of a local religious society or hospital or academy created for church, hospital or academical purposes is public.

Patrick vs. Y. M. C. A. of Kalamazoo, 79 N. W. 208.

"Public building" as used in penal Code Section 725 making it a misdemeanor for any person to designedly destroy, injure or deface any public building, its appurtenances or furniture, relates exclusively to buildings owned by the public as such, as the state capitol, court houses, city halls and the like and does not include a church.

Collum vs. State, 119 Ga. 531; 55 S. E. 121.

"The cities of our state hold the titles to the streets, alleys and public squares in trust for the public; and, upon principle, such trust property can no more be sold to satisfy the debts of the city than can any other trust property be sold to satisfy the individual debts of any other trustee. The property so held by the city can only be used for the purposes to which it was dedicated. It cannot be sold to satisfy its debts."

Ranson vs. Boal, 29 Iowa, 68;

See also the *City of Alton vs. Illinois Trust Co.,* 12 Ill. 38.

You will notice that the cases above referred to have to do largely with propositions involving private contracts, grants for private purposes and the relation of landlord and tenant. I have conferred with Mr. Byers in reference to Section 422 of the Code Supplement and he concurs with me in the opinion, taking the section in its entirety, that the board of supervisors has authority to grant a privi-

lege for the erection of a temporary structure on the court house grounds for a public purpose, provided the manner in which the said structure is erected, its location and use shall not interfere with the public business transacted in the court house, but such right, if granted, must be merely a naked privilege subject to revocation at any time that the public interest may demand or the board of supervisors may deem advisable, as the board would have no authority to bind the county for any definite length of time nor to subject the county to any liability whatever in reference to the erection or maintenance of the structure so erected.

Yours very truly,

CHARLES S. WILCOX.
Assistant Attorney General.

INCORPORATED TOWN—FINANCIAL statement of incorporated town. Not necessary to itemize each order drawn and paid out.

Des Moines, February 8, 1909.

MR. RALPH WALSTER, CITY CLERK,
Marble Rock, Iowa.

DEAR SIR: I have your favor of the 6th instant in which you submit the following question:

"I write you in regard to the publishing of the financial statement of incorporated towns under 600 inhabitants.

"Is it necessary to itemize each order drawn and paid out of each fund, to whom made out and to whom paid, etc.

"Or is it lawful to make a summary of each fund in some such form as sent to the State Auditor last summer."

Replying thereto I have to say, that section 741-e of the 1907 Code Supplement provides as follows:

"Each municipality shall make an annual public report, which shall contain an accurate statement, in summarized form, of all collections made or receipts of such municipality from all sources, all accounts due the public, but not collected, and all expenditures for every purpose; and a statement in detail of the cost and operation and all income of each public utility operated or owned by the municipality. Said report shall further show in detail the entire public debt of such municipality, and the amount of debt, which the municipalty may under the law contract for the year for which the report is made. Said

report shall be published annually at the close of the fiscal year in at least two newspapers of general circulation in said city or town as the case may be, but if only one paper is so published, then in one, and if none be published, then by posting a copy in three public places in said city or town."

I think the above section is a sufficient warrant for condensing such annual financial statement into some such form as that required from towns by the Auditor of State. You will note that the first sentence of the Code section above referred to provides for a statement "in summarized form." I would think that it would be quite unnecessary to itemize each order drawn and paid out of each fund, or to show to whom made out, and to whom paid, etc.

Yours very truly,

CHARLES S. WILCOX.
Special Counsel.

DENATURED ALCOHOL—NONE OTHER THAN REGISTERED PHARMACISTS AUTHORIZED TO SELL.—Section 2588 of the Code and section 2593 code supplement construed.

Des Moines, February 16, 1909.

SENATOR J. J. NICHOLS,
Des Moines, Iowa.

DEAR SIR: A few days ago you left with me a communication from Mr. Osborn of West Liberty, Iowa, in which he wishes to be advised as to whether or not grocers have the right to sell denatured alcohol for commercial purposes. You request that I answer the same through you, so I beg to submit the following:

Section 2593 of the Supplement to the Code, so far as it is material to the question under consideration, provides:

"No person shall sell at retail any poisons enumerated in the following schedule, to-wit: Acids, hydrochloric, nitric, and sulphuric, arsenic, chloral hydrate, chloroform, ammoniated mercury, atropine, arsenate of copper, aconitine, benzaldehyde, bromine, cyanide of potassium, cobalt, corrosive sublimate, dionin, ether sulphuric, hyoscine, morphine, kermes mineral, cantharides, cotton root, croton oil, carbolic acid, digitalis, denatured alcohol, ergot, hydrocyanic acid, nux vomica, opium and its preparations (excepting those containing less than two grains to the ounce), oils of bitter almonds, savin and pennyroyal, oxalic acid, phosphorus, strychnine and its salts, veratum, and wood alcohol; without affixing to the bottle, box, or other package containing the poison, a label bearing the name

of the article and the word poison distinctly shown, with the name and place of business of the registered pharmacist from whom the article was obtained. * * * Provided that it shall not be necessary to keep a record in said book of sales of denatured alcohol and wood alcohol, when it is ascertained they are to be used for mechanical purposes; provided, however, that nothing herein contained shall be construed to permit or authorize the sale of any of the poisons herein named where the sale thereof is otherwise prohibited or regulated by law."

Section 2588 of the code also provides:

"No person not a registered pharmacist shall conduct the business of selling at retail, compounding or dispensing drugs, medicines or poisons, or chemicals for medicinal use, or compounding or dispensing physicians' prescriptions as a pharmacist, nor allow any one who is not a registered pharmacist to so sell, compound or dispense such drugs, medicines, poisons or chemicals, or physicians' prescriptions, except such as are assistants to and under the supervision of one who is a registered pharmacist, and physicians who dispense their own prescriptions only."

Under the provisions of the sections above quoted, it is at once apparent that the sale of denatured alcohol is limited to druggists, and it is therefore my opinion that one not a registered pharmacist is not authorized to sell denatured alcohol for any purposes.

Yours very truly,

CHARLES W. LYON,
Assistant Attorney General.

ARTICLES OF INCORPORATION.—Articles of incorporation of a non-profit corporation may be so amended as to permit associate members who are not stockholders to participate in the business meetings of the corporation.

DEAR SIR: I have before me your favor of November 30th, containing the following proposition:

Des Moines, February 16, 1909.

MR. NEWTON B. ASHBY,

R. F. D. No. 1, Des Moines, Iowa.

"Last year the Central Iowa Poultry and Pet Stock Associ-

ation was organized and incorporated as a not for profit corporation. At the time of organization there were two classes of members, stock holders and associate members, the latter having all the rights of membership except a voice in the business meeting of the corporation. It is now proposed to give the associate members who are not stock holders a voice in the election of officers of the corporation and in the transaction of the corporation business the same as stock holders. Can this be done legally?

"If we should amend our articles of incorporation to permit associate members who do not hold a share of stock to take part in the business meeting of the corporation would it be legal?

"If there were but one objecting stockholder, could we still permit associate members who are non-stockholders to vote in the business meeting of the corporation?"

In reply thereto I have to say that, in my opinion, there is no law upon our statute books which will prevent such an amendment to your articles of incorporation as to permit associate members who do not hold stock to take part in the business meeting of the corporation or to vote on any proposition in connection with the affairs of the corporation, and as any change in your articles would be brought about by vote of the stockholders and the major vote would govern, I do not see how only one objecting stockholder could prevent such a change in the articles.

Sections 1642-1643-1647 and 1651 of the Code seem to bear me out in the statement above made. A part of section 1651 reads as follows:

"Any corporation organized under this Chapter may change its corporate name or amend its articles of incorporation by a vote of a majority of the members in such manner as may be provided by its articles."

Very truly yours

CHARLES S. WILCOX.
Special Counsel.

MAYOR—TOWNSHIP CLERK.—A person cannot legally hold the office of mayor and township clerk at the same time.

Des Moines, February 16, 1909.

MR. R. MEYER,

Durant, Iowa.

DEAR SIR: I have your favor of December 18th, in which you submit the following proposition:

"Can I legally hold the office of mayor of Durant and also office of township clerk at the same time. I gather from the Code that the office of mayor is not an elective office in the Code's meaning as a mayor is not elected at the general election."

Replying to your inquiry I have to say that the office of town mayor is an elective one. Section 649 of the 1907 Code Supplement provides in part as follows:

"In towns there shall be elected, biennially, a mayor, treasurer and assessor."

The office of township clerk is, of course, also an elective one.

It is my opinion that it is contrary to the spirit and intent of the law, and that it is improper and illegal for any person to hold the two offices mentioned at the same time.

Yours very truly,

CHARLES S. WILCOX.
Special Counsel.

OVERSEER OF POOR—DUTY OF TOWNSHIP TRUSTEES.—Where an overseer of the poor has not been appointed in a town by board of supervisors, the trustees of the township in which the town is located is charged with the duty of looking after such poor persons.

Des Moines, Iowa, February 19, 1909.

MR. S. N. HINMAN,

Belmond, Iowa.

DEAR SIR: I have your letters of January 30th and February 17th, in which you submit the following proposition:

"I am chairman of the board of trustees of Belmond township in which a part of the incorporated city of Belmond is located. I am frequently called upon to look after the poor of

the city that reside within the township limits. I am desirous to know whether it is not the business of the mayor or city council rather than the trustees that live out in the country."

In reply to the above I have to say that sections 2230 to 2237 inclusive, of the 1897 code fully cover your propositions. My interpretation of said sections in connection with your proposition is that, if the city of Belmond is without the officer known as overseer of the poor, appointed by the board of supervisors as provided for in section 2230, the township trustees of the township in which a part of Belmond is located are charged with the duty of providing for relief of the poor.

Very truly,

CHARLES S. WILCOX,
Special Counsel.

BONDS—TOWNSHIP CLERK—WHERE BONDS FILED—BOND OF TOWNSHIP CLERK SHOULD BE FILED IN AUDITOR'S OFFICE.

Des Moines, Iowa, February 20, 1909.

MR. O. C. BROKAW,

Corning, Iowa.

DEAR SIR: I have your favor of the 13th inst, in which you ask with what official the bond of a township clerk should be filed, and who should hold such bond. In reply thereto I refer you to section 1188 of the code, which is as follows:

"All official bonds shall run to the state, and be for the use and benefit of any corporation, public or private, or person injured or sustaining loss, with a right of action in the name of the state for its or his use. Those given by state and district officers shall be approved by the governor; those of county officers, township clerk and assessor, by the board of supervisors; those of other township officers by the township clerk; and those of city officers by the mayor, or as may be provided by ordinance. All bonds shall be approved or disapproved within five days after their presentation for that purpose, and indorsed, in case of approval, to that effect and filed, and, unless otherwise provided by law, kept in the office of the approving officer."

Also section 1191, which reads as follows:

"The bonds and oaths of state officers shall be filed in the

office of the secretary of state, except those of the secretary, which shall be filed and recorded in the office of the auditor; those of the county and township officers in the county auditor's office, except those of the county auditor, which shall be kept in the county treasurer's office, and those of justices of the peace, which shall be filed by the auditor in the office of the clerk of the district court, after the same have been approved and recorded."

Very truly,

CHARLES S. WILCOX,
Special Counsel.

TAXES—SOLDIERS' EXEMPTIONS.—Where a soldier has property in this state but is not a resident of the state he is not entitled to any exemption.

Des Moines, Iowa, February 23, 1909.

MR. I. N. FUNK,
909 Thirteenth Street,
Boone, Iowa.

DEAR SIR: I have your favor of the 15th, also that of the 17th, which came to this department from the Adjutant General's office. In your letter of the 15th, you submit the following proposition:

"Is a veteran of the civil war, owning property of the value of $3,000.00 in the state of Iowa, entitled to $800.00 exemption from taxation though having moved from Iowa and now a resident of the state of Ohio?"

Replying thereto I have to say that section 1304 of the 1907 code supplement reads in part as follows:

"The following classes of property are not to be taxed. * * * The property not to exceed eight hundred dollars in actual value, of any honorably discharged Union soldier or sailor of the Mexican war or 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 all 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 eight hundred dollars at the time said assessment is made

by the assessor unless waiver thereof is voluntarily made of said exemption at said time; but this exemption shall not apply in the case of any soldier or sailor or the widow of such soldier or sailor, owning property of the actual value of five thousand dollars ($5,000.00) or where the wife of such soldier or sailor owns property to the actual value of five thousand dollars ($5,000.00)."

It is a general principle of law that the statute making general exemptions from taxation is construed strictly against those for whose benefit they are enacted as the general policy of the law is that all property shall be taxed, and it is my opinion that only bona fide residents of the state can claim exemptions under the statute above referred to.

Very truly,

CHARLES S. WILCOX,
Special Counsel.

SCHOOL ELECTIONS—FREE TEXT BOOKS—RIGHT OF WOMEN TO VOTE ON QUESTION OF FREE TEXT BOOKS.—Women have the right to vote at a school election on question of free text books.

Des Moines, March 4, 1909.

MR. F. T. OLDT,

Dubuque, Iowa.

MY DEAR SIR: I beg to acknowledge receipt of your letter of the 1st instant in which you say:

"At the school election to be held next Monday our people will vote on the free text book question. Many are asking whether women can vote on that question. The general impression seems to be that they cannot, but we are now asked whether we have obtained your decision. Be kind enough therefore to send me your opinion at once. It will satisfy all the people and prevent the possibility of a mistake. By complying with my request you will greatly oblige."

In response thereto I have to say:

Section 2836 of the Code provides for the submission of the question of free text books to a vote of the people.

Section 2837 and sections 2783 and 2806 of the Supplement to the Code 1907, provide for the purchasing and loaning of the books if the voters authorize the use of free text books.

Section 2825 of the Code provides for the payment of the books out of the contingent fund, and in addition thereto provides for the necessary tax levy.

Under these several provisions it is manifest that if at the proposed election a majority of the votes are cast in favor of free text books the tax levy in the district will necessarily have to be increased; in other words, the effect of an affirmative vote upon the question will be an increase in the tax levy.

Section 2747 of the Code provides as follows:

> "To have the right to vote at a school meeting a person must have the same qualifications as for voting at a general election, and must be at the time an actual resident of the corporation or subdistrict. In any election hereafter held in any school corporation for the purpose of issuing bonds for school purposes *or for increasing the tax levy,* the right of any citizen to vote shall not be denied or abridged on account of sex, and women may vote at such elections the same as men, under the same restrictions and qualifications, so far as applicable."

By the adoption of this section the legislature evidently intended to authorize women to vote at all school elections when the question submitted involves an increase of the tax levy.

I am therefore of the opinion, that at the election referred to in your letter the women of your district who are twenty-one years old and over, will be entitled to vote.

Yours very truly,

H. W. BYERS,

OIL—INSPECTION—CHARGES FOR TESTING.—Fees where oils are mixed to get required grade after one class has been rejected.

Des Moines, Iowa, February 4, 1909.

LEROY BURCH,

State Oil Inspector,

Cedar Rapids, Iowa.

DEAR SIR: I have your favor of the 28th ult. in which you submit the following proposition:

Four tank cars of oil were inspected by you, three of which stood the required test, the oil in the fourth tank car was rejected as being slightly below the required grade, the oil from the four tank

cars was pumped into storage tank No. 11, and when so mixed stood approved. The rejected oil in the fourth tank car paid the ordinary fee of 10c per barrel when rejected and you wish to know if the oil in said tank car is subject to another fee of 10c a barrel when released for sale after being mixed with the oil from the other three cars, or as you put the question in the abstract, if a car of oil is rejected and yet is so slightly off grade that it can be mixed with other oil and thus stand the test, is the oil so remedied subject to a double fee, one fee for rejecting and another fee for releasing it for sale.

Section 2505 of the code supplement relating to the inspection of petroleum products, contains the following clause: "There shall be no refund nor rebate of charges made or paid for inspection, except upon a duly verified certificate of the owner that the goods for which such rebate is asked have been disposed of outside of the state." In view of the clause just quoted it seems to me you would not be authorized to refund or rebate the charge of 10c per barrel for the examination of the rejected oil.

Rule No. 11 of the rules and regulations for the inspection of illuminating oils, chapter 10 of the 1907 supplement to the Iowa Health Bulletin, provides in part as follows:

> "Where oil of different grades, or standards, is placed in receiving or storage tanks, an inspection must be made, and the actual standard of oil from such tanks obtained at all times before it is put into barrel for sale and use. There must be no average test, by taking an average of the different qualities or standards of oil before it is placed in such tanks. The inspector must know the quality and standard of the oil before he affixes his brand thereon. Where a number of barrels are filled consecutively from a tank, previously inspected, an inspection of one barrel would suffice for that particular lot of barrels, provided, no oil has been added to the tank during the process of filling the barrel. The barreling, testing and branding must constitute one transaction. There must be no lapse of time therein."

The oil from the four cars, after being placed in the tank, was not the same grade of oil as that contained in the separate tank cars and should undoubtedly be tested before sale, and I see no reason why the usual charge should not be made. If that part of

rule 11 above quoted were followed in the testing of the oil in tank No. 11 the charges for so testing would not necessarily be large, and the owners of the oil could certainly have no just cause for complaint.

Very truly,

CHARLES S. WILCOX,
Special Counsel.

TAXES—REFUND BY BOARD OF SUPERVISORS.—Where taxes are over paid by mistake board of supervisors may refund.

SALOONS—ELECTION DAY.—Saloons in towns where no election is being held are not required to close because a neighboring town is holding an election.

Des Moines, March 15, 1909.

CHARLES E. SCHOLZ, ESQ.,
Guttenberg, Iowa.

MY DEAR SIR: I am in receipt of your communication of the 10th instant in which you wish to know, first, as to whether the board of supervisors in your county should refund certain taxes paid by oversight or mistake on the part of the officials of the bank; and second, as to whether or not the saloons in towns in your county where no election is to be held this year must be closed on the day on which other towns are holding town elections.

Replying thereto I have to say, that without taking the time to investigate the tax question closely I think, under the circumstances stated in your letter, the tax ought to be refunded. As to the other question, saloons would not be required to close except in the towns where an election is being held; as to the other towns the day would not be an election day in the sense that term is used in section 2448.

Yours very truly,

H. W. BYERS.

CITIES AND TOWNS—BILLBOARDS—REGULATION BY CITIES AND TOWNS.—Cities and towns have power to regulate location of billboards.

Des Moines, Iowa, March 17, 1909.

J. R. STEWART, Mayor,

Diagonal, Iowa.

DEAR SIR: I have your favor of the 4th instant, addressed to the attorney general, in which you submit the following proposition:

> "I am requested by our town council to solicit an opinion from your office. The case is like this, namely, one street in the business part of the town has a large sign (board) set up close to and fastened to said sidewalk, as a help to stay it, of course the sign is on the lot inside; the council at a regular meeting ordered same removed, and firm building sign protested, but agrees to leave to advice of authority and abide by decision, hence the information is solicited, as requested. Said council ordered sign placed back on the lot the distance of height of aforesaid sign. Do they have that jurisdiction?"

Replying thereto I have to say that the law does not contemplate that this department shall give official opinions or advice to others than state officers and the two houses of the legislature. However, as a courtesy to you, and with the hope that I might aid you to some small degree in arriving at a correct conclusion of the proposition, I make the following personal suggestions:

Section 700-b of the 1907 supplement to the code provides as follows:

> "Cities and towns shall have the power to regulate the construction and location of billboards and the power to license and tax the owners thereof or persons maintaining the same."
>
> "They shall have power to prevent injury or annoyance from anything dangerous, offensive or unhealthy, and to cause nuisance to be abated; to provide for the destruction of weeds and other noxious growths upon any of the lots and parkings therein and to provide for the assessment of the cost thereof to the property; to provide for the immediate seizure and destruction of tainted or unsound meat or other provisions; to establish all needful regulations as to the management of packing and slaughter houses, renderies, tallow chandleries and soap factories, bone factories, tanneries and manufac-

tories of fertilizers and chemicals, within the limits of such cities or towns; to regulate and restrain the deposit and removal of all offensive material and substances and the engendering of offensive odors and sights therefrom, so as to protect the public against the same; to establish and regulate slaughter houses; and, in cities having five thousand or more inhabitants, to build and control the same."

Section 700-b above quoted should, in my opinion, be construed in connection with section 696, as above quoted.

I refer you to the case of *Crawford vs. City of Topeka*, 51 Kans. 756. The case may also be found in the 33 Pacific Reporter, 476; and, also, in volume 20 L. R. A. 692. The case is almost directly in point.

I quote from the opinion one paragraph as follows:

"It is doubtless within the power of the city to prohibit the erection of insecure billboards or other structures, require the owners to maintain them in a secure condition, and to provide for there removal at the expense of the owners in case they become dangerous. Perhaps regulations may be made with reference to the manner of construction so as to insure safety, but the prohibition of the erection of structures upon the lot line, however safe they might be, would be an unwarranted invasion of private right, and is without legislative authority."

I believe the above to be good law.

Very truly,

CHARLES S. WILCOX,
Special Counsel.

VETERINARY SURGEON—QUARANTINE OF ANIMALS.—A state veterinarian has authority to quarantine animals which he believes to be affected with contagious disease.

Des Moines, Iowa, March 19, 1909.

DR. PAUL O. KOTO,
State Veterinary Surgeon,
Des Moines, Iowa.

DEAR SIR: I have your favor of the 16th inst. in which you ask to be advised as to the authority of the state veterinary surgeon to quarantine animals suspected of being infected with contagious diseases. In reply will say that section 2530 of the supplement to the code, so far as it is material to the question under

consideration, provides:

> "He (the veterinary surgeon) shall have supervision of all contagious and infectious diseases among domestic animals in or being driven or transported through the state, and is empowered to establish quarantine against animals thus diseased, or have been exposed to others thus diseased, whether within or without the state, and, with the concurrence of the state board of health, may make such rules and regulations as he may regard necessary for the prevention and suppression, and against the spread of said disease or diseases, which rules and regulations the executive council concurring, shall be published and enforced, and in the performance of his duties he may call for the assistance of any peace officer."

Section 2531 of the code provides that:

> "Any person who wilfully hinders, obstructs or resists said veterinary surgeon, his assistants, or any peace officer acting under him or them, when engaged in the duties or exercising the powers herein conferred, or violates any quarantine established by him or them, shall be guilty of a misdemeanor."

Section 2533 of the supplement to the code provides, among other things, that:

> "It shall be the duty of all local boards of health in the state, upon the appearance of any contagious or infectious disease among domestic animals, to notify the state veterinary surgeon at once of the existence of such contagious or infectious disease; and it shall be his duty, whenever notified in writing by a majority of any board of supervisors, township trustees, or of any city or town council, whether in session or not, of the existence of, or probable danger from, any contagious or infectious disease among domestic animals, to repair at once to the place designated in such notice, and make an investigation, and take such action as the exigencies of the case may demand."

Rule 22, adopted under the provisions of section 2530 above quoted, provides:

> "Animals reacting to the tuberculin test shall be kept in strict quarantine at the expense of the owner; or destroyed on the premises; or slaughtered at a packing house where federal inspection is maintained, the owner to receive the price paid by the packing house, its actual value in its condition when destroyed."

