STATE OF IOWA

1916

REPORT OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1916

GEORGE COSSON
Attorney General

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LETTER OF TRANSMISSAL.

HON. GEORGE W. CLARKE, Governor:

SIR: I have the honor to submit herewith, in accordance with law, my report of the transactions of the Legal Department of the State of Iowa, for the biennial period ending December 31, 1916.

GEORGE COSSON, *Attorney General.*

Des Moines, December 31, 1916.

REPORT OF THE ATTORNEY GENERAL

The work of the department has very greatly increased both because of increased burdens and duties placed upon the attorney general by statute, and the important work assumed by the department, which was considered to be of very great interest to the public welfare and in harmony with the statutory and common law powers of the attorney general.

The past few years has witnessed the passing by our legislature of a number of new laws in the interest of social justice which have been challenged upon the ground of their constitutionality. A number of these laws were contested during the first four years of my incumbency, the state being successful in almost every instance.

IMPORTANT CASES.

In the case of *State v. J. N. Jones, et al,* the title to the non-navigable meandered lakes was in controversy, it being contended that they passed to private parties under the Swamp Land Act. The state's contention, however, that they belonged to the state for the use and benefit of the people was sustained by the supreme court of Iowa and the supreme court of the United States.

State of Iowa v. J. N. Jones, et al, 143 Iowa, 399;

Marshall Dental Manufacturing Co. v. State of Iowa, 226 U. S., 460.

Another case of importance involved the right of the state to compel a reshipment of cars of coal without unloading and reloading the same into the local equipment of the railway company. Again the state's contentions were sustained in the supreme court of Iowa and the supreme court of the United States.

State v. Chicago, Milwaukee & St. Paul Ry. Co., 152 Iowa, 317;

Chicago, Milwaukee & St. Paul Ry. Co. v. State of Iowa, 233 U. S., 334.

Another case involved the constitutionality of the unfair discrimination law. The state was successful in this case.

State v. Fairmont Creamery Co., 153 Iowa, 702.

Another case of great importance was the *Standard Stock Food Company v. Wright,* involving the constitutionality of the stock food law passed by the thirty-second general assembly. Again the state was successful in both the United States district court and the supreme court of the United States.

Standard Stock Food Co. v. Wright, 225 U. S., 540.

Another case involving the constitutionality of the jurisdiction of the state over the waters of the Mississippi river was that of Enos Moyer. The state was successful in its contentions in this case.

State v. Enos Moyer, 155 Iowa, 678.

Another case of great importance was the case involving the constitutionality of the teachers' minimum wage law. The state was again successful in sustaining the validity of the law.

Bopp v. Clark, 165 Iowa, 697.

The constitutionality of the capitol extension act was likewise attacked with great confidence. The state as you know was successful in both of these contests, the supreme court overruling the district judges in each instance and sustaining the state's contention entirely.

Rowley, et al v. Clarke, et al, 162 Iowa, 732.

The state likewise won the express cases, the express companies being denied a temporary injunction. The rates as prescribed by the commission were put in full force and effect. During this biennial period the state succeeded in having the complainants' bills in the express rate cases dismissed. The sustaining of the rates as fixed by the Iowa commission for express charges for all points in Iowa has meant the saving of hundreds of thousands of dollars to the merchants and citizens of this state.

The state has been successful in sustaining the validity and constitutionality of the workmen's compensation act in the United States district court. This same case has been appealed to the supreme court of the United States and submitted by both written and oral arguments. Every indication points to a verdict in favor of the state.

The state has likewise been sucessful in its co-operation with Polk county and the city of Des Moines in holding invalid the Thacher patent, the result of which will save the municipalities and the people of the state thousands of dollars in royalties which would otherwise be exacted by reason of these invalid patents held by Mr. Thacher.

An immense amount of evidence has been taken in the Luten patent contest and the state looks forward with confidence to a verdict in its favor in connection with these patents.

REMOVAL OF PUBLIC OFFICIALS.

During this biennial period ten public officials have either been removed or caused to resign because of a failure to perform the duties of their office, and at the suggestion of the attorney general, the city council suspended one chief of police for the period of sixty days for neglect of duty.

During my administration in office thirty-four public officials have been ousted or caused to resign in order to avoid prosecution because of misfeasance or nonfeasance in office.

AMENDMENT TO REMOVAL LAW.

We have recently discovered, however, in a very striking manner the necessity of being able to remove superintendents of public safety who have actual charge of the police force. Under the present removal law, the mayor, chief of police and all police officers, the county attorney and sheriff may be removed for a failure to perform their duties, but the superintendents of public safety, who under the commission form of government, may be directly responsible for the inactivity or inefficiency of a police force, may not be removed except under the old jury system.

I therefore recommend that the Cosson removal law should be amended so as to include city, county and township officers, elective or appointive. No reason can be offered why the removal law, which has produced such far-reaching and beneficial results, should not apply to all city and county officers.

The merit of the Cosson removal law and the red light injunction and abatement law is attested by the fact that twenty-two states have adopted the latter statute and the former is now being urged for passage in a number of states.

SPECIAL AGENTS LAW.

The original laws, however, including the additional power given to the attorney general, were found to be not entirely adequate, and hence in my 1913 and 1915 biennial reports I strongly urged the passage of a special agents bill and made a state-wide campaign in the interest of such a law. The last general assembly passed the act recommended except, however, the act placed the control in the hands of the governor instead of the attorney general. I am strongly of the opinion that these special agents should be placed under the charge of the attorney general with a reserve power in the governor to direct action, if necessary. As a matter of practice under the existing statute, they are under the charge of the attorney general. There is no governor who will personally care to direct the special agents in the enforcement of the law. This criticism aside, the law has more than justified itself. The full number of agents were not appointed until the first of January, 1916, the time the repeal of the mulct law became effective.