Under the provisions of the above statutes and rule it is my opinion that the state veterinary surgeon has authority to place in quarantine animals which, upon investigation, he has reason to suspect are affected with contagious or infectious diseases, and to make such tests as are recognized as proper in the premises.

Yours very truly,

CHARLES W. LYON,
Assistant Attorney General.

MAYOR—MAY NOT HOLD OFFICE OF MAYOR AND BE MEMBER OF GENERAL ASSEMBLY.

Des Moines, Iowa, March 24, 1909.

HON. C. J. FULTON,
Member of 33d General Assembly,
Des Moines, Iowa.

DEAR SIR: I have your favor of the 19th instant, in which you state that you have been nominated as a candidate for the office of mayor of the city of Fairfield. You further state, "I am in some doubt if I can legally accept the position unless I should resign my present office. Will you kindly advise me in regard to this?"

In reply will say that section 22, article III, of the constitution of Iowa provides: "No person holding any lucrative office under the United States, or this state, or any other power, shall be eligible to hold a seat in the general assembly. But offices in the militia, to which there is attached no annual salary, or the office of justice of the peace, or postmaster, whose compensation does not exceed one hundred dollars per annum, or notary public, shall not be deemed lucrative."

The question whether a member of the general assembly may accept the office of mayor of a city and still retain his seat in the general assembly has never been passed upon by our supreme court, and is not entirely free from doubt, but my investigation leads me to the conclusion that under the provisions of the constitution above quoted you could not lawfully retain your seat as a member of the general assembly, and at the same time hold the office of mayor of the city of Fairfield.

Attorney General, ex rel. *Dewitt H. Moreland v. Common Council of Detroit*, 37 L. R. A., 211.

Yours very truly,

CHARLES W. LYON,
Assistant Attorney General.

DRAINAGE—CHANGE IN CONSTRUCTION OF DRAINS—AUTHORITY OF BOARD TO MAKE CHANGES.—Considerable latitude is given the board under the statute by way of making changes in ditches and drains.

Des Moines, Iowa, March 30, 1909.

PROF. A. V. STORM,

Department of Agricultural Extension,

Ames, Iowa.

DEAR SIR: I have your favor of the 18th instant, addressed to the attorney general, enclosing a letter addressed to you, dated December 29th, 1908, from F. A. Miller of Rockwell City, as follows:

> I wish you would get an opinion from a reliable source whether the board of supervisors of Calhoun county, Iowa, can legally change a part of drain No. 32 from an open ditch to a tile drain after it has been regularly established.
>
> This drain was established about two and one-half years ago with the upper mile to be constructed of tile, and the lower two and one-half miles to be open ditch. The party owning the land just below where the tile part stopped, did not ask to have the tile continued through his land before the ditch was established. He did ask for $7,000 damages. He was awarded $400. After two years time he now asks the board to change the form of the drain through his land (about 4,200 feet) from an open ditch to a tile drain. The board did so change the ditch by resolution about six weeks ago, and the hearing on the change is ordered for today. The only man who wants the change so far as I have learned is the party in whose land the tile extension is proposed to be laid. Many of us have remonstrated against the extra $5,500 expense which such change will entail.
>
> From my reading of Iowa's drainage laws, it seems evident that a board can make all kinds of changes and errors without rendering its actions illegal, if such changes are made *prior to the establishment of the drain.* Inasmuch as Iowa's drainage law does not give a board the right to review its actions which preceded the establishment of a drain, if such review is subsequent to the establishment, is it to be supposed that a court will validate such review and thus stretch the inter-

pretation of a law in derogation of common law? Is not the establishment a finality? Does it not make all previous actions rigid cast iron? Can the county increase our expense as set forth above and collect the assessments?

You request an opinion thereon. Section 1946 of the 1907 code supplement provides in part as follows:

"When any levee ditch, drain, or change of direction of any water course shall have been located and established, as provided in this chapter, or when it shall be necessary to cause the same to be repaired or reopened, the auditor shall * * * * *" (provisions for procedure).

Section 1946-c of the 1907 code supplement provides as follows:

"When any levee, ditch, drain, water course or change of water course shall have been heretofore established by any of the boards of supervisors of this state and contract or contracts let therefor, and the improvement wholly or partly constructed or drainage bonds issued on account thereof and the proceedings or tax therefor have been or shall be for any cause found invalid and the board of supervisors has found or shall find that such improvement will be conducive to the public health, convenience or welfare, such board is authorized to provide for the completion of the work and the payment therefor, and for the payment of the work already done and of the drainage bonds issued and to that end shall recall the tax theretofore levied and shall reascertain the cost and expense of such improvement, and after notice and hearing as provided in this act shall assess and levy the same upon the lands benefited thereby, and the said board and the other county officers shall proceed as provided by section three (3) and the other provisions of this act. Such re-assessment and re-levy of taxes shall be in proportion to and not in excess of benefits, and all taxes theretofore paid upon such improvement shall be credited as provided in section three (3) of this act."

Section 1989-a11 of the 1907 code supplement is as follows:

"If after said contract shall have been let and the work begun it shall become apparent to the engineer in charge that the dimensions of the levee, ditch or drain should be enlarged, deepened or otherwise changed for the better service thereof of the lands benefited, then the engineer shall report such fact to the supervisors, explaining to them the necessity for such change, and the board may by resolution authorize such change

in the dimensions of said improvement as the engineer shall recommend, provided that all persons whose lands shall be taken or who may be damaged by the said change, shall first have been given like notices and like proceedings had as hereinbefore provided for the establishment of the levee or drainage district."

Section 1989-a12 of the 1907 code supplement provides for assessment of costs and damages when a levee or drainage district shall have been located and established, or when it shall be necessary to cause the same to be repaired, enlarged, reopened or cleared from any obstruction as provided for in the preceding section.

The sections above quoted, together with other sections in the same chapter as to procedure, seem to contain the law applicable to the proposition at hand if the change from open ditch to tile was or is to be made before the drainage system as originally contemplated was finished.

Section 1989-a21 of the supplement to the code provides as follows:

"Whenever any levee or drainage district shall have been established and the improvement constructed as in this act provided, the same shall at all times be under the control and supervision of the board of supervisors and it shall be the duty of the board to keep the same in repair and for that purpose they may cause the same to be enlarged, reopened, deepened, widened, straightened or lengthened for a better outlet, and they may change or enlarge the same or cause all or any part thereof to be converted into a closed drain when considered for the best interests of the public rights affected thereby. The cost of such repairs or change shall be paid by the board from the drainage fund of said levee or drainage district, or by assessing and levying the cost of such change or repair upon the lands in the same proportion that the original expenses and cost of construction were levied and assessed, except where additional right of way is required or additional lands affected thereby, in either of which cases the board shall proceed as hereinbefore provided; provided, however, that 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 employee, or if the same is filled and obstructed by the cattle, hogs or other stock of such owner, employe or agent, then the cost thereof shall be

assessed and levied against the lands of such owner alone."

Section 1989-a46 of the 1907 code supplement provides as follows:

> "The provisions of this act shall be liberally construed to promote the leveeing, ditching, draining and reclamation of wet, overflow or agricultural lands; the collection of the assessments shall not be defeated, where the proper notices have been given by reason of any defect in the proceedings occurring prior to the order of the board of supervisors locating and establishing the levee, ditch, drain or change of natural water course provided for in this act, but such order or orders shall be conclusive and final and that all prior proceedings were regular and according to law unless they were appealed from. But if upon appeal the court shall deem it just and proper to release any person or modify his assessment or liability, it shall in no manner affect the rights or liability of any person other than the appellant; and the failure to appeal from the order of the board of supervisors of which complaint is made shall be a waiver of any illegality in the proceedings and the remedies provided for in this act shall exclude all other remedies."

Section 1989-a47 of the 1907 code supplement provides as follows:

> "The provisions of this act shall be construed as an independent procedure additional to chapter two (2), title ten (X) of the code and supplement, relating to the location, establishment and construction of levees, drains, ditches and water courses and shall not be held to repeal any of such provisions."

Chapter 2, title X of the code and supplement as mentioned above contains the old law which is still in force.

The above sections give the board so much authority and power that I very much doubt whether the contemplated action by them could be prevented.

Very truly,

CHARLES S. WILCOX,
Special Counsel.

ELECTIONS—SCHOOL BOARD—PUBLICATION OF NOTICE OF SCHOOL ELECTIONS.—Notice of election upon question of incurring indebtedness in a school district must be published four consecutive weeks.

Des Moines, Iowa, March 30, 1909.

MR. JASPER C. BENNETT,

Deputy Supt. of Public Instruction,

Des Moines, Iowa.

DEAR SIR: Upon your suggestion I recently gave to J. L. Wylie, member of the school board of Gilman, Iowa, my personal opinion upon the construction which should be placed on section 2820-c of the 1907 code supplement, or so much thereof as refers to notice. As you say you would like to have the same in writing I submit the following:

The section under consideration reads in part as follows:

> "The president of the board of directors on the receipt of such petition shall within ten (10) days call a meeting of the board who shall call such election fixing the time and place thereof, *and give four weeks' notice thereof,* by publication once each week, in some newspaper published in the said town or city, * * * * *"

I believe that the clause, "and give four weeks' notice thereof," contained in the section above quoted, must be construed to mean twenty-eight days.

The case of state of Missouri ex rel. Weber v. Tucker, 32 Mo., 620, seems to be in point. It involves the construction of a Missouri statute, reading in part as follows:

> "That notice of such election shall be given by publication in some newspaper published in the county, and such notice shall be published in such newspaper for four consecutive weeks, and the last insertion shall be within ten days before such election."

I quote from the opinion on page 628 as follows:

> "Does the law require a notice of four weeks, of seven days each, or does it only require a sufficient period of time to cover four consecutive weekly insertions, though such time be less than twenty-eight days? In other words must there be four weeks' notice of the election or a less time? Our answer is that there must be four weeks' notice,—28 days' notice,—of the election, the computation to be made by excluding the first

day of the notice and including the day of the election. In this conclusion we are sustained by the authority of adjudicated cases by the reading of the statute and by the object intended by the law makers."

The opinion cites several cases and discusses the proposition quite thoroughly.

Mr. Wylie states that an election in Gilman, as contemplated in the section above quoted, was held on the 18th day of January, and that prior to that time four publications of the notice of election were made, one of which was on December 24th, one on December 31st, one on January 7th and the last on January 14th. No two publications were made in any one week, but less than 28 days elapsed between the first publication and the day of election. I do not believe the notice of publication complied fully with the law.

Very truly,

CHARLES S. WILCOX,

Special Counsel.

BOARD OF HEALTH—EXPENSES OF MEMBERS.—Where a member of the state board of health makes investigation of conditions upon request of local board, the county in which investigation is made is liable for his expenses.

Des Moines, Iowa, March 31, 1909.

HON. P. M. JEWELL,

House of Representatives,

Des Moines, Iowa.

DEAR SIR: Several days ago you referred to this department a letter which you had received from Mr. C. N. Houck of Decorah, Iowa, in which Mr. Houck asked to be advised as to whether a member of the state board of health is entitled to receive pay from the county for services rendered the local board of health in investigating cases of an eruptive disease prevalent in the town of Calmar, Winneshiek county, Iowa.

It appears from the claim filed with the county auditor that the services rendered by Dr. Sams, a member of the state board of health, was at the request of the local board of health of the town of Calmar.

The certificate of the local board of health further recites that:

> "We have examined the foregoing bill of Dr. J. H. Sams, and that the services therein set forth were rendered by Dr. J. H. Sams, and at our request and were necessary and proper. That the charges therein set out are correct, and the same is allowed by us in the sum of $50, and we hereby certify the same to the county auditor and board of supervisors of Winneshiek county, and recommend payment of the same."

In reply will say that the local board of health has authority under section 2568 of the code, to proclaim and establish quarantine against all infectious and contagious diseases, dangerous to the public and to maintain and remove the same as may be required by the regulations of the state board of health. The power thus conferred upon the local board of health is extensive and can be exercised in any reasonable manner to prevent the spread of contagious diseases.

Quarantine is for the benefit of the public, and the legislature has provided, (section 2570-a, supplement to the code) that the expenses incurred in establishing, maintaining or raising quarantine shall be paid by the county. It appears in the case under consideration that the services were rendered for the purpose of ascertaining the nature of character of a certain eruptive disease, with a view of determining whether or not quarantine should be established, hence was not for the benefit of any particular individual, but for the benefit of the public.

It is my opinion, therefore, that the county is liable for the services rendered by Dr. Sams. The board of supervisors has authority, however, to revise the amount allowed by the local board of health and fix the same.

Yours very truly,

CHARLES W. LYON.
Assistant Attorney General.

BOATS—LICENSE OF ENGINEER—INSPECTION.—A certificate of inspection issued for 1908 is not good for any part of 1909. A license issued to an engineer is not transferable.

Des Moines, Iowa, April 8, 1909.

MR. J. T. PAINTIN,
Boat Inspector,
Iowa City, Iowa.

DEAR SIR: I have your favor of the 6th instant, in which you set forth the following proposition:

> Can any boat inspector in Iowa give a launch owner a license to run a passenger boat for the season of 1908, and tell the owner that he can run that same boat on the same license (season of 1908) part of the season of 1909, or to any time in the season of 1909 until said inspector can get around again?
>
> Again, if Mr. Jones owns several licensed launches and pays for two engineers' licenses, who are then working for him, say their names are Brown and Smith, now Mr. Brown quits Mr. Jones in the midst of his busy season, can Mr. Jones take the license that was given to Mr. Brown and give it to any fellow that will run his boat?
>
> The reason I am asking for this information is as follows: A boat owner of Cedar Rapids, Iowa, was down in our town yesterday and I found out through him that the conditions as stated were practiced there. It led to quite an argument as I claimed that neither could be done under the law, as the law states that boat license shall run *for the season following the date thereon.* And the law says that an engineer's license shall run for five years, but does not state that is transferable.

The law does not contemplate that this department shall give official opinions to others than the two houses of the legislature and certain state officers mentioned in section 209 of the code, and the official business of the office demands so much of our time that it is impossible to give your proposition very careful consideration. I have examined to some extent the law in reference to the inspection of boats as contained in code section 2511, and sections 2512, 2513 and 2514 of the 1907 code supplement and I am pleased to give you my personal views in reference thereto.

I hardly think a certificate issued for the season of 1908 would be in force during any part of the season 1909, and I am quite sure that a certificate issued to a boat engineer is not transferable.

Very truly,
CHARLES S. WILCOX.
Special Counsel.

BANKS—SALE OF SHARES OF STOCK.—A by-law which provides that no stockholder in a bank may sell his shares without approval of board of directors is bad and its provisions cannot be enforced.

Des Moines, April 16, 1909.

MR. FRANK WELLS,

Cashier Preston Savings Bank,

Preston, Iowa.

DEAR SIR: I have your letter addressed to the attorney general enclosing a copy of a proposed amendment to the by-laws of the articles of incorporation of your bank. The same has not received earlier attention for the reason that the official business of the office has prevented consideration thereof.

You propose to make the following amendment to your articles:

"Section 17. Any stockholder of this bank desiring to sell any portion or all of his stock shall notify the board of directors, by written, verified notice, of his intention to sell, of the name of the party to whom he intends to sell said stock and the selling price thereof, whereupon, within five days from the serving of said notice, the board of directors shall either authorize the said transfer of stock or shall themselves sell and place the stock at a price not less than that offered the said stockholder as shown by his sworn statement and notice of his intention to sell as hereinbefore provided.

"No sale of stock except it be sold in the manner hereinbefore provided shall be valid. Said notice shall be served by leaving a copy of the same duly verified at the said bank with an officer of the same and said officer shall forthwith notify the board of directors of the same.

"In case no action is taken by the said board within the time herein prescribed the provisions of this section shall be deemed to be waived in said particular case."

In the case of *Bloede Company of Baltimore v. Bloede*, a Maryland case found in the 33d L. R. A., page 107, a by-law of the plaintiff company was as follows:

"If any stockholder shall desire to dispose of his stock, he shall, at least thirty days before a transfer shall be made, notify the president in writing, of his intention to sell and of the price he can obtain, which notice the president

shall communicate to the other stockholders, who thereupon shall have the option to purchase the stock at the price named, in amounts *pro rata* to the stock held by them, respectively, and the corporation shall have the option to take any such stock as may not be taken by any stockholder individually."

In its opinion the court said:

"But the by-law itself can, when invoked by the company, interpose no obstacle to the transfer of these shares, for the reason that it is invalid. It is an unreasonable and a palpable restraint upon the alienation of property. As a general rule, stockholders indisputably have the right to sell their shares at pleasure. That the power to regulate transfers of stock does not include authority to control its transferability by prescribing to whom the owner may sell, and to whom not, or upon what terms, and that the mere power to regulate transfers does not authorize a refusal to allow a transfer of shares to even an insolvent, is decided in *Chouteau Spring Co. v. Harris,* 20 Mo. 383. And so a by-law prohibiting the alienation of shares of stock or imposing any restrictions on its exercise is declared to be in restraint of trade, and against public policy, and void, in *Moore v. Bank of Commerce,* 52 Mo. 377; *Re Klaus,* 67 Wis. 401, and other cases."

In the Wisconsin case above cited, the court said:

"Enough, and perhaps too much, has been said on general principles, and once for all we hold that a by-law of a corporation which prohibits the transfer of stock by a stockholder without the consent of all the stockholders is void as against public policy. It is an unwarrantable and unlawful restriction upon the sale of personal property, the sale and exchange of which the law favors, and in restraint of trade. * * * * When the law makes stock personal property, it clothes it with all the incidents of personal property, and the owner has full dominion over it and may dispose of it at will. That such a by-law as that under consideration is void as against public policy nearly all the authorities seem to hold."

The editor's notes in connection with the case of *New England Trust Company v. Abbott* (Mass.), on page 271 of Vol. 27 L. R. A. cite several cases similar to the ones above mentioned.

The case of *Farmers and Merchants Bank of Linnville v. Wasson,* 48 Iowa, 336, is doubtless the one referred to in your letter. It is

there held that a by-law of a corporation which provides that transfers of stock shall not be valid unless approved by the board of directors, while it may be enforced as a reasonable regulation for the protection of the corporation against worthless stockholders, cannot be made available to defeat the rights of third persons, and the opinion strongly intimates that a by-law somewhat similar to the amendment which you propose to make to your articles, would operate as an infringement against the property rights of others, which the law will not permit. I take it for granted you have read the opinion.

The law does not contemplate that this department shall give official opinions to others than state officers and the two houses of the legislature, and your proposition is one upon which an opinion may be desired by one of our state officers, hence I doubt the propriety of venturing a personal opinion thereon at this time. I think, however, my reference to the case above cited will indicate what such a personal opinion would be.

Yours very truly,

CHARLES S. WILCOX.

Special Counsel.

PUBLIC LIBRARY—APPOINTMENT OF TRUSTEES.—Library trustees are appointed by the mayor with approval of council.

Des Moines, April 19, 1909.

C. J. CASH, ESQ.,

Anamosa, Iowa.

MY DEAR SIR: I beg to acknowledge receipt of your recent favor referring to the appointment of a library board under section 728 of the supplement to the code 1907.

Replying I have to say, that I agree fully with you in the opinion you gave to the mayor. The section referred to vests the power of appointment of library trustees in the mayor by and with the approval of the council. Any ordinance of the city out of harmony with this provision or which in any manner attempted to limit the power of the mayor to appoint would be non-effective.

Yours very truly,

H. W. BYERS.

ACKNOWLEDGMENTS OF INSTRUMENTS BY INTERESTED PARTIES—COUNTY AUDITOR—SCHOOL FUND LOAN.—A county auditor does not have such interest in a school fund loan as to disqualify him to take acknowledgment of mortgage securing such loan.

Des Moines, April 20, 1909.

MR. GEORGE M. SMITH,

County Auditor,

Le Mars, Iowa.

DEAR SIR: I have your favor of the 8th instant addressed to the attorney general which is in part as follows:

> "I desire to ask your opinion (being newly elected to the auditor's office), I recently made a school fund loan here, and took the acknowledgment as a notary. My commission expires July 4, 1909. The attorney here insists that no employee of the county,—auditor or clerk of courts—can legally acknowledge a school fund mortgage. Could I either as auditor or a notary public make such an acknowledgment? How do I understand code of 1907, page 707, section 2942? Would you object to giving me your ideas on this matter?"

The law does not contemplate that this department shall give opinions or advice to others than state officers and the two houses of the legislature, and it is the duty of your county attorney, under section 302 of the code, to give you advice on such matters as the above. Nevertheless, as a personal courtesy to you I submit the following suggestions:

Section 2942 of the 1907 code supplement provides for the acknowledgment of conveyances by the county auditor or his deputy. The general rule relating to acknowledgments of instruments by parties interested in the subject of transfer is set forth in the case of *Beardsley v. German American Bank,* 113 Iowa, 216, and I quote from the opinion on page 217 as follows:

> "The law relating to the subject is well settled and generally understood. One having an interest, direct or contingent, in a conveyance or its subject matter cannot take and certify an acknowledgment thereof, and the record of an instrument so acknowledged does not impart notice to third persons of the mortgagee's interest thereunder."

The school fund is the property of the state of Iowa and the auditor has no interest therein.

I quote from the opinion in the case of *County of Des Moines v. Harker*, 34 Iowa, 84, on page 85 as follows:

"The fact that the state has constituted certain of its officers, as its agents for the management of the school fund, does not, by any means, tend to negative the ownership of the state, but rather to establish it. Nor does the fact that by legislative enactment such agents or the counties of which they are officers, are made liable for losses of the fund, in any way militate against the ownership of the state, but it rather shows a purpose to protect itself from damage by losses to the fund which the state has pledged itself to make good.

"In other words, it seems to us that the state has the legal title and right to the school fund, that the agents it has, by law, constituted with a view to the sucessful management of the money and the accommodation of the people of the whole state therewith and thereby, are, in no proper sense, the owners of the money or parties in interest in the actions, although, by statute, the actions may be brought in the names of such agents. The term 'school fund' is but a name whereby to designate certain moneys; it has no existence as a corporation or individuality. The state being the legal owner of the school fund, and by the constitution pledged to keep it good against all losses, it is but just, that in controversies concerning it the state should have the benefit of the rules of law attaching to its sovereignty."

I think the county auditor may properly acknowledge such an instrument.

Very truly,

CHARLES S. WILCOX.
Special Counsel.

MULCT SALOON—LEGAL HOLIDAY—WHERE MEMORIAL DAY FALLS ON SUNDAY OBSERVANCE OF OTHER DAY.

Des Moines, May 7, 1909.

JOSEPH R. FRAILEY, ESQ.,
City Solicitor,
Fort Madison, Iowa.

MY DEAR SIR: I am in receipt of your letter of some days ago with clipping indicating that some opinion or decision had been given by this department in which it was held that when Memorial

day falls on Sunday the following Monday is a holiday, and the saloons of the state must remain closed throughout that day.

Replying I have to say, that up to the time of receiving your letter this question had been given no attention whatever by this department, and no opinion had been given on the subject.

The suggestion was made in response to an inquiry from a newspaper man some weeks ago that in cities where Memorial ceremonies are held on Monday or Saturday, as the case might be, the owners of saloons in such cities, if they consulted their own interest, would keep their saloons closed during the day, but in making that suggestion it was not intended that it should be quoted as an opinion from this office as no question was pending before the department upon which we had any authority to give an opinion.

Since receiving your letter we have given the subject some thought, and have examined the law and authorities to some extent, and, without attempting to decide the question or to say what our supreme court would be likely to hold if the question ever came before it, we give you the result of our investigation.

Section 2448, supplement to the code 1907, paragraph 9, provides:

> "The place shall not be open nor any sales be made earlier than five A. M. nor later than 10 P. M. on any day. It shall not be open at all, nor shall any sales be made on the first day of the week, commonly called Sunday, nor on any election day or legal holiday, nor on the evening of such days."

Section 3053 of the code is as follows:

> "The first day of the week, called Sunday, the first day of January, the twenty-second day of February, the thirtieth day of May, the fourth day of July, the first Monday in September, the twenty-fifth day of December, the day of the general election, and any day appointed or recommended by the governor of this state or the president of the United States as a day of fasting or of thanksgiving, shall be regarded as holidays for all purposes relating to the presentation for payment or acceptance, and the protesting or giving notice of the dishonor of bills of exchange, drafts, bank checks, orders and promissory notes, and any blank or mercantile paper falling due on any of the days above named shall be considered as falling due on the succeeding business day."

In interpretating these two sections our supreme court holds

that saloons must be closed on the days mentioned in section 3053, thus determining that such days come within the term "legal holiday" as that term is used in the supplement, section 2448.

Brennan v. Roberts, 125 Iowa 615.

In Nebraska the supreme court holds that where the statutes designated certain days as legal holidays and prohibited courts from transacting business on such days the restriction is confined to the days named in the statutes, and where any of such days fall on Sunday, the succeeding Monday is not to be observed as such holidays so far as it may affect the presentment and demand of commercial paper.

State v. King, 37 N. W. R. 310.

If our supreme court follows the doctrine of this Nebraska case, then the saloons of the state would only have to be closed on the days designated in code section 3053 above quoted, and on such other days as may be appointed or recommended by the governor of this state or the president of the United States as a day of fasting or thanksgiving.

Yours very truly,

H. W. BYERS.

CITIES AND TOWNS—GRADING OF STREETS—LAYING OF PERMANENT WALKS. — It is the duty of a city to bring the street to grade before requiring property owners to lay permanent walks where any considerable filling or excavating is necessary.

Des Moines, Iowa, May 25, 1909.

MR. THEO. JOHNSON,

Marathon, Iowa.

DEAR SIR: I have your favor of the 15th inst. requesting certain information concerning side walks and the grading therefor in towns.

Section 779 of the 1907 supplement to the code is, in part, as follows:

> "They (cities and towns) shall have power to provide for the construction, reconstruction and repair of permanent sidewalks upon any street, highway, avenue, public ground, wharf, landing or market place within the limits of such city or town; but the construction of permanent sidewalks shall not be made until the bed of the same shall have been graded so that, when completed, such sidewalks will be at the established grade;

and to assess the cost thereof on the lots or parcels of land in front of which the same shall be constructed."

Whenever it is necessary to either excavate or fill a street or highway for the laying of a permanent side-walk the city or town is chargeable for the expense of bringing the surface of the ground to grade. The property owner is chargeable only for such grading or filling as is incident to the laying of the permanent walk, that is to say, if the surface of the ground, prior to the laying of permanent walk, conformed exactly with the established grade and it was necessary to excavate to such an extent that the walk, after completion, would be at grade, and the cost of grading in that case, being incident to the walk, is properly chargeable to the abutting property owner, but if any substantial grade or fill is to be made, the city is liable therefor. See

Bancroft vs. City of Council Bluffs, 63 Iowa, 646;
Schofield & Gavin vs. City of Council Bluffs, 68 Iowa 695;
Burgett vs. Town of Greenfield, 120 Iowa 432,438.

The law does not contemplate that this department shall give opinions or advice to other than state officers and the two houses of the legislature, but as a courtesy to you I have submitted my personal views.

Very truly,
CHARLES S. WILCOX.
Special Counsel.

BOARD OF HEALTH—LIABILITY OF BOARD OR MEMBERS FOR DAMAGES.

The board of health or individual members are not liable for damages for acts done in performing their duties where acts are done in good faith.

Des Moines, Iowa, May 27, 1909.

DR. T. U. MCMANUS,
Member State Board of Health,
Waterloo, Iowa.

DEAR SIR: I have your favor of the 10th inst. addressed to the attorney general in which you submit the following proposition:

"In a city of 7,000 in my district a case of scarlet fever was found in a hotel and lodging house. The city does not support a detention hospital for contagious diseases and the board of health after more or less earnest attempt to find a vacant

house for isolation abandoned the search and quarantined the case of scarlet fever in a room of the hotel, which room has an outside entrance.

"The proprietor of the rooming house believes that an earnest effort was not made to secure further quarters for the case and he believes also that his business has been greatly lessened on account of this quarantine.

"The question of interest to me is whether or not the board of health or a health officer is in any way responsible under any circumstance for any loss which may be incurred by the establishment of quarantine and also whether or not any public or quasi public institution enjoys any immunity or protection against quarantine which is not equally shared by any private individual?"

Replying thereto I have to say that in my opinion neither the interested city, its board of health or the individual officers thereof are liable for damages under the circumstances set forth, provided, of course, that the action taken by the board or its officers was in good faith and without malice. I do not know of any immunity or protection from quarantine enjoyed by any public or quasi-public institution against quarantine which is not equally shared by private individuals. However, should a board of health quarantine a public or quasi-public institution, unless the same was reasonably necessary, its action would be improper.

The new act passed by the 33d general assembly repealing section 2570-a and other sections of the 1907 supplement to the code, and substituting other provisions therefor, provides, in section one thereof, that the local board of health *may* remove a person infected with any contagious disease to a separate house, house of detention or hospital. It is therefore discretionary with the board as to whether or not such person shall be removed.

The local board of health acts as the agent of the city or town, and also for the state. (Sec. 2568 of the code.)

In the case of *Ogg vs. City of Lansing,* 35 Iowa, 495, it is held that:

"A city is not liable for the negligence of its officers or agents in executing sanitary regulations, adopted for the purpose of preventing the spread of contagious disease, or in taking the care and custody of persons afflicted with such disease or the houses in which such persons are kept. In ex-

ecuting these legislative functions the city acts as a quasi sovereignty, and is not responsible to individuals for the negligence or non-feasance of its officers or agents."

Other similar cases are as follows:

Where the powers conferred are governmental in nature, the city cannot be made liable for the execution thereof.

Saunders vs. City of Ft. Madison, 111 Iowa, 102.

"No action can be maintained against a city or town for the unlawful acts of its health committee or other officers in taking possession of a hotel and using it for a small pox hospital without the consent of the owner and without legal authority."

Lynde vs. City of Rockland, 66 Maine, 309.

"Where a hotel domestic, who dies with small pox, was buried from the hotel, the court held that in the absence of any contract the owner could not recover of the city for the damages on account of the necessary disuse of a part of the premises during the illness, or for the destruction of goods supposed to be disinfected which were burned under direction of an officer at the instance or assent of the owner."

Kollock v. Stevens Point, 37 Wisconsin, 348;

Cited in notes to 26 L. R. A., 490.

Further cases bearing on the proposition are found in the notes to the case of *Evans v. City of Kankakee,* 13 L. R. A. (N. S.) 1190.

The liability of health officers in the enforcement of quarantine is discussed in the case of *Beeks v. Dickinson County,* 131 Iowa, 244, as follows:

"The statute makes it the duty of health officers to quarantine against all infectious or contagious diseases dangerous to the public and it cannot well be questioned that the defendants were acting within the scope of their duty as such officers, and that in establishing the quarantine they were acting in a quasi judicial character. They were vested with the power to determine whether an infectious or contagious disease existed in the appellant's family, and if found to exist their duty under the statute required them to take the proper steps to prevent its spread, and had they neglected to do so they would have been culpable in a high degree. They were therefore acting judicially, and it is the general rule that officers so acting are not liable for injuries which may result from such acts performed in the honest exercise of their judgment, however erroneous or mistaken the action may be, provided

there be no malice or wrong motive present. * * * It is the modern tendency of judicial opinion to hold that the public health is the highest law of the land and whenever a police regulation is reasonably demonstrated to be a promoter of public health all constitutionally guaranteed rights must give way to be sacrificed without compensation to the owner."

The following quotation from the opinion in the case of *Village of Verdon v. Bowman*, 97 N. W. R. 229 (Neb.), may also be of interest to you:

"We do not intend to be understood to hold that the plaintiff has no remedy whatever. If for any reason the ordinance under which the officers of the village of Verdon acted is void, it affords them no protection whatever, and an action would lie against them for the damages caused by their unlawful act."

Trusting that the above is a reasonably satisfactory reply to your communication, I am,

Very truly,

CHARLES S. WILCOX.

Special Counsel.

PERMIT HOLDERS—REQUEST BLANKS—NUMBERING BLANKS.—It is the duty of the county auditor to number request blanks consecutively.

Des Moines, June 14, 1909.

MR. GEOBGE T. MASON,

County Auditor,

Mt. Pleasant, Iowa.

DEAR SIR: I am in receipt of your communication of the 10th instant requesting to be advised as to whether the act passed by the thirty-third general assembly amending section 2394 of the code, requires county auditors to have consecutively numbered the blank form of requests, or whether the blank requests may be numbered by the permit holder.

You suggest that the cost of numbering each of these blanks consecutively will be excessive and that if the county auditor numbered the first and last blank furnished to each permit holder, that this would be a substantial compliance with the law.

It is my opinion that it was the legislative intent to have the county auditor cause each of the blanks to be consecutively numbered. I also suggest that you keep some form of a permanent record showing the blanks furnished to each permit holder and the numbers of same.

Yours very truly,

GEORGE COSSON.

Special Counsel.

GIFT ENTERPRISE—WHAT CONSTITUTES A GIFT ENTERPRISE.

Des Moines, June 15, 1909.

WOOLSON SPICE COMPANY,

Toledo, Ohio.

GENTLEMEN: I am in receipt of your communication of the 11th instant requesting an interpretation of the bill passed by the thirty-third general assembly known as "an act to define gift enterprises and to provide a penalty for carrying on the same."

In order for the enterprise to be known as a "gift enterprise" and prohibited by said act, the following conditions must obtain:

At least two or more persons, which may include a firm or corporation, must co-operate together for the purpose of inducing the public to purchase merchandise or other property, one of the parties to such scheme for a valuable consideration advertising, causing or attempting to induce the public to believe that he will give premiums, gifts or prizes to such persons purchasing merchandise or other property, by the giving of stamps or tickets with each sale which will entitle the purchaser of such property to receive a prize or gift from another party to such scheme. All such transactions or enterprises are unlawful, unless at the time the sale is made the person connected with the scheme who gives the ticket or stamp shall have definitely described on such stamp or ticket the character and value of the prize or gift promised to the person purchasing an article of merchandise, and the right of the person receiving such stamp or ticket to the gift, prize or premium promised becomes absolute and fixed upon the delivery thereof without the holder of such stamp or ticket being required to collect a specific number of other stamps or tickets and present the same for redemption, and the further condition that there is no chance, un-

certainty or contingency whatsoever connected with said enterprise.

It will be observed that if two or more persons are co-operating together in any trading stamp or gift or premium enterprise that each stamp given by one of such persons must show the character and value of the gift. Its value must be definite and certain at the time the transaction is made, and a single stamp or ticket thus given must be redeemable itself without the necessity of securing other tickets of like character.

It will also be observed that the act in question does not prohibit a person, firm or corporation operating by himself or itself from giving coupons to its own customers to be redeemed by the person, firm or corporation giving the same.

Nothing herein stated, however, is to be construed as authorizing any form of sales of chance or any lottery enterprises which are otherwise prohibited by law.

Yours very truly,

GEORGE COSSON.
Special Counsel.

ROADS—DUTIES OF TRUSTEES—DRAGGING.—It is mandatory upon township trustees to have roads dragged.

Des Moines, June 16, 1909.

COUNTY ATTORNEY C. B. HUGHES,

Guthrie Center, Iowa.

DEAR SIR: I am in receipt of your communication of the 9th instant requesting an opinion as to whether township trustees are subject to the penalty provided in section 6 of the act making it mandatory upon township trustees and city councils to have the roads dragged.

The very basis of the act itself was to make it mandatory upon the trustees to cause the main traveled roads to be dragged in their township, and also to cause the city council of cities and incorporated towns to have the main traveled roads within the corporate limits leading into the city or town, dragged.

The language used in section 6 is general and comprehensive in its nature and if the language is to receive its usual meaning and construction, it is certainly broad enough to include township trustees and councils of cities and incorporated towns.

In the act in question there is lodged in the township trustees and city and town councils a certain amount of discretion. In all such acts of discretion, which are necessarily judicial in their nature, no criminal liability would attach.

It is my opinion that the trustees or city or town councils would not be criminally liable for an error of judgment, but if it can be shown that there are funds on hand to pay for the work and trustees neglect or refuse to take any action whatsoever with reference to the matter, it is my opinion that an action of mandamus will lie or they may be prosecuted under the provisions of section 6 of said act.

The question is of such public importance that I believe you can well afford to test the matter in court.

Yours very truly,

GEORGE COSSON,
Special Counsel.

INTOXICATING LIQUORS—COLD STORAGE—BUILDING SEPARATE FROM SALOON.—A person cannot keep intoxicating liquors in a cold storage building separate from saloon.

Des Moines, June 17, 1909.

SHECKEL & SHECKEL,

Alton, Iowa.

DEAR SIRS: I am in receipt of your communication of the 15th instant advising that you are engaged in the sale of intoxicating liquors at wholesale and retail. You ask for an opinion as to whether you may legally maintain a cold storage building on the same lot where the saloon building is located without paying the mulct tax upon each building separately; also whether beer may be transferred from the cold storage room to the saloon to be disposed of at wholesale and at retail.

The law upon this question is well settled. Our supreme court in *Cameron v. Fellows,* 109 Iowa, 534-538, held that there was no distinction made in the statute between the selling of liquor at wholesale and at retail; "that the accused might lawfully sell beer at the cold storage plant but not elsewhere."

In the case of *Bell v. Hamm,* 127 Iowa, 343, the exact question was before the court for consideration. The court said:

"We have the question whether one who is engaged in operating a mulct saloon may lawfully use a storage warehouse situated a part from and wholly unconnected with his saloon proper for the sole purpose of storing liquors until such time as they may be needed to supply the demands of his saloon trade."

"We think there can be but one answer to this question. Put in plain language, the legislature has said to all who may propose to engage in the traffic that the right to do so shall be subject to the imperative condition that the business of keeping liquors intended to be sold, as well as the business of selling, on the part of any particular dealer, shall be confined to one room. It is immaterial, therefore, that in this particular case it does not appear that any sales had been made or are intended to be made from the warehouse. The business—and this includes keeping for the purpose of sale as well as the selling—must be carried on within the four walls of a single room.

To the same effect, see

Bell v. Thompson, and

Brown v. Wieland, 106 N. W. 949.

It was held in *In re Taxation Des Moines Railway Company,* 137 Iowa, 730, that a cold storage warehouse used for the storage of beer was subject to the mulct tax.

It was held in *Thomas v. Arie,* 122 Iowa, 538, that a liquor dealer having paid but one tax under the mulct law had no right to keep for sale and sell intoxicating liquors from two wholly separate and independent rooms in the same building.

It was also held in *Cameron v. Fellows,* 109 Iowa, 534, that the keeping of a place under the mulct law does not authorize the peddling of beer in various parts of the city. That this could not be done either at wholesale or at retail.

It was held in *Carter v. Miller Brewing Company,* 111 Iowa, 457, that it was illegal to maintain a cold storage warehouse and solicit orders for beer in different parts of the city and fill such orders from its stock in the warehouse, delivering the liquors to various customers at their respective business houses.

Yours very truly,

GEORGE COSSON,
Special Counsel.

ITINERANT VENDOR OF DRUGS—LICENSE—REGISTERED PHARMACIST. —Where a firm sells drugs to a druggist and then employs canvassers to sell and deliver the goods from house to house such canvassers should have vendor's license. A registered pharmacist traveling over country selling drugs must have a vendor's license.

Des Moines, Iowa, June 23, 1909.

MR. I. W. CLEMENTS,

Board Pharmacy Commission,

Marengo, Iowa.

DEAR SIR: Sometime ago Attorney General Byers requested me to make reply to your favor of the 4th instant. Delay in reply has not been due to the reason suggested in your letter of the 19th addressed to me. The fact is that the great amount of official business going through the office has made it impossible to give earlier attention to your inquiries.

You desire an opinion on several propositions. Your first one is as follows:

> "It seems that the A. H. Lewis Med. Co. of St. Louis, run a proposition as follows: They sell their goods to the druggist, then engage women to make a house to house canvas to sell and deliver the goods. Do such peddlers require an itinerant vendor's license?"

I am not prepared to say that the particular firm or the particular persons employed by it are itinerant vendors. The term "itinerant vendor" doubtless includes any person, either principal or agent, who engages in a temporary or transient business within the state, either in one locality or in traveling from place to place selling goods, wares and merchandise.

Section 2594 of the code provides that "any itinerant vendor of any drug, nostrum, ointment or appliance of any kind for the treatment of any disease or injury shall pay to the treasurer of the commission of pharmacy an annual fee of $100, upon the receipt of which the secretary of the commission shall issue a license for one year from its date * * * * *."

It occurs to me that it would not be difficult to show that such practice as suggested in your inquiry constitutes itinerant vending, and that such vendors should be required to have itinerant vendors' licenses. The case of *State of Iowa v. Mrs. C. F. Steward,*

138 Iowa 536, may be of interest to you in connection with the above.

Your second inquiry is as follows:

> "Does the fact that one is a registered pharmacist, permit him to vend his remedies itinerantly thru the country without a vendor's license."

Section 2591 of the code provides that the certificate of the pharmacist shall be displayed in his place of business, and it doubtless contemplates that the business of a registered pharmacist shall be conducted at said place rather than on the streets or roads or in the homes of his customers.

Section 2594, in reference to itinerant vendors of drugs, makes no exceptions in favor of registered pharmacists. I am of the opinion, therefore, that a registered pharmacist who vends his remedies itinerantly through the county should be required to have an itinerant vendor's license.

Your third inquiry is as follows:

> "Does not section 2588 mean that an itinerant vendor of proprietary or patent medicines and domestic remedies, *cannot* sell such remedies provided they contain any *alcohol or poisons, except as* specifically mentioned in said section."

Section 2588 provides, among other things, as follows:

> "But no one shall be prohibited by anything contained in this chapter from keeping and selling proprietary medicines and such other domestic remedies as do not contain intoxicating liquors or poisons, nor from selling denatured alcohol and poisoned fly paper, concentrated lye or potash, having written or printed on the package or parcel its true name, and the word 'poison,' sales of which need not be registered."

While I do not base my opinion exclusively on the clause above quoted, I am of the opinion that the said clause, together with other provisions in the pharmacy law, warrants the conclusion reached by you.

Your fourth proposition is as follows:

> "In the event of an application from a graduate in pharmacy for registration under the provisions of section 2589-b, upon whom does the responsibility of furnishing proofs that the school from which such applicant is a graduate, fulfills the requirements of the American Conference of Pharmaceutical Faculties for the year 1905?"

I call your attention to the fact that the 33d general assembly has amended section 2589-b by striking out the words "for the year 1905" after the words, "American Conference of Pharmaceutical Faculties."

I am of the opinion that the pharmacy commission is charged with the responsibility of ascertaining the entrance and graduation requirements of pharmaceutical schools, the graduates of which apply for examination. The colleges themselves will doubtless be glad to give the commission the information desired and I doubt not the rules prescribed by the American Conference of Pharmaceutical Faculties may be easily obtained.

Yours very truly,

CHARLES S. WILCOX,
Special Counsel.

BLANK CARTRIDGES—SALE OF FOR USE IN TOY PISTOLS PROHIBITED. —A person selling blank cartridges cannot escape punishment for violating the law by marking the box containing such cartridges, "Must not be used in toy revolvers or pistols."

Des Moines, Iowa, June 23, 1909.

GEO. W. HEALEY & SON,
Dubuque, Iowa.

GENTLEMEN: Attorney General Byers has requested me to make reply to your favor of the 22d concerning the sale of blank cartridges. You state you have been selling them with a slip pasted to the box containing the following:

"Must not be used in toy revolvers or toy pistols," and that wholesale dealers have advised you that such sales are not violations of the Iowa statutes.

Section 5028-p of the 1907 supplement to the code is as follows:

> "No person shall use, sell, offer for sale or keep for sale within this state any toy pistols, toy revolvers, caps containing dynamite, blank cartridges for toy revolvers or toy pistols, or firecrackers more than five inches in length and more than three-fourths of an inch in diameter; provided caps containing dynamite may be used, kept for sale or sold when needed for mining purposes, or for danger signals, or for other necessary uses."

I am of the opinion that under the section above named the sale of blank cartridges which can be used for toy revolvers or toy pistols is prohibited and that the pasting of a warning upon the package would not relieve a dealer from the prohibition contained in said section.

Very truly,
CHARLES S. WILCOX,
Special Counsel.

ROAD SUPERINTENDENT—TRUSTEES PERFORMING LABOR ON HIGHWAY. —Township trustees cannot do work of road superintendent and draw pay for such work.

Des Moines, Iowa, June 23, 1909.

MR. A. T. ZIMMERMAN,
Washta, Iowa.

DEAR SIR: I am in receipt of your communication of the 22d instant requesting an opinion as to whether township trustees may refrain from appointing road superintendent and perform the duties themselves of such road superintendent and receive pay for such work. You also ask what penalty there is attached for such procedure provided the same is unlawful.

Section 468-a supplement to the code 1907, provides that:

> "Members of boards of supervisors and township trustees shall not buy from, sell to or in any manner become parties directly or indirectly to any contract to furnish supplies, material or labor to the county or township in which they are respectively members of such boards of supervisors or township trustees."

The act itself being prohibited by law, the same is by section 4905 of the code made a misdemeanor. A misdemeanor in this state is an indictable offense which may be punished by imprisonment in the county jail not more than one year or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.

State v. York, 131 Iowa 635; same case 135 Iowa 529.

With reference to the advisability as to what you shall do in case labor cannot be procured in your township, I suggest that you take this matter up with your county attorney as it is a question upon which this department would not care to offer an opinion.

Yours very truly,
GEORGE COSSON,
Special Counsel.

INTOXICATING LIQUOR—REGISTERED PHARMACISTS—PERMIT HOLDER. A registered pharmacist who is not a permit holder has no right to sell intoxicating liquor or malt liquor containing any part of alcohol.

Des Moines, Iowa, June 24, 1909.

MR. I. W. CLEMENTS,

Marengo, Iowa.

DEAR SIR: I am in receipt of your communication of the 23d instant submitting the following questions:

1st. Has a registered pharmacist, who is not a permit holder, a legal right to dispense intoxicating liquors on a physician's prescription?

2d. Has a registered pharmacist, whether a permit holder or not, the legal right to sell malt liquors which contain from one to three and one-half per cent of alcohol?

Both of your questions must be answered in the negative. A registered pharmacist, who is not a permit holder, has no right to sell intoxicating liquors for any purposes whatsoever. This proposition of law is so well settled that citations are unnecessary, but see, *In re Applications of Henery*, 124 Iowa 358.

Replying specifically to your second question: a registered pharmacist,either with or without a permit, has no right to sell malt liquors which contain any per cent of alcohol for any purposes under any circumstances.

See section 2385 of the code.

Yours very truly,

GEORGE COSSON,
Special Counsel.

CIGARETTES—TAX ON CIGARETTES—PAYMENT OF TAX NOT BAR TO PROSECUTION FOR ILLEGAL SALE.—The property owner and property itself is liable for payment of tax.

Des Moines, Iowa, June 28, 1909.

MR. JOHN B. HAMMOND,

Des Moines, Iowa.

DEAR SIR: I am in receipt of your communication of the 24th instant advising that in a number of cities in this state merchants are openly advertising and making sales of cigarettes and cigarette papers, and submitting the following questions:

1st. Does the mulct cigarette law found in section 5007 of the code protect the dealer in any manner?

2d. Is any one permitted to sell or keep for sale or gift cigarette papers?

3d. What penalty is provided for the violation of this law?

4th. Is the property owner liable for violations made by a tenant?

First. The payment of the mulct cigarette tax levied pursuant to the provisions of section 5007 of the code does not in any manner authorize the sale or keeping for sale of cigarettes or cigarette papers or wrappers. The section itself expressly provides:

> "The payment of such tax shall not be a bar to prosecution under any law prohibiting the manufacturing of cigarettes or cigarette paper, or selling, bartering or giving away the same."

Said section was enacted not for the purpose in any way of relieving the person who paid the tax pursuant to its provisions from any of the criminal penalties imposed by section 5006 of the code; one of its objects was to add an additional impediment to the business of selling or disposing of cigarettes and cigarette papers or wrappers.

Judge Deemer, speaking for the court in *Hodge v. Muscatine County,* 121 Iowa, 482, said:

> "It is manifestly a tax upon the traffic which the legislature saw fit to impose, not for the purpose of giving countenance to the business, but as a deterrent against engaging therein."

It was there held that the act was not unconstitutional by reason of the fact that said section exacted a tax for all persons who engaged in the business, but expressly provided that said tax should not authorize the sale thereof or operate as a bar to any of the penalties provided by section 5006. This case was affirmed by the supreme court of the United States.

See *Hodge v. Muscatine County,* 196 U. S. 276;

See, also, *Cook v. Marshall County,* 119 Iowa, 384; same case 196 U. S. 261.

Second. It follows from the reasoning above given that your second question must likewise be answered in the negative. Stronger language could not be used than that found in section 5006 prohibiting the sale or disposition of cigarettes and cigarette papers and wrappers either by way of gift or exchange, the only exception being that the act does not apply to the sales of jobbers doing

an interstate business with customers outside the state. The attempt has been made to escape the sweeping provisions of this section by resorting to the sanctity of the interstate commerce clause and having cigarettes shipped direct to the retail dealers in small packages containing ten cigarettes in each package, but not bound together in any form.

It was said by our supreme court in *Cook v. Marshall County,* that this was a mere subterfuge; that such packages did not constitute what is known as an original package, and that the interstate commerce clause in the constitution afforded to the offender no relief. This case was affirmed by the supreme court of the United States.

Third. Section 5006 of the code provides:

> "Whoever is found guilty of violating any of the provisions of this section, for the first offense shall pay a fine of not less than twenty-five dollars nor more than fifty dollars and costs of prosecution, and stand committed to the county jail until such fine and costs are paid; for the second and each subsequent offense, he shall pay, upon conviction thereof, a fine of not less than one hundred dollars nor more than five hundred dollars and the costs of prosecution, or be imprisoned in the county jail not to exceed six months."

It will be observed that the second and each subsequent offense for violating said section is made indictable.

Fourth. The property owner and the property itself is liable for the payment of the mulct tax. The liability of the property owner does not extend beyond this unless it can be shown that he is interested, concerned or engaged in the selling, giving, owning or keeping for sale or gift, cigarettes or cigarette papers, for the purpose of violating the provisions of section 5006.

Yours very truly,

GEORGE COSSON,
Special Counsel.

INTOXICATING LIQUOR—MULCT TAX—SALE OUTSIDE CORPORATE LIMITS.—The provision of the law regarding collection of mulct tax outside the corporate limits of a town does not imply that sales may be legally made outside such corporation.

Des Moines, July 6, 1909.

COUNTY ATTORNEY W. J. KEEFE,
Clinton, Iowa.

DEAR SIR: I am in receipt of your communication of the 29th ultimo directing my attention to chapter 140, acts of the thirty-third general assembly, which provides in part for the distribution of the mulct tax collected by reason of intoxicating liquors being sold without the corporate limits of a city or town, and requesting to be advised as to whether this may be construed to authorize the sale of intoxicating liquors under the mulct law without the corporate limits of a city or town.

In passing upon this question we must constantly bear in mind that prohibition is still the law in Iowa; that whoever claims the right to sell intoxicating liquors in this state must be able to point to the statute or legislative enactment authorizing the sale.

The only authority granted anywhere in the law in this state to sell intoxicating liquors as a beverage is to be found in section 2448 of the supplement to the code, 1907, and section 2449 of the code. These two sections are known as the bar sections to the prohibitory law. A careful reading of these two sections discloses the fact that nowhere in either of said sections is any reference made or authority given to conduct the business of selling intoxicating liquors as a beverage outside the corporate limits of a city or town.

Section 2448 provides a bar in cities, including cities acting under special charters of five thousand or more inhabitants, and also cities over twenty-five hundred and less than five thousand inhabitants; and section 2449 of the code provides a bar for cities and towns and cities acting under special charters of less than five thousand inhabitants.

Any one wishing to sell intoxicating liquors as a beverage in any city or town must comply with all of the conditions specified in paragraphs 1 to 12 inclusive of section 2448 of the supplement to the code. Paragraph 2 of said section provides among other things that "the person appearing to pay the tax shall file with the county auditor a certified copy of a resolution regularly adopted by the city council consenting to such sales by him." It is evident that a city or town council could not grant a resolution of consent to any one outside of the corporate limits of such city or town, and that therefore paragraph 2 of said section could not be complied with.

Paragraph 4 provides that the selling or keeping for sale of intoxicating liquors shall be carried on in a single room having but one entrance or exit, and that opening upon a public business street. We do not refer to the ordinary country roads as public business streets.

As chapter 140, acts of the thirty-third general assembly relates wholly to the disposition of the mulct tax, it could not be construed in any sense as a bar section to the prohibitory law. In this state the tax should be assessed against every person selling intoxicating liquor as a beverage whether legally or illegally; therefore, the legislature might provide for the disposition of mulct tax collected from business conducted outside the limits of a city or town without in any way implying that intoxicating liquors might be lawfully sold as a beverage outside the corporate limits of a city or town.

Yours very truly,

GEORGE COSSON,
Special Counsel.

SHERIFFS—SALARY—PUBLIC OFFICERS.—A sheriff in a county of 14,000 is entitled to salary of $1,800.00.

Des Moines, Iowa, July 6, 1909.

CHARLES J. LEWIS, County Attorney,
Mount Ayr, Iowa.

DEAR SIR: Attorney General Byers has requested me to make reply to your favor of the 1st instant in which you state that the population of your county is about 14,000; that the receipts of the sheriff's office amount to from $700 to $900 annually, and you wish to know what salary your sheriff is entitled to draw under sections 510-a, 510-b, and 511.

The parts of the sections to be construed are as follows:

> Section 511, Par. 23. "The sheriff is also entitled, for attending the district court, and for other service for which no compensation is allowed by law, except in counties having a population of over twenty-eight thousand, an annual salary, which shall be fixed by the board of supervisors, but in no case less than two hundred dollars nor more than four hundred dollars. When sheriffs perform official duties in justices' courts, their fees shall be the same as allowed constables."

Section 510-a: "In counties having a population of over 11,000 and less than 28,000 the sheriff shall receive in full compensation for his services, including the salary provided by section 511 of the code, the sum of $2,000 per annum, the same to be paid out of the receipts of the office, * * * provided, * * * * * that in counties having a less population than twenty-eight thousand, in which the receipts of the office and salary allowed under section five hundred and eleven of the code do not amount to the sum of eighteen hundred dollars per annum, the board of supervisors shall, at the January session thereof following, make an allowance to the sheriff of a sum equal to the difference between the receipts of the office in the previous year, and $1800."

It will be observed that section 511 was enacted prior to section 510-a and if there is any conflict between the two, section 510-a must, of course, govern. I am of the opinion that under the circumstances set forth in your letter your sheriff is entitled to a salary of $1800 only.

Very truly,

CHARLES S. WILCOX,

Special Counsel.

INTOXICATING LIQUORS—SALE OF ALCOHOL AND WINE FOR SACRAMENTAL PURPOSES—SALE OF LIQUOR TO PATIENTS OF HOSPITAL FOR INEBRIATES.

Des Moines, Iowa, July 7, 1909.

HON. EDWARD J. MOORE,

Eldon, Iowa.

DEAR SIR: I have your favor of recent date in which you ask to be advised upon the following propositions:

1st. May permit holders, under section 2385 of the code, sell wine for other than sacramental purposes and alcohol for other than specific chemical and mechanical purposes.

2d. Does section 2310-a24 of the supplement to the code prohibit permit holders from selling intoxicating liquors to a physician under the provisions of section 2385, if said physician has been a patient in the hospital for inebriates.

In response to your inquiries I beg to submit the following:

1st. Section 2385 of the code, so far as it is material to the first question, provides as follows:

> "Persons holding permits may sell and dispense intoxicating liquors, not including malt liquors, for pharmaceutical and medical purposes, and to permit holders for use and resale by them only for the purposes authorized in this chapter; they may also sell and dispense alcohol for specified chemical and mechanical purposes, and wine for sacramental uses."

It is my opinion it was not the intention of the legislature, in enacting the provisions of the above section, to limit the sale by permit holders of wine for sacramental purposes and alcohol for specified chemical and mechanical purposes, but that the sale of wine and alcohol for the purposes mentioned in said section is in addition to the general provision for the sale of intoxicating liquors by permit holders.

2d. Under the provisions of section 2385 of the code:

> "Physicians holding certificates from the state board of medical examiners * * * may buy from permit holders intoxicating liquors (not including malt) for the purpose of compounding medicines, tinctures and extracts that cannot be used as a beverage, etc."

Section 2310-a24 of the supplement to the code provides:

> "Any person who shall furnish any patient of said hospital for inebriates, or any patient who has been or may hereafter be committed to any insane hospital as an inebriate, dipsomaniac, or as one addicted to the excessive use of narcotics, any intoxicating liquor or narcotic drug, except on the written prescription of the superintendent, shall be guilty of a felony, and on conviction thereof shall be punished by imprisonment in the state penitentiary for not less than six months nor more than one year, or by a fine, not less than five hundred dollars ($500) nor more than one thousand dollars (1,000) at the discretion of the court. Any person who shall knowingly furnish any intoxicating liquor or narcotic drug to one who has been discharged from either of said institutions as cured, except upon the written prescription of a reputable practicing physician, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than three hundred dollars ($300) and not more than one thousand dollars

($1,000) and stand committed to the county jail until such fine is paid."

It is my opinion that under the provisions of section 2310-a24 above quoted, the fact that a paroled or discharged patient was a physician would not exempt any one giving or selling to him any intoxicating liquor or narcotic drug except on the written prescription of the superintendent of the hospital, from the penalties prescribed in said section.

Yours very truly,

CHARLES W. LYON,
Assistant Attorney General.

INTOXICATING LIQUOR—MOON LAW—RESOLUTIONS OF CONSENT.—Resolutions of consent in force April 15, 1909, within provisions of chapter 142, acts 33d general assembly.

Des Moines, July 8, 1910.

MR. JOHN S. DENISON,
Dubuque, Iowa.

MY DEAR SIR: Replying to your letter of yesterday referring to chapter 142 laws of the 33d general assembly I have to say, that it is the opinion of this department that it is only such resolutions of consent as were in force on April 15, 1909, that are within the saving provisions of section 2 of chapter 142, and to be in force, as we use the term above, the person holding the resolution of consent must have complied with all of the other provisions of the mulct law, and been engaged in the operation of a mulct saloon.

Yours very truly,

H. W. BYERS.

INTOXICATING LIQUOR—REQUEST BLANKS—FILLING OUT BY PURCHASER.

Des Moines, Iowa, July 8, 1909.

MR. A. W. MORGAN,
Muscatine, Iowa.

DEAR SIR: I am in receipt of your communication of the 7th instant directing my attention to the fact that the form of request slips furnished to permit holders by county auditors fails to pro-

vide a blank space for the residence of the person where liquor is purchased for him by another, and submitting the following questions:

1st. Shall the permit holder fill out the request blank as the same is printed leaving out the residence of the person where liquor is purchased for him by another, or shall the permit holder write it in over the printed form?

2d. Can the permit holder or registered clerk fill out the request for liquor and have the buyer sign, or must the buyer himself fill out the blank in his own handwriting?

3d. In case a request blank is spoiled in filling out the same, what shall the permit holder do?

First. It was not the intention of the legislature in passing chapter 139, acts of the thirty-third general assembly to repeal any part of section 2394 of the code, and inasmuch as said section provides that the request must be signed by the applicant, stating for whom and whose use the liquor is required and his true name and residence, I think you should state the residence on the blank form where liquor is purchased by one person for another. In the blank form sent out by the auditor I think there is ample room on the blank line for both the name and the residence of the person for whom the liquor is desired.

Second. Chapter 139 above referred to provides in part that, "the permit holder shall require each applicant for liquor to fill out in his or her handwriting requests for same in ink, and shall fill out the corresponding stubs in ink." This provision is mandatory and you should therefore have the applicant fill out for himself the blank request in ink and the permit holder should fill out the corresponding stubs in ink.

The question has been raised as to the authority of the permit holder to fill out the request blank in the event that the applicant cannot write or can only write his own name. Inasmuch as the act referred to specifically states that the permit holder shall require each applicant to fill out in his or her handwriting requests for same in ink, this department does not desire to offer any opinion upon the question as to whether ignorance or inability to write would furnish sufficient excuse for not complying with the provisions of said act, thinking it better to wait until the supreme court has passed upon the queston.

Third. In case a blank form of request is spoiled, the permit holder should preserve the same and return it when he makes returns pursuant to the provisions of section 2397 of the code.

Yours very truly,

GEORGE COSSON,
Special Counsel.

SUNDAY—LABOR PERFORMED ON SUNDAY—WHAT CONSIDERED WORK OF NECESSITY.—Filling prescriptions by druggists, serving meals by hotels, selling papers, running street cars and trains are considered matters of necessity.

Des Moines, July 15, 1909.

COUNTY ATTORNEY C. B. HUGHES,
Guthrie Center, Iowa.

DEAR SIR: I am in receipt of your communication of the 9th instant relating to the proper interpretation to be placed upon section 5040 of the code. You advise that you have interpreted the section to except not only work of necessity and charity but also business dealings of necessity or charity, such as the filling of prescriptions by druggists, the serving of meals by a hotel,etc. I agree with you in your interpretation of the section. The section should, as I view it, receive a fair and reasonable interpretation looking to the spirit of the law rather than the exact letter.

Without going into detail as to what is prohibited by section 5040 of the code, it is apparent that the ordinary secular business transactions are prohibited by said section and ought not to be permitted in any community. Such transactions, however, as the filling of a prescription by a druggist at the special instance of a physician, the serving of meals by hotels and restaurants, the sale of Sunday newspapers, which in the cities almost invariably contain the church announcements, the running of street cars, passenger trains and freight trains containing perishable freight, have under modern conditions become to be accepted as matters of necessity without controversy.

In view of this fact the department of justice does not feel like recommending prosecutions upon matters of this nature which, if not strictly and technically matters of necessity, are considered to be such by a large majority of our people including a vast number of our best citizens and church members.

Yours very truly,

GEORGE COSSON,
Special Counsel.

ROADS—USE OF FOR PASTURE.—Adjoining property owners are entitled to the use of grass, trees and stones along the road, but in use of same must not interfere with travel.

Des Moines, Iowa, July 16, 1909.

WALLACE'S FARMER,
Des Moines, Iowa.

GENTLEMEN—Official business of the office has prevented an earlier reply to your favor concerning the right of horse traders to pasture their horses along country roads, with which letter you enclosed an item from your paper upon that subject.

I concur with you in the conclusions reached in that item to the effect that the country roads of Iowa belong to the owners of the land adjoining, subject only to the rights of the public to use the roads for ordinary purposes of travel, and that the grass, trees, sod and stones in such roads belong to the abutting property owners; however, such owners in the use of such grass, trees, sod and stones must not interfere with the free and safe use of the roads by the public.

See the following cases:

Overman v. May, 35 Iowa 89;
Dickinson County v. Fouse, 112 Iowa 21;
City of Dubuque v. Maloney, 9 Iowa 450.

Unfortunately the present statutes do not provide as speedy and adequate remedies for the abuses mentioned in your letter as doubtless is desired by the farmers interested. The civil remedy of injunction would probably afford satisfactory relief in some cases. The subject is one which should receive the attention of the legislature.

Yours very truly,
H. W. BYERS.

GIFT ENTERPRISE—WHAT CONSTITUTES—GIFT ENTERPRISE DISCUSSED.

Des Moines, Iowa, July 20, 1909.

WARFIELD, PRATT, HOWELL COMPANY,
Des Moines, Iowa.

GENTLEMEN: I have your favor of the 14th instant in which you state you have been handling for some time prior to July 4, 1909, certain standard commodities in which there are packed library

slips of the Magazine and Book Company, one of which slips you enclose in your letter, and you ask whether or not the act of the thirty-third general assembly, known as the gift enterprise act, affects the handling of such slips packed with such commodities.

In order for the enterprise to be known as a gift enterprise and prohibited by said act (chapter 226 acts of the thirty-third general assembly) the following conditions must obtain:

At least two or more persons, which may include a firm or corporation, must co-operate together for the purpose of inducing the public to purchase merchandise or other property, one of the parties to such scheme for a valuable consideration advertising, causing or attempting to induce the public to believe that he will give premiums, gifts or prizes to such persons purchasing merchandise or other property, by the giving of stamps or tickets with each sale which will entitle the purchaser of such property to receive a prize or gift from another party to such scheme. All such transactions or enterprises are unlawful, unless at the time the sale is made the person connected with the scheme who gives the ticket or stamp shall have definitely described on such stamp or ticket the character and value of the prize or gift promised to the person purchasing an article of merchandise, and the right of the person receiving such stamp or ticket to the gift, prize or premium promised becomes absolute and fixed upon the delivery thereof without the holder of such stamp or ticket being required to collect a specific number of other stamps or tickets and present the same for redemption, and the further condition that there is no chance, uncertainty or contingency whatsoever connected with said enterprise.

It will be observed that if two or more persons are co-operating together in any trading stamp or gift or premium enterprise that each stamp given by one of such persons must show the character and value of the gift. Its value must be definite and certain at the time the transaction is made, and a single stamp or ticket thus given must be redeemable itself without the necessity of securing other tickets of like character.

The handling of commodities with which the slips mentioned are packed probably does not violate the terms of the act above referred to.

Very truly,

H. W. BYERS.

INTOXICATING LIQUORS—TRANSPORTATION.—Persons cannot lawfully transport liquor from a saloon to a private residence.

Des Moines, July 23, 1909.

COUNTY ATTORNEY J. G. PATTERSON,

Oskaloosa, Iowa.

DEAR SIR: I am in receipt of your communication of the 20th instant submitting the following questions:

1. May common carriers or other persons transport liquor over the country to customers, if such liquor is labeled as provided in section 2421 of the code?

2. May a person operating a mulct saloon deliver liquor to his private customers where the liquor is bought at the saloon and paid for, or may some other person haul or convey said liquor from said saloon to the residence of the purchaser without being liable to punishment for illegally transporting liquor?

First. Section 2421 of the code must be construed with section 2419 of the code. Section 2419 of the code absolutely prohibits any person, whether common carrier or otherwise, from hauling or transporting liquor between points within this state, unless the person conveying such liquor has been furnished with a certificate from a clerk of the court showing that the person to whom the liquor is consigned is a permit holder or otherwise authorized to sell intoxicating liquor in this state.

Section 2421 in no wise limits the provisions of section 2419 of the code, but furnishes an additional requirement which makes it necessary for any person who transports liquor, even if transported to a permit holder or one who is authorized to sell intoxicating liquor in this state, to first require that the vessel or other package containing such liquor shall be plainly and correctly labeled showing the quantity and kind of liquor contained therein, as well as the name of the party to whom such liquor is to be delivered.

That section 2419 prohibits the transportation of intoxicating liquors between all points within this state, see *State v. Creeden,* 78 Iowa, 56; and *State v. Rhodes,* 90 Iowa, 496.

The fact that *State v. Rhodes* was reversed by the supreme court of the United States (170 U. S. 412) in no wise militates against the effect of the decision of our supreme court in so far as it might refer to the transportation of intoxicating liquors between points wholly within the state, for the reason that the supreme court of the United States reversed our supreme court upon the ground that

the particular shipment in question in that case was protected by the commerce clause of the federal constitution, and that the liquor in question being an interstate shipment, it did not become subject to the law of Iowa even under the Wilson bill until it arrived at the point of destination and was delivered to the consignee.

Upon the question as to when interstate shipments of intoxicating liquor become subject to our state law, see opinion given to Bruce & Zeigler, a copy of which I enclose herewith.

Second. It follows from the reasons above given that neither the saloon keeper nor any other person could lawfully transport liquor for another from the saloon to the private residence of the purchaser.

It was said by our supreme court in *Cameron v. Fellows,* 109 Iowa, 534-538, that "the keeping of a place under the mulct law does not authorize the peddling of beer in all parts of the city."

See also

State v. Campbell, 76 Iowa, 122;
State v. Reilly, 108 Iowa, 835.

Yours very truly,

GEORGE COSSON,
Special Counsel.

INTOXICATING LIQUOR—INTERSTATE SHIPMENT—DRAYMEN—POINT OF DESTINATION.—Under Wilson bill liquors become subject to state law after arrival at destination, which means as soon as receipted for at station by consignee or agent.

Des Moines, July 23, 1909.

BRUCE & ZIEGLER,
Anita, Iowa.

GENTLEMEN: I am in receipt of your communication of the 7th instant requesting an interpretation of section 2419 of the code, and specifically as to whether a drayman or other person may lawfully haul or convey intoxicating liquors from the express or freight office to one who has purchased said liquor outside of the state for his own private use, assuming of course that the person conveying the liquor has not been furnished with a certificate from the clerk of the court showing that the consignee is a permit holder or is otherwise authorized to sell liquors.

The solution of this question depends almost entirely upon the interpretation to be placed upon the commerce clause of the federal constitution, which provides that congress shall have power "to regulate commerce with foreign nations and among the several states and with the Indian tribes;" and the Wilson bill which provides:

> "That all fermented, distilled or other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

Unquestionably the transportation of liquor between points within this state is prohibited by section 2419 of the code.

Our supreme court in the case of *State v. Rhodes,* 90 Iowa 496, went so far as to hold that the conveying of liquor from the depot platform into the freight house, which was an interstate shipment and which was being placed in the freight house to await delivery to the consignee, was prohibited by said section, and that since the passage of the Wilson bill, interstate shipments of liquor became subject to our state laws as soon as the liquor crossed the boundary of Iowa and entered the state.

This case was reversed by the supreme court of the United States (170 U. S. 412)upon the ground that such interstate shipments were protected by the commerce clause of the federal constitution, and that it was not the intention of congress in the passage of the Wilson bill to subject interstate shipments of intoxicating liquor to the state law until the arrival of such liquors at the point of destination and delivery there to the consignee.

The Wilson bill received a much broader construction by the state courts than by the United States supreme court. The supreme court of Maine and the supreme court of several other states having either local option or prohibitory laws construed the Wilson bill to authorize the laws of the several states to apply to interstate shipments of intoxicating liquors as soon as the liquors entered the boundary lines of the states, or in any event, as soon as the

liquor arrived at its destination and the relation of the transportation company as a common carrier ceased.

While the supreme court of the United States has uniformly reversed the state courts which adopted this view, in no case have they gone farther than to say that under the Wilson bill, the power of the state did not apply until the arrival of the liquor at the point of destination and delivery there to the consignee.

In *Rhodes v. Iowa,* supra, the supreme court of the United States said:

> "Undoubtedly the purpose of the act (Wilson bill) was to enable the laws of the several states to control the character of merchandise therein enumerated at an earlier date than would have been otherwise the case."

This is the position universally taken by the supreme court of the United States. See *Delamater v. South Dakota,* 205 U. S. 93, and cases cited. *State v. Int. Liquors,* 11 L. R. A. (N. S.) 550, Note.

Considering that the Wilson bill provides that intoxicating liquors transported into any state shall, upon arrival in such state, be subject to the operation and effect of the laws of such state enacted in the exercise of its police powers to the same extent and in the same manner as though such liquors had been produced in such state; and considering that in the case of *Rhodes v. Iowa,* supra, wherein the supreme court of the United States reversed the supreme court of Iowa, three of the justices of the supreme court of the United States dissented from the majority opinion; and considering that in the case of *Delamater v. South Dakota,* the supreme court of the United States held that soliciting orders for interstate shipments of intoxicating liquor, even though the liquors might be purchased by one for his own use, were not protected by the commerce clause of the federal constitution in view of the Wilson bill, it is my opinion that the supreme court of the United States will not extend its doctrine further in protecting interstate shipments under the commerce clause; that it will adhere to the rule many times previously announced by said court that interstate shipments of intoxicating liquors become subject to state laws upon the arrival of such liquor at the point of destination and delivery there to the consignee.

It seems almost self-evident that as soon as the consignee or his agent receipts for the liquor at the freight or express office that

the same has then arrived at the point of destination and that it has then been delivered to the consignee, and under the Wilson bill becomes subject to the state law.

Yours very truly,

GEORGE COSSON,
Special Counsel.

INTOXICATING LIQUORS—PERMIT HOLDERS REGISTERED PHARMACISTS —COMPOUNDING MEDICINES CONTAINING ALCOHOL BY PHARMACISTS NOT PROHIBITED.—Requests for liquor must contain statement of purpose for which it is to be used. Hostetters Bitters containing 50 per cent alcohol can only be sold by a permit holder.

Des Moines, July 31, 1909.

MR. H. E. EATON,
President Pharmacy Commission,
Shenandoah, Iowa.

DEAR SIR: Replying to your favor of the 22d instant, enclosing several questions in reference to the pharmacy law, I have to say that I am glad the questions have come to this department through the proper channel and it is a pleasure to make reply thereto.

As a convenience to you I will take the propositions up in the order presented in your letter.

1. Has a druggist any right under the law to sell alcohol for medical use?

Under section 2382 of the 1907 supplement to the code, alcohol is defined as intoxicating liquor.

A druggist who is not a permit holder may not sell alcohol in the form of alcohol alone.

See *In Re Application of Henery,* 124, Iowa, 358;
Also, *State v. Bissell,* 67 Iowa, 616.

Code section 2385 is in part as follows:

"* * * Registered pharmacists * * * may buy from permit holders intoxicating liquors (not including malt) for the purpose of compounding medicines, tinctures and extracts that cannot be used as a beverage, but nothing herein contained shall be construed to authorize the manufacture or sale of any preparation or compound, under any name, form or device,

which may be used as a beverage, and which is intoxicating in its character."

While the language of the section above quoted gives registered pharmacists only the right to *buy* intoxicating liquors for the purposes named, the inference is that such registered pharmacists may sell the medicine, tincture or extract compounded by him and containing the intoxicating liquors so purchased by him.

I know of no reason why a druggist without a permit might not keep a sufficient amount of alcohol on hand for the sole purpose of compounding medicines, provided the prescription as filled could not be used as a beverage, and provided further, that the characteristic of alcohol was destroyed by the other ingredients. If, however, a druggist kept an unusual quantity of intoxicating liquors on hand, I think it would be evidence that the same were kept for the purpose of selling illegally.

2. Has a druggist a right under our law to sell wine for medical use?

The same principles are involved in this second proposition as are involved in the first one, as under section 2382 of the supplement, wine is also defined as an intoxicating liquor. My opinion, therefore, is substantially as above set forth in reference to the sale of alcohol.

3. If a druggist sells alcohol for specified chemical purposes and mechanical purposes, and fills in the blank "for bathing" or for "burning in a lamp," or simply writes the word "liniment," is he within the law?

Code section 2394 is in part as follows:

> "Before selling or delivering any intoxicating liquors to any person, a request must be signed by the applicant, * * * stating * * * the actual purpose for which the request is made, and for what use desired, * * *"

I am of the opinion that the full intent of the law would not be fulfilled if the request blank was filled out as suggested in the question.

4. Suppose a purchaser lives in a town where streets are numbered, but the purchaser does not live on a numbered street, is the writing of the name of the town sufficient?

Code section 2394 requires that the request blank shall show * * * * name and residence, and, where numbered, by street and number if in a city, * * *."

I am of the opinion that under the circumstances set forth in the question, the filling in of the name of the town would be sufficient.

5. Under the new law the purchaser has to fill out the entire request. Suppose he cannot write, is it proper for the druggist to fill it out for him?

Inasmuch as chapter 139, acts of the thirty-third general assembly provides that "The permit holder shall require each applicant for liquor to fill out in his or her handwriting, requests for same in ink, * * *," this department does not desire to offer any opinion upon the question as to whether inability to write would furnish a sufficient excuse for not complying with the provisions of the law, thinking it better to wait until the supreme court has passed upon the question.

6. To say that the purchaser wants alcohol for "mechanical" purposes, but with no additional statement or specification, is it a violation of law?

The same principles are involved in the above question as are involved in question No. 3, and my opinion in reference to question No. 6 is substantially the same as given in reply to question No. 3.

7. If a purchaser fills out an entire blank except that he omits the street number, and the druggist discovers it after the purchaser is gone, and the druggist knows the street number, has he the right to fill it in?

As hereinbefore stated, code section 2394, as amended by chapter 139 of the acts of the thirty-third general assembly, provides that the applicant shall fill out the entire blank in his own handwriting. It is the permit holder's business to see to it that before the intoxicating liquor is sold, the applicant fills out the blank complete, and I do not deem it proper for the permit holder to alter the request made by the applicant.

8. A druggist writes on a request as follows: ½ pt, G——— or ½ pt. Wh—— as an attempt to specify the kind of liquor purchased. Is this a violation of the law?

Under code section 2394, as amended, the permit holder has no right to fill in the blank in any form and manifestly it would not be proper for the applicant to specify the amount and kind of liquor desired in the abbreviated manner suggested in the question.

9. Is it incumbent on a druggist to register Hostetter's Bitters, that is over 50 per cent alcohol, and is often used as a beverage?

Judge Sherwin in the case of *State v. Colvin,* 127 Iowa, 632, said:

"Proof that liquor used as a beverage contains alcohol is sufficient to establish its character as intoxicating liquor, however much the alcohol may be diluted or however weak its intoxicating effect as a beverage may be."

I am of the opinion that such a preparation as mentioned in your question can be sold only by a permit holder upon a properly executed request therefor, the same as in the case of any other intoxicating liquor.

10. A request is filled in as follows: for "my mother," without naming her or stating her age, or for "my family." Is this a violation?

I am of the opinion that the requirements of code section 2394, as amended by chapter 139, acts of the thirty-third general assembly, would not be fulfilled if the request were filled out as suggested in the question.

Trusting that the above satisfactorily replies to your communication, I am,

Very truly,
CHARLES S. WILCOX,
Special Counsel.

COUNTY OFFICERS—PUBLICATION OF REPORTS—BOARD OF SUPERVISORS—PUBLICATION OF PROCEEDINGS—WHAT TO CONTAIN—ASSESSED VALUATION OF RAILROAD PUBLISHED—BOARD OF HEALTH RULES PUBLISHED.

Des Moines, August 16, 1909.

MR. P. S. JUNKIN,
Creston, Iowa.

MY DEAR SIR: In response to your letter of some days ago submitting numerous questions referring to the publication of the proceedings of boards of supervisors and other official matters, I have to say that I enclose you, under items from one to thirteen inclusive,—except question five which I withhold for further consideration and will forward you an opinion later,—my opinion on the several questions.

Yours respectfully,
H. W. BYERS.

"1. Must reports of county officers be published as they are presented to the board of supervisors in accordance with the law, or is it sufficient, in the publication of the proceedings, to

say that the report of such an officer was received and placed on file?''

Supplement section 441 provides for the publication of ''all the proceedings of the county board of supervisors, the schedule of bills allowed, and the reports of the county treasurer, including a schedule of the receipts and expenditures.''

Code section 470 provides that the county auditor shall (section 1) record all the proceedings of the board in proper books provided for that purpose; (section 2) make full entries of all its resolutions and decisions on all questions concerning the raising of money, and for the payment of money from the county treasury; (section 3) record the vote of each supervisor on any question submitted to the board, if required by any member present.

''The proceedings of the board are its official acts, resolutions and orders upon the various matters which may come before it.''

Haislett v. County of Howard, 58 Iowa, 377-378.

I am of the opinion that the published proceedings of the board should contain substantially everything that is made a part of the record proceedings of the board, so that the tax payer may get from the publication exactly the same information and all of it that he could secure by an examination of the board's records.

''2. May a county auditor, in furnishing copy of board proceedings to official newspapers, bunch a number of claims together and make them read:

'10 warrants on gopher bounty fund.....$12.50'

Or must each warrant be listed separately, giving the name of the party in whose favor it is drawn, the amount claimed, and the amount allowed?''

For the same reason as set forth in the preceding paragraphs, I am of the opinion that each warrant should be listed separately, giving the name of the party in whose favor it is drawn, the amount claimed and the amount allowed.

Under paragraph 2 of code section 470, supra, it is doubtless contemplated that each item be separately acted upon.

''3. Should the list of names as published show the amount claimed and the amount allowed in each case; or, in other words, should the list of claims as published be substantially as the record is kept by the auditor?''

I am of the opinion that the answer should be affirmative for the reasons suggested in the two preceding answers.

"4. In the case of *Brown v. Lucas County*, the supreme court decided that publishers were entitled to charge three prices for tabular work. If the board proceedings properly furnished by the county auditor contains copy which, according to the standard of printer's measurements, is price and a half, would the charge of a price and a half be proper?"

Brown v. Lucas County, 94 Iowa, 70-73, holds:

"The legislative intent was, not to fix a compensation for filling a certain space with printing, of whatever kind, but to fix a compensation for a particular space of a particular kind of printing, and make it the standard by which other kinds of printing could be measured and compensated. It is fair to presume that the compensation fixed was designed as just for a square of ten lines in brevier type in straight work. If so, it would be a harsh construction to say that the board could deliver tabular work, requiring the three times the cost to perform it, and then make compensation upon the basis of straight work, because of the words, 'or its equivalent,' as used in the law. There is, however, justice in the thought that the intent was to fix a compensation for a specified service, and then allow for additional services on the same basis. * * * * With the square 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 costs more for the same space, then more is to be paid for it. The payment is to be made, at all times, on the basis of the fixed compensation for the specified space and form of printing."

In the absence of a contract between the publisher and the board fixing a different price I am of the opinion that this question should be answered in the affirmative.

"6. Should the county treasurer's semi-annual report show the condition of each fund in each township, the balances, the amount received, and the amount paid out; or, will a synopsis for the whole county, instead of the township, be sufficient?"

I am of the opinion that a reasonable construction of supplement section 441 will warrant such a publication of the treasurer's report as will show the condition of each fund in each township, the balances, the amount received and the amount paid out.

"7. Should the accounts and the business transacted in vacation be published as board proceedings?"

Supplement section 411 provides for the regular meetings of the board, and code section 420 for special meetings.

If the inquiry has to do with special meetings, the business transacted at such meetings should be published as provided for in supplement section 441. If the inquiry has to do with the business transacted by the various county officers during the time between the regular meetings of the board, the question should be answered in the negative, as I find no authority for any official publication of such business transacted.

"8. Should the canvass of election returns, as made by the board of supervisors, be furnished the official newspapers for publication?"

Section 11, chapter 69, page 66, of the 33d general assembly in reference to primary elections, provides that "the published proceedings of the board of supervisors as a canvassing board shall contain only a brief statement," etc.

Code section 1149 providing for the canvassing of the votes at general election, and the other sections in that chapter, contain no provision for the publication of the canvass.

I am of the opinion that such record of the canvass as is made a part of the board's proceedings should be published under section 441 of the supplement.

"9. Should the table showing the length and the assessed value of railroad, telephone, telegraph, and express lines be furnished the official newspapers for publication?"

Supplement section 1330-e provides that the statement showing the length and value of telegraph and telephone systems prepared by the executive council and forwarded to the county auditor, shall be entered in the minute book of the board of supervisors.

Supplement section 1337 and code section 1338 make similar provisions in reference to the length and assessed value of railroads.

Supplement section 1346-g makes similar provisions in reference to express lines.

I am of the opinion that inasmuch as these various statements must be entered in the minute book of the board, they should be published as a part of the proceedings under supplement section 441.

"10. Must council proceedings be published in all cities in accordance with the provisions of the law enacted by the last general assembly?"

Section 1 of chapter 42 of the 33d general assembly leaves it optional with the council to either publish the proceedings in a newspaper in such city or town, or to post such proceedings in one or more public places.

"11. Is it still incumbent upon local boards of health to publish the rules of the board of health in cities where this has not been done, and what will be the effect of an attempt to enforce the quarantine law where such publication has not been made?"

Section 2, chapter 156 of the 33d general assembly provides that local boards of health "shall give notice of all regulations adopted by publication thereof in some newspaper of general circulation in the town, city or township, or by posting a copy thereof in five public places therein."

New rules of the board of health were adopted at their last meeting, but will not appear in printed form for probably thirty days; meanwhile the old rules are in force.

"12. In case reports, etc., which the law says shall be published are not furnished the official newspapers, would the proper recourse be for the newspapers to secure the matter, publish it, and present the bill to the board of supervisors for payment?"

Since the statute does not in terms make it the duty of any particular officer to furnish the official newspaper with reports and other matter which the law requires to be published, it seems to me upon failure or refusal on the part of the officials who have the matter required to be published in their custody to furnish the same it would be entirely proper to secure the matter in some other way, if that be possible, publishing it and presenting the bill to the board of supervisors for payment. In other words official newspapers' right to compensation for publishing the proceedings of the board of supervisors is in no way dependent upon how such newspaper secured the matter published or who furnished it.

"13. In the foregoing questions, some of the points which have been in controversy between official newspapers and boards of supervisors in various counties in the state are covered, but it is, of course, impossible to list all of them. In

general, should not the board proceedings, as furnished to the official newspapers for publication, contain a record of *all* the business transacted by the board; full and complete enough to be understood by the reader?''

As suggested in the former question the official publication of the board proceedings should be full and complete enough to give to the tax payer the same opinion that he could secure by an examination of the records kept by the board. The object and purpose of the publication is to furnish the citizen a convenient method of ascertaining just what business is being transacted by the board of supervisors and how it is being transacted, as well as to furnish a check upon extravagance and to prevent the presentation and allowance of trumped up or padded claims against the county. To fully accomplish this purpose the publication, as said before should be full and complete enough to give the reader an intelligent understanding of all the official transactions of the board.

MINORS—BILLIARD AND POOL HALLS—GAMBLING.—It is a violation of law to permit a minor to be or remain in a pool or billiard hall. Playing cards to determine who shall pay for cigars is gambling.

Des Moines, Iowa, September 15, 1909.

MR. WILL J. SHILEY,

Missouri Valley, Iowa.

DEAR SIR: I am in receipt of your communication of the 15th instant requesting an opinion.

1st. As to whether a person operating a billiard and pool hall may allow a minor in the room and to play at billiards, provided the written consent of the parent or guardian is given?

2d. Is it illegal to run card tables, the person losing the game to pay for the cigars?

In reply thereto I have to say:

First. Section 5002 of the code absolutely prohibits a person who keeps a billiard hall, beer saloon or nine or ten pin alley, or the clerk, agent or servant of any such person, from allowing any minor to remain in such hall, saloon or alley, or to take part in any of the games known as billiards or nine or ten pins.

The violation of said section is punished by a fine of not less than $5.00 nor more than $100.00, or imprisonment in the county jail not exceeding thirty days. In view of the wording of this section the consent of the parent or guardian is immaterial.

See *Jones v. Byington*, 128 Iowa, 397.

Second. With reference to your second question, the playing of cards to see who pays for the cigars is gambling under the laws of this state, and the person operating the building is guilty of conducting a gambling house and subject to indictment.

Sections 4952 and 4964 of the code.

Yours truly,

H. W. BYERS.

INTOXICATING LIQUORS—NUISANCE—IMPRISONMENT FOR NON-PAYMENT OF FINE AND COSTS.—A person may be imprisoned for non-payment of costs in prosecution under section 2384 of the code.

Des Moines, Iowa, September 15, 1909.

MR. A. A. KUGLER,

Osage, Iowa.

DEAR SIR: I am in receipt of your communication of the 14th instant requesting to be advised as to whether a person may be imprisoned for non-payment of costs where the fine and costs were imposed under a conviction of maintaining a liquor nuisance.

While I do not have time at present to investigate the authorities completely bearing upon this question, it is my understanding of the law, in the absence of a specific statute that one may not be imprisoned for non-payment of costs, but it is entirely within the power of the legislature to provide for imprisonment for the non-payment of costs, and in my opinion, this the legislature has done in the passage of section 2384 of the code. There are some early cases which seem to hold contrary but they were decided under the code of 1873, the wording of which was materially different.

Yours very truly,

H. W. BYERS.

RIVERS—INLAND WATERS.—The waters of the Mississippi are not inland waters of the state.

Des Moines, Iowa, September 16, 1909.

MR. GEO. A. LINCOLN,

Fish and Game Warden,

Cedar Rapids, Iowa.

DEAR SIR: I am in receipt of your communication of the 6th ultimo requesting an opinion as to whether the amendment to section 2547 of the code results in making the waters of the Mississippi inland waters of this state, and therefore covered by the provisions of section 2540 as amended in reference to shipping game and fish for sale.

In my opinion the waters of the Mississippi are not inland waters of the state. It is a cardinal principle of criminal law that nothing may be taken for intendment; that the language of the act itself must govern.

Yours very truly,

H. W. BYERS.

CORPORATIONS—TELEPHONE COMPANY—CHANGE OF PLACE OF BUSINESS.—The changing of switchboard of telephone company does not change the place of business of the corporation from that fixed in its articles.

Des Moines, Iowa, September 22, 1909.

MR. EDWIN B. WILSON,

Iowa City, Iowa.

MY DEAR SIR: I am in receipt of your favor of the 18th instant referring to the Pleasant Valley Telephone Company, and in which you ask for an opinion as to whether or not the removal of the company's switchboard from one township into another would amount to a change of the place of business of the corporation under the provisions of Code section 1612 and amendments thereto.

In reply I have to say that under the facts stated in your letter the removal of the switch board would in no sense affect or change the place of business of the corporation as fixed by its articles.

Yours very truly,

H. W. BYERS.

INTOXICATING LIQUORS—"MOON LAW."—No new resolution of consent shall be granted in excess of one saloon to every one thousand people.

Des Moines, September 25, 1909.

COUNTY ATTORNEY J. W. ANDERSON,
Onawa, Iowa.

DEAR SIR: I am in receipt of your communication of the 23d instant requesting to be advised as to whether your city of Onawa, which has a population of twenty-four hundred people, is entitled to three saloons under the provisions of chapter 142, acts of the thirty-third general assembly; and also as to when the Moon law will become operative in your city.

The law does not recognize fractions. The law, however, provides that it shall not be mandatory upon city and town councils to cancel a sufficient number of resolutions of consent to reduce the number of saloons to one to every one thousand population in such city or town. It also provides that where the person was legally operating a mulct saloon at the time of the passage of the act, the city council might grant a resolution of consent to the grantee or transferee of such person. No new or additional resolutions of consent, however, shall be granted in excess of one to every one thousand population and in case any person operating a mulct saloon is convicted either civilly or criminally or quits business after a suit has been instituted against him, he is not only prohibited from again engaging in the business of selling intoxicating liquors in this state within a period of five years, but the council is also prohibited from granting to his transferee, grantee or any other person, a resolution of consent except in compliance with the provisions of section 1 of said act.

Yours very truly,

H. W. BYERS.

COUNTY FUNDS—RATE OF INTEREST—PERIOD OF CONTRACT.—County treasurers and boards of supervisors do not have authority to enter into agreement for any definite length of time with respect to deposit of funds and rate of interest.

Des Moines, September 25, 1909.

MR. H. F. KUHLEMEIER,
County Attorney,
Burlington, Iowa.

DEAR SIR: I am in receipt of your communication of the 1st

instant advising that the board of supervisors and your county treasurer entered into a contract for the ensuing year with the bankers of your county relative to the rate of interest to be received upon county deposits. You request an opinion as to whether this contract has been abrogated by reason of the passage of chapter 91, acts of the thirty-third general assembly.

The question hinges upon the authority of the board of supervisors and county treasurer to make contracts with bankers for a definite period of time under the provisions of section 1457 of the supplement to the code 1907. If they had authority to make a contract under the provisions of said section for a definite time, of course such contract would not be affected by the provisions of chapter 91, acts of the thirty-third general assembly, because it would be subversive of vested rights. I am, however, of the opinion that no authority was granted under section 1457 supplement to the code to make contracts for any definite length of time. If the board could enter into a contract for a year, they could enter into a contract for ten years.

In my opinion chapter 91 should govern at the present time regardless of the previous action of the board and the county treasurer, for the reason that the action of the board and county treasurer in entering into a contract for a definite period was in excess of their authority.

Yours very truly,

H. W. BYERS.

CORPORATIONS—EXCHANGE OF STOCK FOR PROPERTY—CONSENT OF EXECUTIVE COUNCIL.—Capital stock of corporations cannot be exchanged for property without consent of executive council.

Des Moines, Iowa, November 9, 1909.

MESSRS. HENRY & HENRY,
Des Moines, Iowa.

GENTLEMEN: I am in receipt of yours of November 5th in which, among other things, you say:

> "As we do not want to put our clients in the attitude of any possible violation of section 1641-b of the code supplement, we would like your opinion upon the following situation:
>
> "A corporation organized prior to the passage of such law issued its capital stock for an amount in excess of actual payments thereon. It has accumulated some profits, however, and

now considers reducing its stock actually issued so that it shall represent as accurately as possible the actual amount of capital and profits now in the hands of the company. The question in our minds is whether such a transaction comes within the law referred to. It seems that such law only applies to new stock isued after the passage of such law, the intention being that if anything other than money is received for such new stock the matter must be submitted to and receive the approval of the executive council. The matter contemplated by our client is far different from this, and, it being true that the stock issued before the passage of the act can be still held by the stockholders, though not paid for in full, we can see no objection to the holders now surrendering such stock and taking new stock for the amount of capital and profits held by the company."

In reply I have to say that since the passage of the so-called Peterson act, chapter 71, acts of the thirty-second general assembly, (section 1641-b of the 1907 supplement to the code) numerous corporations in the state which were organized prior to such enactment desiring to capitalize their surplus and profits have made inquiry of this department as to the necessity of proceeding under said act, and the department has in every instance held that in all cases where it is desired to exchange stock for property application must be made to the executive council for permission to make such exchange, as provided in said section 1641-b of the supplement to the code.

The purpose of the act, if we understand it correctly, is to prohibit the exchange of capital stock for property under any circumstances without the permission of the executive council.

It may be in your client's case the court would take your view of the matter, but in view of the importance of right procedure in such cases we feel that our interpretation is at least a safe one.

Yours very truly,

H. W. BYERS.

PUBLIC OFFICER—INTEREST IN CONTRACTS—COUNCILMEN AND CITY RECORDER.—City may contract with its recorder to do printing in matters in which he has no voice or vote.

Des Moines, Iowa, November 11, 1909.

MR. J. B. WILLIAMS,

Bristow, Iowa.

DEAR SIR: I am in receipt of your communication of the 7th instant advising that you are the editor of a newspaper in your town and that you also hold the office of city recorder. You request an opinion as to whether you may lawfully as editor perform services for your city and receive compensation therefor.

Paragraph 14 of section 668 supplement to the code 1907, provides:

> "No member of any council shall, during the term for which he has been elected, be appointed to any municipal office which shall be created, or the emoluments of which shall be increased, during the term for which he shall have been elected; nor shall he be interested, directly or indirectly, in any contract or job of work, or the profits thereof, or services to be performed for the corporation."

Under the common law as repeatedly declared by our supreme court, no public officer is permitted to act in a dual capacity, acting on the one hand as a representative of a municipality or the state, and on the other hand, in his individual capacity.

Bay v. Davidson, 133 Iowa, 688.

Under the doctrine of this case, however, and the statutory provision above referred to, you of course as recorder would be clearly barred from performing any services as editor concerning which you yourself had the authority, either as recorder or acting in conjunction with other officials, to enter into such contract on behalf of the municipality; but the mere fact that you hold a clerical office of the city does not, in my opinion, prevent the city from contracting with you to render the city services in a private capacity concerning matters over which you have no official voice, vote or authority.

Yours very truly,

H. W. BYERS.

BANKS—DUTIES OF STATE AUDITOR.—The auditor should not interfere in behalf of stock holders of a bank unless the matter in hand affects the rights of depositors and creditors.

Des Moines, Iowa, November 16, 1909.

HON. JOHN L. BLEAKLY,

Auditor of State.

DEAR SIR: I am in receipt of your communication of the 30th ultimo advising that the Palo Alto county bank voluntarily liquidated with all of its depositors and creditors in 1906; that thereafter a new bank was organized known as the Emmetsburg National Bank; that the new bank was organized by the directors of the old bank but that a number of the stockholders in the old bank are not included in the stockholders or officers of the new bank, and that such stockholders were otherwise discriminated against by the officers of the National Bank. You request an opinion as to whether in view of the circumstances, the auditor of state has any authority or jurisdiction to take any action to protect the interests of the stockholders in the old bank, such interests in no wise affecting the general creditors and depositors of such bank.

An opinion was given by a former attorney general to the effect that the auditor of state had no jurisdiction to proceed in the interests of stockholders or directors of a bank, if the interests of such stockholders or directors did not in any way concern or affect the depositors and creditors of the bank. With this opinion I wish to concur. In any event I incline to the view that the jurisdiction or authority of the auditor of state is not sufficiently comprehensive to warrant him in interfering on behalf of stockholders in a bank which has voluntarily liquidated, where such interference is not demanded on behalf of the creditors, the depositors or the general public; that is to say, wherever a stockholder's rights are entirely separable and independent from the rights of creditors, depositors and the general public, the auditor of state has no jurisdiction in the premises.

Yours very truly,

H. W. BYERS.

INTOXICATING LIQUORS—PERMIT HOLDERS—REPORT TO COUNTY AUDITOR—FALSE SIGNATURE—HABITUAL DRUNKARDS.—Permit holders must report to county auditor on or before the 15th of bimonthly period all requests for liquor. Applicant making false signature punished. Permit holders violate law in selling to habitual drunkards.

Des Moines, Iowa, November 18, 1909.

MR. STEPHEN HALL,

Toledo, Iowa.

DEAR SIR: I am in receipt of your communication of the 16th instant submitting the following questions:

1. Is it illegal for a registered pharmacist to fail to make return to the county auditor on or before the 15th day of January, March, May, July, September and November of each year of all requests for liquor filled by him and his clerks during the two preceding months?

2. Is there any law prohibiting a person from making false statements in the requests signed by him in order to secure liquor of a permit holder?

3. What is the penalty prescribed in case a registered pharmacist, who is a permit holder, sells intoxicating liquors to persons who are in the habit of becoming intoxicated?

In reply thereto I have to say:

First. Section 2397 makes it mandatory upon permit holders to make returns under oath on or before the 15th day of January, March, May, July, September and November of each year to the county auditor.

Second. Section 2395 of the code provides that any person who shall make any false or fictitious signature, or sign any name other than his own to any paper required to be signed, or make any false statement in any paper or application signed to procure liquors, the person so offending shall be punished by a fine of not less than twenty dollars nor more than one hundred dollars and costs of prosecution and shall be committed until said fine and costs are paid, or shall be imprisoned not less than ten nor more than thirty days.

Third. Any permit holder who sells intoxicating liquors to a person who uses intoxicating liquors as a beverage, and who is in the habit of becoming intoxicated, is subject to indictment, or he may be permanently enjoined for maintaining a liquor nuisance,

his permit revoked, in which event, under a law passed by the last general assembly, he would not again be permitted to sell intoxicating liquors for any purpose in this state for a period of five years. The mulct tax should also be assessed against him in case he is selling intoxicating liquors as a beverage.

Yours very truly,

H. W. BYERS.

TERMS OF COURT—PUBLICATION OF SCHEDULES.—Since the repeal of section 232 code supplement there is no provision for publishing schedule of terms of court.

Des Moines, Iowa, November 22, 1909.

COUNTY ATTORNEY T. M. DOUGHERTY,

New Market, Iowa.

DEAR SIR: I am in receipt of your communication of the 18th instant stating that you have advised the board of supervisors that since the taking effect of chapter 10, acts of the thirty-third general assembly there is no longer any authority for the publication of the schedules showing the terms of district court held throughout the judicial district.

I think you are entirely correct in your interpretation of the law. Chapter 10 of the thirty-third general assembly expressly repeals section 232, supplement to the code, 1907, which authorized the publication of the schedule of the terms of court once each week for four weeks in some weekly newspaper published in each county. Chapter 10 aforesaid, as it was originally introduced, retained the provision authorizing publication, but the bill was amended eliminating this provision.

Yours very truly,

H. W. BYERS.

RAILROADS—SIXTEEN HOUR LAW—WHEN CREWS ARE CONSIDERED ON DUTY.—Under the sixteen hour law the time begins to run when men report for service.

Des Moines, January 17, 1910.

MR. J. H. FUNK,

Iowa Falls, Iowa.

DEAR SIR: I am in receipt of your communication of the 29th ultimo requesting an interpretation of section 2110-a, code supple-

ment, 1907, and specifically as to whether the sixteen hours begin to run from the time train crews are called for service, or whether the time begins to run when the crews actually take charge of the trains.

It is my opinion that the time starts when the crews assume their duties; that is to say, when the crews are called and report for service at the time fixed in the call so that they are thereafter subject to any order of the company and in readiness to carry out such order, the crews are as clearly then on duty as though they were actively engaged in the management of the trains.

Of course this would not be true if the train master relieves them for a definite time. In such an event, the time in question should be deducted.

Yours very truly,

H. W. BYERS.

INSURANCE—ILLEGAL COMBINATION.—The Iowa "Anti Trust" law applies to insurance companies which combine on rates.

Des Moines, Iowa, February 2, 1910.

WEBSTER BROTHERS,

Waucoma, Iowa.

GENTLEMEN: I am in receipt of your favor of the 24th ultimo in which you submit the following proposition:

> "We would like to ask if there is anything in the trust laws to prohibit insurance companies from putting their rate making powers into the hands of one man. The inspection bureau, as they call it, at..... makes the rates for all the insurance companies absolutely."

In reply thereto I submit the following:

Section 5060 of the code provides:

> "Any corporation organized under the laws of this or any other state or country for transacting or conducting any kind of business in this state, or any partnership, association or individual, creating, entering into or becoming a member of or a party to any pool, trust, agreement, contract, combination, confederation or understanding with any other corporation, partnership, association or individual, to regulate or fix the price of any article of merchandise or commodity, or to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this

state, shall be guilty of a conspiracy."

The above section is a re-enactment, with some changes, of section 5454 of McClain's code. In construing the section, the supreme court of Iowa said in the case of *Beechley v. Mulville*, 102 Iowa 602 at 608:

> "It is thought by appellants that such statute has no application to insurance companies, but the only reason assigned for it is that the same subject has been before each successive legislature since the act passed, and no one has thought that the act referred to such companies. However that may be, we have no doubt of its application to insurance companies because of the language of the act. There is a manifest purpose to make the section comprehensive as to the subject-matter, as well as to persons, both natural and artificial, coming within its prohibitions. It prohibits combinations to fix the price of oil, lumber, coal, grain, flour, provisions, or any other commodity, or article whatever. Insurance is a commodity. 'Commodity' is defined to be that which affords advantage or profit. Mr. Anderson, in his law dictionary, defines the word as 'convenience, privilege, profit, gain; popularly, goods, wares, merchandise.' We see no reason why, in the act, the word should be restricted to its popular use. It is common to speak of 'selling insurance.' It is a term in insurance business, and law writers have, to quite an extent, adopted it. Again, there are the same reasons why it should be protected against combinations as there are in matters clearly within the provisions of the law. The district court instructed the jury that the combination was prohibited by the act in question, and we think the holding was right."

While the statements in your letters are not as comprehensive as I would like to have them in order to give definite conclusions in the case you mention, yet under the facts stated in your letter, it is my opinion the acts of the insurance companies in the city you mention would bring them within the purview of section 5060 of the code.

Yours very truly,

CHARLES W. LYON.
Assistant Attorney General.

ROADS—DRAGGING—COMPENSATION. The fifty cents per mile allowed for dragging roads means fifty cents for each mile dragged and not fifty cents for each trip one mile in length.

Des Moines, Iowa, February 2, 1910.

MR. FRANK C. CORY,

What Cheer, Iowa.

DEAR SIR: I am in receipt of your favor of the 26th ultimo in which you ask to be advised as to what is the proper compensation to be allowed for dragging roads under the provisions of section 1, chapter 101, acts of the thirty-third general assembly.

Section 1 of said chapter, so far as it is material to the question under consideration, provides:

> "The township trustee shall have all the main traveled roads, including mail routes, in their townships dragged at such time as in their judgment is most beneficial, and they shall contract at their April meeting to have a given piece of road dragged at a rate not to exceed fifty cents per mile for each mile traveled in dragging."

It is my opinion that it was the legislative intent that fifty cents per mile should be allowed for each mile of road dragged, and not fifty cents for each trip if more than one was made by the party in dragging the mile of road in question.

Yours very truly,

CHARLES W. LYON,
Assistant Attorney General.

PRIMARY ELECTION—CITIES AND TOWNS—ALPHABETICAL LIST—DUTY OF CITY AUDITOR—OFFICIAL BOOKS AND RECORDS.—Alphabetical lists for use in city primaries to be made up from June primary list. It is the duty of city auditor or clerk to make list. County auditor determines under what circumstances he may permit withdrawal of records from his office.

Des Moines, February 4, 1910.

MR. M. F. DONEGAN,
City Attorney,
Davenport, Iowa.

DEAR SIR: I am in receipt of your communication of the 28th ultimo submitting the following questions:

1. In making up the alphabetical list of names to be used at the

municipal primary election, should the list be made from the poll books of the last primary election held in June, 1908, or should the list be made from the last city election?

2. If the alphabetical list to be used at the coming municipal primary election should be prepared from the poll books used at the last primary election in June, should the list be made by the county auditor or the city auditor or city clerk?

3. Has the city auditor the right to withdraw the poll books from the county auditor's office and take the same in his possession in his own office for the purpose of making the list?

First. Section 1087-a7, Supplement to the Code, 1907, provides that the voter's selection at the June primary in 1908 should constitute his declaration of party affiliation. It is therefore my opinion that the alphabetical lists to be used by judges of election should be made from the poll books used at the primary election in June, 1908, for all succeeding primaries, both state and municipal.

Second. The provision found in the above named section which requires the county auditor to prepare for each voting precinct two of the above mentioned lists taken from the poll books of the last preceding primary election, which he shall deliver to the succeeding primary boards, does not, in my opinion, contemplate that the county auditor shall prepare the lists to be used at the municipal primary election. This position is made evident by section 1087-a34, which provides in part that "the duties devolving upon the county auditor by the foregoing provisions of this act shall, in municipal elections, devolve upon the city auditor." Under this latter provision it becomes the duty of the city auditor or city clerk to prepare the alphabetical lists for the municipal election.

Third. This department has no authority to say that county auditors must permit municipal officers to withdraw certain books kept in the custody of the county auditor. The county auditor being responsible for all records and papers in his charge, it is incumbent upon him to determine under what circumstances and conditions he will permit the withdrawal of books and papers in his custody.

Yours very truly,

H. W. BYERS.

RAILROAD—TELEGRAPH OPERATORS—NINE HOUR LAW—EMPLOYER LIABLE FOR PENALTY.—Where a station is a day station only an operator may work 13 hours. The penalty for violation of nine hour law is applicable to employer and not employee.

Des Moines, Iowa, February 5, 1910.

MR. J. B. PAINTER,

Reinbeck, Iowa.

DEAR SIR: I am in receipt of your communication of the 9th ultimo requesting to be advised as to the nine hour law relating to telegraph operators.

Section 2 of the Compiled Statutes of the United States 1901, provides:

> "That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hour period on not exceeding three days in any week."

You will observe that where a station is a day station only, an operator may be kept on duty for a period not to exceed thirteen hours except in case of an emergency. The penalty prescribed does not apply to the employee but only to the corporation, officer or agent who has charge of the operator or other employee.

Yours very truly,

GEORGE COSSON,
Special Counsel.

PRIMARY ELECTIONS—ALPHABETICAL LISTS—HOW MADE UP—In making up alphabetical list for use at June primary, 1910, auditor should take the June, 1908, list and add thereto names of additional persons voting at November, 1908, primary. For use in subsequent primaries corrections should be made as changes occur.

Des Moines, February 10, 1910.

MR. H. B. FRASE,
County Auditor,
Des Moines, Iowa.

DEAR SIR: I am in receipt of your communication of the 8th instant requesting an interpretation of section 1087-a7 of the supplement to the code, 1907, and specifically as to whether in making up the alphabetical lists as therein specified you should (1st) include in said lists only qualified electors voting at the June, 1908, primary; or (2d) whether you should include only those who voted at the November, 1908, primary; or (3d) whether you should include in said lists all qualified electors voting at the primary in June, 1908, and add to the lists those who voted at the primary in November, 1908, and did not vote at the June, 1908, primary.

Section 1087-a7, supplement to the code, 1907, fixed the June primary in 1908 at which all qualified electors participating in said primary might select and determine their party affiliation; that the voter's selection should constitute his declaration of party affiliation; that the election board should record his name and check his declaration of party affiliation on the poll books.

Said section further provided that:

> "Copies of the names and party entries on such list, together with the changes of party affiliation as hereinafter provided, arranged alphabetically by surnames, shall be used at subsequent primaries for determining with what party the voter has been enrolled, and no voter enrolled under the provisions of this act shall be allowed to receive the ballot of any political party except that with which he is enrolled, but he may change his enrollment as hereinafter provided. The county auditor shall prepare for each voting precinct two of the above mentioned lists duly certified by him, and taken from the poll books for the last preceding primary election, which he shall deliver to the succeeding primary election boards in the year nineteen hundred ten and biennially thereafter, at least one day prior to the day of the primary election, and which lists, together with the poll books of the primary election, shall be returned to the said auditor in good condition within twenty-four hours after the primary election, to be preserved by him."

At a special session of the thirty-second general assembly provision was made for holding a primary under certain conditions at the November election, and pursuant to said act a primary election

was held in November, 1908. Persons voting at the November, 1908, primary election were required to declare their party affiliation by the making of a written or printed request to the judges of election, stating the party with which they were affiliated, and the names of all persons voting at said primary election were duly recorded in separate poll books.

It is my opinion, therefore, that all the provisions of the primary law, including the general primary law passed by the thirty-second general assembly, and also the November primary passed by the special session of the thirty-second general assembly, should be construed together; that the alphabetical lists used at the June, 1908, primary should be taken and there should be added thereto the names of all persons voting at the last preceding primary, which was the November, 1908, primary. The lists thus made will be used at all subsequent primaries by correcting the same with each succeeding primary showing thereon the changes made as evidenced by the last preceding primary, as by law provided.

By no other construction can we harmonize all of the provisions of section 1087-a7. Moreover, a different construction would require a considerable number of persons who had already declared their party affiliation to again declare the same at a succeeding primary. This was certainly not the intention of the legislature.

Yours very truly,

H. W. BYERS.

PUBLIC LIBRARY—MAY NOT ISSUE BONDS TO PURCHASE LOT—MAY ISSUE WARRANTS OR NON-NEGOTIABLE NOTES.

Des Moines, Iowa, February 11, 1910.

MISS ALICE S. TYLER,
Secretary of Library Commission,
Des Moines, Iowa.

DEAR MISS TYLER: I am in receipt of your communication of the 12th ultimo, enclosing a letter from Mrs. Heckert, one of the trustees of the public library of Missouri Valley, requesting an opinion as to whether the trustees may lawfully issue bonds in anticipation of the tax levy made by the city council for the purpose of purchasing a lot upon which to construct a library, without a vote of the people.

The authorities upon this proposition seem to be in conflict. I have given the matter careful consideration and have come to the

conclusion that under the later decisions you would have no authority to issue negotiable bonds for the purpose of purchasing the lot in question in the absence of an express statute so authorizing, and I find no such statute. You may, however, under section 898, supplement to the code, 1907, issue warrants or non-negotiable promissory notes in anticipation of your revenues for the fiscal year in which the loans are negotiated or warrants issued, but the aggregate amount of such loans and warrants shall not exceed the estimated revenue of your city for the fund or purpose for which the taxes are to be collected for such fiscal year.

See *Witter v. Board of Supervisors*, 112 Iowa, 380.

Swanson v. City of Ottumwa, 131 Iowa, 540, and cases cited.

Yours very truly,

H. W. BYERS.

TAXATION—SOLDIER'S EXEMPTION.—Where a soldier has property of the value of $5,000.00 or over, no matter where situated, he is not entitled to exemption to the extent of $800.00.

Des Moines, Iowa, February 21, 1910.

MR. J. C. EMERY,

Maurice, Iowa.

DEAR SIR: I am in receipt of your communication of the 13th instant advising that you are a soldier of the civil war; that you do not own property within the state to the value of five thousand dollars, but do own property outside the state worth five thousand dollars. In view of this you request an opinion as to whether you are entitled to the exemption of eight hundred dollars.

The department is not authorized to give official opinions except to the various departments of state, but since you have made the request I may say to you personally that I believe the exemption does not apply where the soldier owns property of or exceeding the value of five thousand dollars, and it would not matter where the property was located.

Yours very truly,

H. W. BYERS.

PRIMARY ELECTIONS—PROHIBITION OR SOCIALIST PARTY—RIGHT TO HAVE TICKET PRINTED in county where they cast two per cent of vote at preceding election.

Des Moines, Iowa, March 5, 1910.

THE TELEGRAPH-HERALD,
Dubuque, Iowa.

GENTLEMEN: I am in receipt of your letter of the 26th asking for an opinion on the following question:

If the prohibition or socialist party casts over two per cent in a county of the total votes cast in 1908, could they have a county ticket placed on the ballot at the primary election of 1910?

I very much doubt the propriety of giving even my personal views on questions of this kind to a private individual, as it is the duty of this office to furnish opinions to the different departments of the state and state officials. However, as a matter of courtesy to you and for your own information, I submit my personal views.

After a careful reading of section 1098 of the code of 1897 I am satisfied that any party which at the general election next preceding polled at least two per cent of the entire votes cast in any county of the state may in such a county make a nomination for each office to be filled, regardless of the fact that their candidate for governor in the preceding general election did not receive two per cent of the total votes cast in the state at such election.

Yours truly,

H. W. BYERS.

ELECTIONS—CITIES AND TOWNS—ENDORSEMENT OF CANDIDATES BY OPPOSING FACTION—METHOD OF VOTING—NAMES OF PARTIES.

Des Moines, Iowa, March 21, 1910.

MR. E. H. ANDERSON,
Town Clerk,
Ossian, Iowa.

DEAR SIR: I am in receipt of your favor of the 21st instant in which you state that at caucuses held in your town two tickets have been placed in the field for town officers, one known as Citizens' Union, and the other as Progressive, and also that the Progressive caucus endorsed as candidates for treasurer and assessor the same persons who had been previously nominated by the Citizens' Union caucus, and you ask to be advised upon the following propositions:

1. Should the names be printed on the ballot under the head of Citizens' Union and Progressive captions?

2. If an elector places an X before the names of candidates who appear opposite each other on the ticket, would each vote count provided the elector votes for five councilmen only, five being the number to be elected?

3. Is the endorsement by one caucus of the candidates nominated at another caucus legal?

In reply to your inquiry I beg to submit the following:

First. In reply to your first question will say, that under the provisions of section 1098 of the code it is my opinion that it would be entirely proper for you to print the two tickets under the head of Citizens' Union and Progressive, as you state that both of these parties were in the field in 1908 and both received at least two per cent of the entire vote cast.

Second. In reply to your second question will say that so long as the elector does not vote for a greater number of councilmen than the number to be elected, it is immaterial so far as the counting of the vote is concerned as to which candidates he votes for on the different tickets.

Third. It is entirely proper and legal for the caucus of one party to endorse the candidates nominated by another caucus.

Yours very truly,

CHARLES W. LYON,
Assistant Attorney General.

ATTORNEY FEES—PAID BY STATE.—Where a state officer entered into an agreement to pay attorney fees prior to the enactment of chapter 154, acts of the 33d general assembly, such agreement is not affected by that enactment.

Des Moines, March 26, 1910.

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

DEAR SIR: I am in receipt of your communication of February 5th advising that there has been filed with the executive council a claim by Thomas & Thomas, of Maquoketa, Iowa, for attorney fees in the trial of the case of Little v. Green in the justice court in the amount of twenty-five dollars under date of June 18, 1906; under date of June, 1907, a charge is made for perfecting an appeal in

the district court in the amount of fifty dollars; under date of December, 1908, services in perfecting appeal to the supreme court in the amount of two hundred twenty-five dollars, making a total of three hundred dollars.

An opinion is desired as to whether the statute now authorizes these bills to be paid. All of the bills were contracted prior to the enactment of chapter 154, acts of the thirty-third general assembly, the retention of the attorneys being made by George A. Lincoln, state fish and game warden, during the year 1906.

It is my opinion that Mr. Lincoln had authority to enter into the above agreement with Messrs. Thomas & Thomas; that the agreement being legal at the time, it is not affected by a subsequent change in the law, and that therefore the bill should be allowed and paid.

Yours very truly,

H. W. BYERS.

CENSUS—OFFICIAL CENSUS OF IOWA—THE PRINTED REPORT known as "THE CENSUS OF IOWA, 1905," is the official census of the state.

Des Moines, March 26, 1910.

MR. A. H. DAVISON,
Secretary Executive Council,
State House.

DEAR SIR: I am in receipt of your communication of the 23d instant in which you set out the facts and circumstances regarding the method of compiling statistics and preparing abstracts of the same in connection with the census of Iowa for the year 1905, and request an opinion based upon the facts therein stated on the following question:

> "What is the official census of Iowa for 1905, and would the secretary of state or this office be justified in making any certificate varying from the facts set forth in the printed report,—table one, pages 2 to 382?"

Under the facts stated by you, the printed report known as "The Census of Iowa, 1905," compiled under the direction of the executive council, is the official census of the state, and we do not believe that the executive council or the secretary of state would be justified in making any certification at variance with the report, or the certification of such report by the officer in charge of the office at the time the report was compiled and certification made of its contents.

Yours very truly,

H. W. BYERS.

FISH AND GAME—SALE OF BY HOTEL KEEPER TO GUESTS—PURCHASE OF GAME BY WARDENS.—Where a hotel keeper serves game to guests as a part of a meal he is guilty of violation of the law. Deputy game wardens may purchase game for the purpose of detecting offenses without being subject to punishment for such purchase.

Des Moines, April 16, 1910.

HON. GEORGE A. LINCOLN,

State Fish and Game Warden,

Cedar Rapids, Iowa.

DEAR SIR: I am in receipt of your letter of the 8th instant in which you request my opinion on the following questions:

1. Under section 2554 of the code, as amended by section 6, acts of the thirty-third general assembly, is it lawful for a hotel keeper to serve game birds to his guests?

2. Are deputy game wardens who pay for meals at which game birds are served, the selling of which is in violation of law, guilty of a violation of the statute?

First. Section 6, acts of the thirty-third general assembly, reads as follows:

> "It shall be unlawful for any person, firm or corporation to buy or sell, dead or alive, any of the birds, game or animals named in this chapter, and it shall be unlawful to have the same in possession during the period when the killing of such birds, game or animals is prohibited, except during the first five days of such prohibited period; and the possession by any person, firm or corporation of any such birds, game or animals during such prohibited period, except during the first five days thereof, shall be presumptive evidence of the violation of this chapter relating to game, and he or they shall be held to be guilty of a misdemeanor and shall be punished as provided for in section 2556 of the supplement to the code, 1907."

It is my opinion that where a hotel keeper serves game to his guests as a part of the regular meals of the hotel and for which he receives pay, he would be guilty of making such a sale as is prohibited by statute.

In answer to your second question, I would say that where deputy wardens purchase game at a hotel for the purpose of assisting in the enforcement of the law and as a means of accumulating evidence

against an offender, they are not guilty of an offense. Officers undoubtedly have the right to use such means to ferret out offenses and apprehend those who may be violating the law.

Yours truly,

H. W. BYERS.

PRIMARY ELECTION—NOMINATION PAPERS—FILING TWO SETS OF PAPERS BY ONE CANDIDATE.—Where a set of nomination papers is defective a second set may be filed.

Des Moines, May 6, 1910.

COUNTY ATTORNEY R. L. MCCORD,
Sac City, Iowa.

DEAR SIR: I am in receipt of your favor of the 4th instant in which you state that a candidate for a county office filed with the county auditor nomination papers circulated by himself and the affidavit as to the signatures was made by himself. Later, upon being advised that it was contrary to the statute for candidates to circulate and make affidavit as to signatures on his own nomination paper, he had prepared and circulated another set of nomination papers, which papers, so far as the circulation and affidavits are concerned, are in regular form, and offered said set for filing with the county auditor. You wish to be advised as to whether the county auditor should accept and file said second set of nomination papers.

In reply thereto will say that in my opinion the said second set of papers should be received and filed by the county auditor.

We have in mind that portion of section 1087-a10 of the supplement to the code which provides: A nomination paper, when filed, shall not be withdrawn, nor added to, nor any signature thereon revoked," but we do not believe that the filing of the second set of nomination papers in question would be in any way irregular, or that the same would be prohibited under the provisions of the statute above quoted.

Yours very truly,

CHARLES W. LYON,
Assistant Attorney General.

PRIMARY ELECTION—COUNTY SUPERINTENDENT—QUALIFICATION OF CANDIDATE.—It is necessary for a primary candidate for office of county superintendent to possess a first grade certificate, state certificate or life diploma.

Des Moines, May 19, 1910.

MR. D. W. TURNER,
Corning, Iowa.

DEAR SIR: I am in receipt of your favor of the 18th instant in which you ask to be advised as to whether "in order for one to run for the nomination for county superintendent of schools it is necessary to have a first grade certificate."

In reply will say that section 2734-b of the code supplement, 1907, provides:

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

Section 1087-a10 provides in part as follows:

> "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," etc.

It is apparent from a reading of the sections above quoted:

First. That in order to be eligible to the office of county superintendent, the person must be a holder of a first grade certificate, or of a state certificate or of a life diploma, as the case may be.

Second. In order to be entitled to become a candidate, the person must make affidavit that he is eligible to the office.

It is my opinion, therefore, that in order to be a candidate for the office of county superintendent it will be necessary for the person to be the holder of a first grade certificate, or of a state certificate or of a life diploma.

Yours very truly,
CHARLES W. LYON,
Assistant Attorney General.

PRIMARY ELECTION—PUBLICATION OF NOTICE—WHAT TO CONTAIN. It is only necessary to publish date of election, offices to be filled and time of opening and closing polls.

Des Moines, May 21, 1910.

MR. W. M. WELLS,
County Auditor,
Guthrie Center, Iowa.

DEAR SIR: I am in receipt of your favor of the 19th instant in

which you wish to be advised as to whether the names and addresses of candidates should be contained in the notice of a primary election which the county auditor is required to publish.

In reply thereto will say that under the provisions of section 1087-a12 of the 1907 supplement to the code, the names and addresses of candidates were required to be published but the thirty-third general assembly, in the enactment of section 5, chapter 69, acts of the thirty-third general assembly, so amended the section in question as to make the publication of names and addresses of candidates, in the notice of primary election, unnecessary. All that is required in the published notice is the date of the primary election, the offices to be filled thereat, and the time of the opening and closing of the polls.

Yours very truly,

CHARLES W. LYON,
Assistant Attorney General.

PRIMARY ELECTION—BALLOTS.—Ballots used by different parties must be uniform in size.

Des Moines, May 24, 1910.

MR. WALTER H. BEAM,
County Auditor,
Indianola, Iowa.

DEAR SIR: In reply to your communication over the telephone in which you asked to be advised as to whether the ballots used at the primary by the different political parties should be the same size, will say that section 1087-a13 provides in part as follows:

> "The names of the candidates of each political party for nomination for the several offices, and for party committeemen and blank spaces for the delegates to the county convention shall be printed in black ink on separate sheets of paper, uniform in color, quality, texture and size, with the name of the political party printed at the head of said ballots," etc.

Under the provisions of the section above quoted, it is my opinion that the ballots used by the different political parties at the primary should be of uniform size, even though there is but one or two names appearing upon the ballot of some one political party.

Yours very truly,

CHARLES W. LYON,
Assistant Attorney General.

PRIMARY ELECTION—NOMINATION PAPERS—DUTY OF COUNTY AUDITOR TO FILE—NOMINATION OF CANDIDATES WHOSE NAMES ARE NOT PRINTED ON BALLOT.—If nomination papers are regular on their face it is the duty of county auditor to file. Where no name is printed on ballot as candidate for an office, voters may write in name.

Des Moines, May 24, 1910.

COUNTY ATTORNEY CHAS. E. SCHOLZ,
Guttenberg, Iowa.

DEAR SIR: I am in receipt of your favor of the 16th instant in which you state:

First. That nomination papers were circulated in your county for A for clerk of the district court. The required number of signatures were secured, but A then refused to become a candidate for nomination, whereupon X, who circulated the nomination papers for A, erased the name of A from the caption of said paper and placed thereon the name of B, without consulting or getting the consent of the persons who signed the nomination papers for A, and you wish to be advised as to whether or not the nomination papers for B are legal. (I have used the letters in place of names stated in your letter.)

In reply thereto will say that the duty of the county auditor relative to the filing of nomination papers is purely ministerial, and when the papers presented for filing appear regular upon the face, it is his duty to file them. If there has been irregularity in connection with the procuring of the signatures or the filing of the papers, there is a remedy, but the county auditor is not to be the judge as to the legality of the papers in question.

Second. You state that you are a candidate for the nomination for county attorney on the democratic ticket and that no one has filed nomination papers entitling him to become a candidate on the republican ticket. You wish to be advised as to whether it is possible for a republican candidate to be nominated at the primaries, and whether the name of such nominee should be placed on the ticket for the election in November.

In reply thereto will say that if the name of some person is written in the blank space as a candidate for the nomination for county attorney, he would become the republican candidate for the office, and his name should be placed on the ballot at the November election. However, if several different names are written on the republican primary ballot for the office of county attorney,

and no one receives 35 per cent of the vote cast for said office, then it is my opinion that the republican county convention would be authorized to place in nomination a candidate for the office.

Yours very truly,

CHARLES W. LYON,
Assistant Attorney General.

PRIMARY ELECTION—NOMINATION PAPERS—REQUIRED PER CENT OF SIGNATURES, HOW COMPUTED—SIGNING OF MORE THAN ONE PAPER FOR SAME OFFICE—AFFIDAVIT AS TO SIGNATURES MADE BY ONE SIGNING PAPERS—DUTY OF COUNTY AUDITOR WITH REGARD TO FILING NOMINATION PAPERS.

Des Moines, May 24, 1910.

MR. A. S. CLARK,
County Auditor,
Mason City, Iowa.

DEAR SIR: I am in receipt of your favor of the 17th instant in which you submit the following questions, and ask to be advised thereon:

"First. The law provides that such papers must be signed by two per centum of the votes cast for the 'head of the ticket.' At the last general election (republican, say) the highest vote for presidential elector was 2,990, for the lowest presidential elector 2,861, and for governor 2,773. On which vote is the number required to be computed?

"Second. The law requires that the voter shall sign but one such nomination paper. The names of several voters appear on the nomination papers of two candidates. All of the names were signed on one before these persons signed the second. Are these names to be counted on either one of the papers, and if on one, which one is it? Are they not rather to be rejected from both?

"Third. The affidavits to one set are made by a qualified elector, but he himself is a signer of the nomination paper. Is this in any wise illegal and wherein?

"Fourth. With respect to one such nomination paper, it is alleged that the candidate himself circulated the same and procured the signatures thereto; and that the person who signed and made the required affidavit was not present when

the signatures were procured, and had no personal knowledge of the matters in relation thereto, and which the language of the law clearly indicates, must be within the personal knowledge of such affiant. It would seem that these circumstances would render such a nomination paper insufficient, but, of course, they do not appear on the face of the paper. It is offered to show the alleged facts by affidavits or the production of evidence in any way that may be required. What is the auditor's duty in respect hereto?''

I will reply to these questions in the order in which they are submitted.

First. The percentage should be figured on the vote for the head of the ticket; that is to say, for the primary to be held this year June 7th, it would be figured on the vote for the presidential elector whose name apears first on the ballot.

Second. Where a voter signs two nomination papers for the nomination of candidates for the same office, his name should not be counted on either paper.

Third. Where the person circulating a nomination paper, and who makes affidavit as to the signatures thereon, also signs said nomination paper, his signing would not make the nomination paper illegal, but his name would not be counted among the signers of said paper.

Fourth. Under the conditions stated in your fourth question, the party making the affidavit has not only violated the spirit but the letter of the law. If, however, the nomination papers presented to the county auditor for filing appear to be regular upon their face, it is his duty to file them. As regards the filing of nominanation papers, the duties of the county auditor are purely ministerial.

Yours very truly,

CHAS. W. LYON,

Assistant Attorney General.

PRIMARY ELECTIONS—NOMINATION PAPERS—METHOD OF SIGNING—''DITTO MARKS''.—Ditto marks may be used to indicate residence of a signer on a nomination paper.

Des Moines, May 26, 1910.

MR. F. D. MCKAY,

Deputy County Auditor,

Adel, Iowa.

DEAR SIR: I am in receipt of your favor of the 25th instant

enclosing nomination paper and asking to be advised how many names thereon should be considered legally signed.

The nomination paper you enclose contains twenty names, the first two writing out their name and address, "Adel, Iowa," and the date, "May 21, 1910," in full. The following fifteen persons signing their names did not write the address nor the date in full, but indicated their residence "Adel, Iowa," and the date, "May 21, 1910," by ditto marks. You wish to be advised as to whether this is a sufficient indication of address and date.

Section 1087-a10 of the 1907 supplement to the code, as amended by section 4, chapter 69, acts of the thirty-third general assembly, requires that "each signer of a nomination paper shall add his residence with street and number, if any, and date of signing."

The said section further provides: "For all nominations, all signers of each separate part of a nomination paper shall reside in the same county."

The purpose of the statute is to enable those whose duty it is to pass upon the legality of the nomination papers to definitely locate the signers of the petition.

"Ditto" marks are to be read as a repetition of what appears on the line above them, and are as much a part of the English language as are punctuation marks, such as the comma, semicolon, colon and period.

In the case of Hughes v. Powers, 42 S. W. (Tenn.) 1, it is held:

> "They (ditto marks) are often given an important, and sometimes a controlling, part in the construction of general writings, and in the interpretation of legal documents and statutes and constitutions. Being regarded as a part of the language, the court will, of course, take judicial notice of their meaning."

In the case of Steinmetz v. Versailles & O. Turnpike Company, 57 Ind., 457, at 460, it is said:

> "The use of a double comma following the name of a subscriber to articles of association under the name of a specific locality, sufficiently designates such subscriber's residence."

In the case of New England Loan & Trust Company v. Avery, 41 S. W. (Tex.), 673, it is held:

> " 'Ditto marks' are generally understood to mean 'the same as above.' The statute requiring the index to a judgment record to contain the names of plaintiff and defendant is satisfied, where the same party has been defendant in several actions, by

the writing of his name once as defendant in the action first indexed, and the using of ditto marks in place of his name in the titles to the other actions."

It is my opinion, therefore, that the ditto marks used on the nomination paper enclosed by you are a sufficient indication of the residence and date of those signing said paper.

Yours very truly,

CHARLES W. LYON,
Assistant Attorney General.

PRIMARY ELECTION—METHOD OF VOTING FOR PRECINCT COMMITTEEMAN.—Names must be written in blank space on ballot.

Des Moines, June 3, 1910.

HON. FRANK NIMMOCKS,

Ottumwa, Iowa.

DEAR SIR: In your communication over the telephone yesterday you stated that in several precincts in your county no one had filed an affidavit of candidacy for the office of precinct committeeman, and you wish to be advised as to whether it would be proper to print the name of some person upon a slip of paper and paste the said slip on the ballot in the space left vacant for candidates for committeemen.

In reply thereto will say that the 33d general assembly provided that candidates for committeemen might have their names placed upon the primary ballot by filing an affidavit of candidacy at least fifteen days prior to the primary election date. There is an express provision in the primary election law (section 1087-a25, code supplement) that the names of candidates for delegates to the county convention shall be written *or pasted* upon the ballot, but I know of no provision in the primary law which would authorize the pasting upon the ballot the name of a candidate other than candidates for delegates to the county convention.

It is my opinion, therefore, that it would not be proper to paste the name of a candidate for committeemen upon the ballot, but that such name should be written upon the ballot in the space left blank for that purpose.

Yours very truly,

CHARLES W. LYON,
Assistant Attorney General.

PRIMARY ELECTION—WHO ENTITLED TO VOTE.—A person voting at a primary election must have the qualifications necessary to entitle him to vote at a general election.

Des Moines, June 3, 1910.

ATTORNEY J. W. COREY,

Spencer, Iowa.

DEAR SIR: I am in receipt of your favor of the 2d instant in which you submit the following propositions:

"First. A man who moves from the state of Minnesota and is a citizen of the state of Minnesota, and of the United States, and on June 7th, 1910, has actually lived in Clay county, Iowa, for ninety days or more, but not six months, but will on the day of general election be in the state for six months, with the intention of making that his home, can he vote at the primary election?

"Second. A young man who is twenty years and ten months old on June 7, 1910, but will be twenty-one years old on the day of general election and was born in Iowa or the United States, and has lived in Iowa for more than six months, and in the county of Clay for more than sixty days, can he vote at the primary election?

"Third. Can a man who is a citizen of the United States and has lived in the state of Iowa for more than six months, but moved to Clay county, and has been in that county only forty days on the day of primary election, but will be a full-fledged citizen on the day of general election, can he vote at the primary election?"

In reply to your inquiries will state that section 1087-a2 of the code supplement provides:

"The term 'primary election' as used in this act shall be construed to apply to an election by the members of various political parties for the purpose of placing in nomination candidates for public office, for selecting delegates to conventions, and for the selection of party committeemen."

Section 1087-a1 provides in part as follows:

"The provisions of chapters three (3) and four (4), title six (6), and chapter eight (8), title twenty-four (24), of the code, shall apply so far as applicable to all such primary elections, the same as general elections, except as hereinafter provided."

It is clearly apparent that it was the intent of the legislature to make the primary election an "election," and that a person wishing to vote thereat must have all the qualifications necessary to entitle one to vote at the general election in November. It is my opinion, therefore, that each of your interrogatories should be answered in the negative.

Yours very truly,

CHARLES W. LYON,
Assistant Attorney General.

PRIMARY ELECTION—SELECTION OF DELEGATES TO COUNTY CONVENTION—METHOD OF VOTING.

Des Moines, June 10, 1910.

MR. ARTHUR SPRINGER,
Wapello, Iowa.

DEAR SIR: I am in receipt of your letter of the 9th instant in which you request my opinion regarding the method of voting for delegates to the county convention.

There are two methods provided in section 1087-a25 of the code supplement by which a voter may designate his choice of delegates to the county convention at the primary election. One method is by writing the names of persons of his choice in the blank space provided on the ballot and making a cross in the square opposite the name of each person so written. The other method is by the use of a uniform white paster or pasters containing the names of persons to be voted for as delegates. By the latter method either of two different forms may be used. The paster may contain the names only of the persons to be voted for as delegates, and the voter shall make a cross in the square provided on the ballot opposite the name of each person on the paster for whom he desires to vote, or pasters may be used upon which are printed squares opposite the names printed thereon, and the voter may vote for delegates by making a cross in the square opposite the name of any person for whom he desires to vote. Marking of the ballot with reference to delegates or marking pasters to be attached to the ballot must be done by the voter himself while in the voting booth, or by some one designated by him where he is unable to write after he receives the ballot and before depositing it. It is entirely improper and illegal for a voter to use a paster that has been marked either

by himself or some one for him before he enters the booth, except that where a voter cannot write he may request some one to mark his delegate ticket for him, but this must be done after he receives his primary ballot. Not only must the voter mark his delegate ticket in the manner herein set out, but where the paster method is used he must attach the paster to his ballot while in the booth.

Yours very truly,

H. W. BYERS.

COUNCIL PROCEEDINGS—ANNUAL REPORT OF CITIES—PUBLICATION.

It is optional with council to have council proceedings published. Annual report of municipality must be published.

Des Moines, June 22, 1910.

MR. A. H. SNIFF,

Missouri Valley, Iowa.

DEAR SIR: I am in receipt of your communication of the 17th instant advising (1st) that your city council has for years refused to make and publish in any newspaper the financial affairs of the city; (2d) they have never made a practice of making an estimate of the sums needed in each department for the ensuing year; (3d) they have for years refused to select an official paper in which to publish their ordinances.

Section 1 of chapter 42, acts of the thirty-third general assembly, provides:

> "Immediately following a regular or special meeting of the city or town council, the clerk shall, when so ordered by said council, prepare a condensed statement of the proceedings of said council, including the list of claims allowed, and from what funds appropriated, and cause the same to be published in one or more newspapers of general circulation, published in said city or town, or by posting in one or more public places, as directed by said council."

It has been the ruling of this department that it was entirely optional with the council whether they should publish in a newspaper, or post in one or more public places, a statement of the proceedings of the council.

Referring to your third complaint, my attention has not been directed to any section of the code which makes it mandatory upon a city council to select an official paper in the manner that is required of boards of supervisors.

Section 741-c, supplement to the code, 1907, however, makes it mandatory upon each municipality to make an annual public report, and also provides that "said report shall be published annually at the close of the fiscal year in at least two newspapers of general circulation in said city or town, as the case may be, but if only one paper is so published, then in one, and if none be published, then by posting a copy in three public places in said city or town."

Paragraph 16 of section 668, supplement to the code, 1907, provides that "In cities of the first and second class, the council shall make an appropriation for all the different expenditures of the city government for each fiscal year at or before the beginning thereof," and further provides that "the council of such cities shall advertise in at least two newspapers published in said cities for three weeks, two insertions for each week, for bids for furnishing all supplies of every kind for the several departments of the city, not required to be advertised for by the board of public works; said advertisements to be published two weeks before the beginning of each fiscal year."

I regard the provisions of paragraph 16, section 668 and section 741-c, supplement to the code, 1907, as mandatory, and therefore believe that a proceeding by mandamus would lie to compel the council to comply with the law as set forth in the above sections.

On this point see the late case of Clark et al. v. Lake, County Auditor, 124 N. W., 866. This was an action of mandamus brought in Taylor county, Iowa, before Judge Towner to compel the county auditor to furnish copy to the local newspaper and was decided by our supreme court February 17, 1910.

Yours very truly,

GEORGE COSSON,
Special Counsel.

INTOXICATING LIQUOR—TRANSPORTATION—DRAYMAN.—Where liquor is shipped by express from outside the state it may be delivered at purchaser's residence by a drayman employed by express company, such delivery being a part of interstate shipment.

Des Moines, June 27, 1910.

MR. H. W. TERRELL,
Mt. Ayr, Iowa.

DEAR SIR: I am in receipt of your communication of the 23d instant requesting an opinion as to the right of a drayman to haul

liquor from the express office and deliver it to the residence of the consignee.

Our law prohibits the transportation of liquor between points within the state of Iowa. See sections 2419 to 2421, inclusive, of the code. The supreme court of the United States, however, has held that under the commerce clause of the federal constitution, liquor shipped from one state into another state is not subject to the state law until it arrives at its point of destination and is there delivered to the consignee.

Under the holdings of the United States supreme court, if some one in Mt. Ayr, for instance, should order of a liquor dealer in some other state a case of liquor to be transported from that state and delivered by the express company to his residence in Mt. Ayr, it would be lawful for the drayman as a part of the interstate shipment to deliver the liquor to the residence of the consignee. If, however, the liquor is shipped to some point in Iowa and the owner goes to the freight or express office and receipts for it, and then places it in the hands of a drayman to be transported to some other point in the state, I believe this would be transportation within the state and therefore prohibited.

Yours very truly,

GEORGE COSSON,
Special Counsel.

OFFICIAL BONDS—SURETY COMPANIES—"CASH CAPITAL"—**Under the statute providing no surety company shall be accepted on any bond which is in excess of ten per cent of their "cash capital" the words "cash capital" mean capital stock.**

Des Moines, July, 9, 1910.

MR. M. F. DONEGAN,
City Attorney,
Davenport, Iowa.

DEAR SIR: I am in receipt of your communication of the 10th ultimo submitting the following questions:

"First. Has the city council or body having the approval of official bonds, the right to approve any bond in excess of ten per cent of the paid up capital stock of such company, or can such body approve a bond in excess of ten per cent of the paid up capital stock, but which is not in excess of ten per cent of the capital and surplus of the surety company?

"Second. Has the city council or body having the approval of official bonds, the right to approve a bond in excess of ten per cent of the paid up cash capital, (whether capital stock or capital and surplus), provided that the surety company furnished proof of having reinsured the amount of such bond in excess of such ten per cent?"

The answer to these questions is governed by the provisions of section 360 of the code and sections 1709 and 1710, supplement to the code, 1907.

Section 360 of the code provides in part that "no such security shall be accepted on any bond for an amount in excess of ten per cent of the paid up cash capital of such company or corporation."

I incline to the view that whenever the words "cash capital" appear in any of the sections above referred to, they refer to capital stock and not merely assets of the corporation.

Section 1710, however, implies that a company may insure in an amount exceeding ten per cent of its paid up capital provided it shall reinsure the excess of over ten per cent of the paid up capital in some other good and reliable company; and further provides that "the restrictions as to the amount of risk a company may assume shall not apply to companies organized to guarantee the fidelity of persons in places of public or private trust," etc.

While this provision was in the code of 1897 and also in the code of 1873, it was re-enacted into law by the thirty-first general assembly, Chapter 71, and is therefore the latest legislative pronouncement on the question. This being true, any provision of this statute which is in direct conflict with this and enacted at a previous time must be considered as repealed by implication.

Your council, however, ought to feel morally certain that the surety company is perfectly good for the amount of the bond before they approve the same.

Yours very truly,

H. W. BYERS.

ELECTIONS—WOMEN VOTING. The failure to provide separate ballot boxes for women where there is but one proposition to be voted on will not invalidate election.

Des Moines, July 14, 1910.

MR. W. J. DIXON,
President Library Board,
Sac City, Iowa.

DEAR SIR: You advise that at a special election held in your city

on the 12th day of July, 1910, the following question was submitted:

"Shall a free public library be established and maintained in Sac City, Iowa?"

That the result of said election showed that 349 votes were cast in the affirmative and 161 votes in the negative; that at said election women with the necessary qualifications were permitted to vote as well as men; that no separate ballot boxes, however, were provided in certain of the voting precincts in said city for the ballots cast by the women, and no separate ballots furnished said women.

You request an opinion as to whether the omission to furnish separate ballots and separate ballot boxes for women, and the further fact that no separate canvass was made of the vote cast by the women at the election will invalidate the entire election.

In my opinion the fact that separate ballots were not furnished the women, no separate ballot boxes were used, and the further fact that a separate canvass was not made, will not invalidate the election, considering that there was only the one proposition voted upon, that no demand was made by anyone for the use of a separate ballot or ballot box, and that it affirmatively appears that if separate ballots and separate ballot boxes had been used, and a separate canvass made, it could in no wise have changed the result of the election.

Yours very truly,

H. W. BYERS.

PUBLICATION—OFFICIAL NOTICE. Legal notices should be published in English.

Des Moines, July 15, 1910.

VOLKSFREUND PUBLISHING COMPANY,
Burlington, Iowa.

GENTLEMEN: I am in receipt of your letter of the 1st instant asking my opinion on the following question:

"Is it lawful to publish an official notice of a city council in a newspaper published in the German language, if said notice is printed in English type in said paper?

"Is it lawful to publish such notice in the translation (German) in such paper, so that the readers would understand the same better?"

I cannot give you an official opinion on this question and submit only my personal views.

I believe that all legal notices should be published in the English language except where there is a specific statute authorizing their

publication in a foreign language as provided in section 441 of the Code.

It is very doubtful if a notice printed in English type in a paper that is published in the German type would be such a legal notice as the law contemplates, although in some states it has been held that this is a legal publication of a notice. The question has never been determined by our courts.

Yours truly,

H. W. BYERS.

MINES.—Kind of oil for lamps used in mine.

Des Moines, September 17, 1910.

MR. M. H. BYERS,
State Oil Inspector,
Des Moines, Iowa.

DEAR SIR: I am in receipt of your communication of recent date requesting an opinion as to whether, under section 2493 of the code, acetylene lamps are in violation of the law.

Section 2493 of the code provides that:

> "Only pure animal oil, paraffine or electric lights shall be used for illuminating purposes in any mine in this state, and for the purpose of determining the purity of oils the state board of health shall fix a standard of purity and establish regulations for testing said oil, and said standard and regulations, when so determined, shall be recognized by all the courts of the state."

This section is mandatory and no oil lamps may be used except those specified therein.

Yours very truly,

H. W. BYERS.

TAXATION.—Taxing of land contracts discussed.

Des Moines, September 24, 1910.

MR. W. C. LEONARD,
Rock Valley, Iowa.

DEAR SIR: I am in receipt of your communication of the 14th instant requesting an opinion as to whether a contract for sale of land given in the fall with a small amount of money paid, balance to be paid March next, and possession and deed then given, is taxable as a credit.

The attorney general is not authorized to give official opinions except to the various departments of state. I will, however, in an unofficial way, direct your attention to the authorities upon this question.

The latest case by our supreme court is *In re* Assessment of Boyd, 138 Iowa, 583. It is there held that an enforcible contract for the sale of land is subject to taxation as against the owner of the land, or one holding the same and having a pecuniary interest therein.

It was held, however, in the case of *In re* Assessment of Shields Brothers, 134 Iowa, 560, that a contract, which, by its terms and by the understanding of the parties thereto, was a mere option to purchase, was not a credit in the hands of the owner and therefore not subject to taxation.

Yours very truly,

GEORGE COSSON.

INTOXICATING LIQUOR—CONSENT PETITION—SIGNATURES.—Names of signers of a consent petition must be identical with such names on the poll lists of preceding election.

Des Moines, September 27, 1910.

MR. C. A. ROWND,
Waterloo, Iowa.

DEAR SIR: I am in receipt of your communication of the 26th instant advising that you are now canvassing a general consent petition to operate saloons in the city of Waterloo, that the petition in many places contains the signature of one man who signs two different names, either enclosing the name in brackets to indicate that it is the same man, or by using the word "or" or "by" between the names; that a sample of such signatures so used is Henry Apple and Henry Apfel; that there are two such families in the city of Waterloo; that another instance is E. A. Swift and E. F. Swift purporting to be the same man.

You request an opinion as to whether if the name Henry Apfel appears on the poll list and Henry Apple signs the consent petition and thereafter puts the name Henry Apfel below the name of Henry Apple with a bracket or something to indicate that the two names are meant for the same person, the name Henry Apple can properly be counted on the consent petition. In other words, may one who signs the general consent petition in his true name, but

who is advised that a similar name appears on the poll books, have his name counted by first writing his true name on the consent petition and then writing some other name of like character below his true name with a bracket or something to indicate that both persons were meant to be one and the same.

Our supreme court in the cases of *Porter vs. Butterfield,* 116 Iowa, 725; *Wilson vs. Bohstedt,* 135 Iowa, 451, and the late case of *Scott vs. Naacke,* 122 N. W. 624, held that the names appearing on the consent petition must be identical with the corresponding names on the poll list if the same are to be counted.

In the last case named the language of the court reads:

> "And names appearing on the petition that are not identical with the corresponding name on the poll list cannot be counted, and this is clearly the doctrine of the Bohstedt case as shown by the abstract.
>
> "If the name of John Brown appears on the poll list, John Smith, who signs the consent petition, has no right to first sign his true name as John Smith, and then sign the name John Brown below and attempt to indicate that both are meant to be one and the same person by bracket or otherwise in order to avoid the clear decisions of our supreme court.
>
> "Indeed, section 2452 of the code provides that "the signing the name of another to any statement of general consent provided for in the sections of this chapter relating to the mulct tax shall be punishable as forgery," etc.

The law contemplates that one man shall only sign his true name according to his usual and customary signature upon the consent petition, and it is not for him to say, when he signs his name John Smith that perhaps the clerks at the last general election recorded his name as John Brown. I think this would be admitted. If, however, he is not permitted to sign two names which are entirely different, he is not legally authorized to sign two names which are somewhat similar, as, for instance, Henry Apple or Henry Apfel; or E. A. Swift and E. F. Swift. Henry Apple is clearly not Henry Apfel and E. A. Swift is clearly not E. F. Swift, and there is absolutely no difference in principle between signing Henry Apple and Henry Apfel and signing John Brown and John Smith.

Yours very truly,

H. W. BYERS.

JURY LISTS—MADE UP FOR BIENNIAL PERIOD.—Under chapter 20, acts of the thirty-third general assembly, the lists are made up to cover the biennial period, and not for each year of such period.

Des Moines, October 7, 1910.

LE MARS PRINTING COMPANY,

Mason City, Iowa.

GENTLEMEN: I am in receipt of your communication of the 4th instant directing my attention to chapter 20, acts of the thirty-third general assembly, and requesting to be advised as to whether the lists to be selected for the panel of the grand jury and petit jury should include the number of names specified in said chapter for each year of the biennial period; or whether the number therein specified is to cover the entire biennial period.

I am of the opinion that the number of persons to be selected is to constitute the number for the biennial period, and not for each year of said period.

Section 1 of said chapter provides in part that "no person on the list of petit or grand juries shall be eligible to serve on more than one grand jury panel *during the biennial period for which the list is made.*"

This makes it clear that the general assembly contemplated that the list be made for the biennial period, and that the number therein specified is not to be selected for each year of said period.

Yours very truly,

H. W. BYERS.

STATE WATERWAYS AND CONSERVATION COMMISSION.—The entire appropriation is available for the use of the commission subject to the officer's fees mentioned in the section.

October 14, 1910.

HON. A. C. MILLER,

Chairman Iowa State Waterways and Conservation Commission,

Des Moines, Iowa.

MY DEAR SIR: Replying to your favor referring to the appropriation made by the legislature for the use of your commission, I have to say, that the question you submit was fully covered by the opinion given to your commission at its first meeting, and your recollection of it as stated in your letter is correct.

The entire appropriation is available for use, limited only by the provisions of section 4 of the act, which provides that not to exceed $1,500.00 per year shall be paid to the secretary, and the further provision that the salary and expense of his assistants, if any are appointed, shall not exceed $1,000.00 in any one year.

Yours very truly,

H. W. BYERS.

RAILROADS—FREE TRANSPORTATION.—A railway company may issue free passes to officers of another company from which it leases a line.

Des Moines, October 22, 1910.

JUDGE GEORGE H. CARR,
Des Moines, Iowa.

MY DEAR SIR: In response to your request for an opinion as to whether or not the officers and directors of the Mason City and Fort Dodge Railroad Company are entitled to free transportation over the lines of its lessee, the Chicago Great Western Railroad Company, within the State of Iowa, I have to say that I am of the opinion that the granting of such transportation would be within the spirit of the so-called anti-pass act, and would not be illegal.

Yours very truly,

H. W. BYERS.

ELECTIONS—CANVASS OF VOTES.—Under section 1138 of the code, judges of election do not have authority to begin a canvass of the vote until the poll is closed.

Des Moines, Iowa, October 27, 1910.

HON. JOHN F. DALTON,
Manson, Iowa.

DEAR SIR: I am in receipt of your letter of the 25th instant requesting me to advise you as to whether it would be legal for the election board to begin a canvass of the votes before the poll is closed.

I do not think that under our statute the ballot box should be opened for any purpose until the poll is closed.

Section 1138 of the code reads as follows:

"When the poll is closed, the judges of election shall forthwith, and without adjournment, canvass the vote and ascertain the result of it, comparing the poll lists and correcting errors therein. Each clerk shall keep a tally list of the count. The canvass shall be public, and each candidate shall receive credit for the number of votes counted for him. The candidate receiving the highest number of votes, if for an office in that precinct alone, shall be declared elected, and judges shall issue certificates accordingly."

In addition to the express direction in the section above quoted that the board shall commence the canvass of the vote *when the poll is closed,* there is the further objection to the plan suggested by you that all of the judges of election are required to be present during the time that the voters are casting their ballots, so that no part of the board could be absent from the polling place for the purpose of canvassing the ballots already cast. Then, too, the section above referred to requires the canvass of the vote to be public, so that under the plan suggested by your board the public would be advised at all times as to the result of the ballot, and you can readily see that where a contest between candidates was close in a precinct there would be quite an incentive for candidates and political workers to resort to corrupt practices in attempting to influence voters.

Yours truly,

H. W. BYERS.

BANKS—EXAMINING COMMITTEE.—The examining committee provided for by section 1871 of the code should be made up of members of board of directors who are not in active charge of the bank.

Des Moines, October 29, 1910.

MR. P. J. KORTH,
Earling, Iowa.

MY DEAR MR. KORTH: I am in receipt of your letter of the 26th instant requesting me to give you an opinion on section 1871 of the code, which relates to the selection by the board of directors of each state and savings bank of an examining committee, and you desire to be advised as to whether the president and cashier of a bank, being also members of the board of directors, should be selected as members of the examining committee.

The evident object of the statute referred to by you is to enable the board of directors to be advised as to the condition of the bank, and that this committee should act as a check on the officers of the bank who are in active charge and management of the business of such bank, so that I do not believe it would be proper for any one who is in charge to be named on the examining committee, and I believe that in many instances where a cashier or president has been named as a member of this committee, the state auditor's office has requested that a change be made on the committee.

Yours truly,

H. W. BYERS.

STATE DRAINAGE AND WATERWAYS COMMISSION—PUBLICATION OF ANNUAL REPORT.—The commission has the power under the act creating it to publish a report.

Des Moines, November 15, 1910.

MR. LISLE V. HITES,

Sec. Iowa State Drainage, Waterways and Conservation Com., Des Moines, Iowa.

MY DEAR SIR: I beg to acknowledge receipt of your letter in which you request my opinion as to whether or not the Iowa State Drainage, Waterways and Conservation Commission has the power under the act creating the commission to publish its report in book form and pay for the same out of the funds appropriated for its use.

In response thereto I have to say that in my opinion the commission not only has the power to publish its report in some permanent and convenient form for distribution and pay for such publication out of the appropriation made in the act referred to, but it is its duty to do so if sufficient funds are available for such purpose.

See opinion on page 230, Attorney General's Report for 1909.

Yours very truly,

H. W. BYERS.

SPEED OF TRAINS—RIGHT OF CITIES AND TOWNS TO REGULATE BY ORDINANCE.—If an ordinance regulating speed of trains within the limits of a city is reasonable and necessary the courts will hold it valid and constitutional.

Des Moines, Iowa, November 30, 1910.

MR. ALBERT HEAD,

Jefferson, Iowa.

DEAR SIR: I deferred answering your letter until it was possible to give the matter proper consideration.

Section 769 of the Code provides in part that "cities and towns shall have power to regulate the speed of trains and locomotives on railways running over the streets or through the limits of the city or town."

This section has been construed by our supreme court in three or four cases; in some, the ordinance passed pursuant to said section was held invalid while in others, it was held valid, the test being as to whether or not the ordinance under all the circumstances considering the population of the town, the question of finances, the question of location and danger and the amount of traffic, was reasonable.

It was held in one case that an ordinance prohibiting a train from moving more than at the rate of four miles an hour was unreasonable; and it was held in another case that an ordinance prohibiting trains from moving more than at a rate of speed of ten miles per hour through the city limits was not unreasonable.

The authority for municipalities to pass such ordinances and for the state to pass a law authorizing the same, is found under the police power. It must, however, be borne in mind that these trunk lines are engaged in interstate commerce and that no state has the right to burden, regulate or interfere with interstate commerce, and hence in order for the ordinance to be valid it must be entirely reasonable and justified by the facts. In other words, under the police power in order for the same to be valid and constitutional, it must be shown that the ordinance is necessary in order to protect the lives, safety and welfare of the people. If it is reasonable and necessary in my opinion it will be valid and constitutional.

See—

Larkin v. B. C. R. & N., 85 Iowa, 492;
Ibid, 91 Iowa, 654;
Meyers v. C., R. I. & P., 57 Iowa, 555;
Cincinnati, New Orleans & Texas v. Ky., 17 L. R. A. (N. S.), 561; Note.

Yours very truly,

H. W. BYERS.

SALOONS—NUMBER THAT MAY OPERATE.—Number of saloons that may operate after July 1, 1911, governed by chapter 142, acts of the thirty-third general assembly.

Des Moines, December 5, 1910.

MR. WILLIAM CHAMBERLAIN,

Cedar Rapids, Iowa.

MY DEAR SIR: Replying to your letter of December 2d, I have to say that I am of the opinion that your city council, in the passage of resolutions of consent for the operation of saloons under the new petitions of consent which must be secured on or before July 1, 1911, will be controlled by chapter 142, acts of the thirty-third general assembly; that is to say, that after that time the number cannot exceed the number provided for in that act.

Yours very truly,

H. W. BYERS.

SALOONS—CONSENT PETITION—CANVASS BY BOARD OF SUPERVISORS—THE BOARD MAY ADJOURN FROM THE DAY FIXED FOR THE CANVASSING OF A CONSENT PETITION TO A LATER DATE.

Des Moines, Iowa, December 14, 1910.

MR. I. N. TAYLOR,

Oskaloosa, Iowa.

MY DEAR SIR: In response to your inquiry, I know of nothing in the mulct law that would prevent the board of supervisors from adjourning from the day fixed for the canvassing of a general consent petition to a later day for the purpose of making such canvass. All that the statute requires in this respect is, that after proper notice the canvass must be a public one and at a regular meeting of the board. That an adjourned meeting is simply a continuation of the regular meeting was decided and fully settled in the case of *Butterfield vs. Treichler,* Judge, 115 Iowa 328.

Yours very truly,

H. W. BYERS.

BOARD OF SUPERVISORS—REDUCING NUMBER FROM FIVE TO THREE—WHEN CHANGE BECOMES EFFECTIVE.—Where at a general election the proposition to reduce the number of members of the board from five to three carries, the membership is reduced when the terms of two of the members expire.

Des Moines, December 28, 1910.

COUNTY ATTORNEY F. F. HUNTER,

Rockwell City, Iowa.

DEAR SIR: I am in receipt of your communication of the 22d ultimo advising that Calhoun county has had five supervisors elected from supervisor districts; that three men were elected at the November general election, one of which assumes his duties the first of the year, and the other not until a year later; that during the summer of 1910 a petition was filed by the requisite number of voters asking that the board of supervisors be reduced from five to three members, said members to be elected at large; that the question was duly submitted and the same carried at the last general election.

You request an opinion as to when the reduction becomes effective, and if the same becomes effective at once, in what manner you determine the three members who are to serve and the two who are to be excluded.

If the abolition had been made by a vote of the people and a resolution by the board duly passed prior to the time the three members were elected to office, then the reduction would be made at once even though they had been previously nominated.

State vs. Parker, 125 N. W., 856;
Lahart vs. Thompson, 140 Iowa, 298.

But since the men have been duly elected, I am of the opinion that the change will not take place until the terms of two of the members expire. In case the proposition to increase the number should have carried, the change would not become effective until the next general election, and this same principle will apply, in my opinion, in the instant case in which the number was decreased. This position is further strengthened by section 419 of the code, which provides:

"Any county may be redistricted, as provided by the three preceding sections, once in every two years, and not oftener, and nothing herein contained shall be so construed as to have the effect of lengthening or diminishing the term of office of any member of such board."

Yours very truly,

GEORGE COSSON.

OFFICERS—WHEN TERM OF OFFICE BEGINS.—Under chapter 68, acts of Thirty-third General Assembly, providing that the term of office of all officers elected at a general election shall commence on the second secular day of January, the terms of such officers taking office in 1911 shall commence January 3, 1911.

Des Moines, December 29, 1910.

MR. S. M. CRISWELL, *County Auditor*,

Glenwood, Iowa.

DEAR SIR: I am in receipt of your communication of the 28th instant, requesting an opinion as to the date on which the second secular day in January falls under the provisions of chapter 68, acts of the Thirty-third General Assembly.

In reply will say that all officers' bonds recite the time the term of office commences. The certificates of election given to the various elective officers specify the date at which the term of office commences, and the legality and validity of the actions of officers may depend upon whether or not they are *de jure* officers as well as *de facto* officers.

For over a half century the law provided that, "The term of office of all officers chosen at a general election for a full term shall commence on the first Monday of January next thereafter, except when otherwise provided by the constitution," etc.

Revision section 462; Code of 1873, section 576;

Code of 1897, section 1060; Supplement to the Code, 1907, section 1060.

The law, however, was amended by the Thirty-third General Assembly. See chapter 68, acts of the Thirty-third General Assembly.

As amended the law now reads:

"The term of office of all officers chosen at a general election for a full term shall commence on the second secular day of January next thereafter, except when otherwise provided by the constitution or by statute," etc.

The second secular day in January, 1911, falls on Tuesday, January 3d, at which time all elective officers chosen at the general election for a full term should commence their terms of office, except when otherwise provided by the constitution or by statute.

Yours very truly,

GEORGE COSSON,

Special Counsel.

POLICE AND FIREMEN—DISABLED—PENSIONS—FUND, HOW MADE UP. —All rewards, fees, gifts, etc., to fire or police departments shall go into pension fund. Fees of policemen as witnesses in matter within official knowledge shall go into fund.

Des Moines, Iowa, December 31, 1910.

MR. F. T. TRUE,

City Treasurer,

Council Bluffs, Iowa.

DEAR SIR: I am in receipt of yours of the 30th instant respecting pensions for disabled and retired policemen, under chapter 62, acts of the thirty-third general assembly.

The provision in section 4 thereof that "all rewards in money, fees, gifts or emoluments of every kind or nature that may be paid to any police department or any member thereof * * * * shall be paid into the said fund and become a part thereof," is probably sufficiently comprehensive to include fees paid to a policeman for testifying in regard to a matter coming to his knowledge in the discharge of his official duties, and the trustees of the fund would have no discretionary power in the matter of granting exceptions to the rule.

I am of the opinion that the provisions in section 5 of the act are intended as prospective and could not apply where the injury or disablement occurred prior to the passage of the act.

Very truly,

H. W. BYERS.

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