WORK OF SPECIAL AGENTS.

We have, however, secured evidence against fifteen bank robbers, nine murderers, thirteen white slavers, three men operating a confidence game known as wire tapping, over four hundred bootleggers, and over one hundred gamblers, in addition to a large number of other men convicted of serious crimes from highway robbery to the lesser offenses.

In one county alone, the fines for liquor nuisances amounted to nearly eight thousand dollars; in another county, the fines for liquor nuisances amounted to over six thousand dollars and in still another county, the fines aggregated nearly four thousand dollars. In one county the fines for gambling amounted to fifteen hundred dollars; in another county, five hundred dollars.

Over twenty-five confirmed criminals are now in the penitentiary as a result of the work of our special agents and assistants sent out from this office. These men received sentences ranging from life to three years. In a very large number of cases the evidence has been so well secured that the defendants pleaded guilty, thus relieving the state and county of any costs in the matter of prosecution. In one county with forty-seven persons indicted, there was not a case contested.

For over three months I have kept two men exclusively at work investigating violations of the motor vehicle law. As a result of this over seven hundred persons have been arrested or cited to appear and thousands of dollars have been paid into the state treasury. In the last two months alone, over ten thousand dollars have been paid into the state and county treasuries as a result of the activity of this department.

During the past week our special agents secured evidence against one of the most prominent restaurants in the state for maintaining a liquor nuisance. The defendants pleaded guilty, paid a fine of $500, and consented to permanent injunction.

REFORM IN COURT PROCEDURE.

The past few years has witnessed a great protest throughout the country against the miscarriage of justice due to technicalities in the law and a real desire to see the several states of the Union follow the lead of England and Canada in simplifying their procedure.

In 1907 the legislature of Wisconsin passed a law providing in substance that no judgment should be reversed or set aside or new trial granted in any action or proceeding, civil or criminal, on the ground of misdirection of the jury or the improper admission of evidence or for any error as to any matter of pleading or procedure, unless after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in the miscarriage of justice.

Section 3072-m, Laws of Wisconsin, 1907.

This reform, however, is not confined to Wisconsin alone, but has made progress in a large number of the states of the Union; and in 1914, the American Bar Association by a unanimous vote recommended the passage of a law of this nature in the several states. This has been the law of England for a number of years.

Michigan in 1915 (see act No. 89 of the Laws of Michigan, 1915) passed a law in almost the exact language of the Wisconsin law.

California has a similar statute. See section 960 Penal Code of California, 1915, and it was proposed to place it in the constitution.

Kansas, Colorado, Montana, Tennessee, Utah, Idaho, Washington, Kentucky, North Dakota, Indiana and New York likewise have statutes similar to the Wisconsin law—all in substance holding that

error should not be presumed to be prejudicial but it must affirmatively appear to the court that such error resulted in a miscarriage of justice, or that the verdict would have been otherwise; in other words, the court under these statutes determines whether the jury was warranted in finding the defendant guilty, rather than whether the rules of a game had been played with all the precision which custom has engrafted on to the law by way of precedent.

See session laws of Utah, 1915, chapter 113;

See chapter 32, acts of the session laws of Tennessee, 1911;

Sections 9415 and 9548 Revised Code of Montana, 1907;

Section 8236 Revised Code of Idaho;

Section 542, Code of Crim. Pro. of New York.

See Section 1752 Rem. & Bal. Code of Washington, wherein it is provided that all technicalities shall be disregarded and that all amendments shall be considered as made which should have been made.

We find then that this reform is not confined to the western states, but has been placed upon the statute books of the eastern, central and southern states as well.

Virginia and Maryland have no such law, but the court has adopted the more liberal view irrespective of the statute.

The supreme court of Virginia, in the absence of a statute, has taken the view that they are to determine the guilt or innocence of the defendant as shown by the record.

In the case of *Hanger v. Commonwealth,* 107 Va., 872, the supreme court of Virginia in response to objections made by counsel for defendant on page 875, said:

> "As we view the case, it is needless to consider the instructions given or refused, since it appears plainly from the evidence that no other verdict could have been rendered thereon than that rendered by the jury."

In other words the court held that since they found from the record the jury was warranted in finding the defendant guilty, the court would refuse to consider errors of law which did not result in a miscarriage of justice.

In my opinion the position taken by the Virginia court is eminently sound and should be followed, but since our court takes a

different view, I recommend in the most solemn manner a law similar to that of Wisconsin and the states above referred to.

The importance of such a law will be recognized when it is known that Wisconsin, with larger cities and over a hundred thousand more population than Iowa, during the biennial period for 1913 and 1914 (the statistics for the last year not being available), had only twenty-two cases appealed and of this number fifteen were affirmed and only four reversed.

Kansas, another mid-western state, which has a law similar to Wisconsin, affirmed forty-nine criminal appeals and reversed three during the past year.

Minnesota, another state with substantially the same population as Iowa, and larger cities, during its last biennial period, had fifty cases appealed, forty of which were affirmed and but ten reversed, but five reversals a year.

Maryland, during the last biennial period, had but twenty-two criminal cases appealed, of which fourteen were affirmed and only six reversed.

Connecticut, during the last biennial period, had but twelve criminal cases appealed, of which nine were affirmed and three reversed.

South Dakota had a total of twenty-two criminal appeals of which seventeen were affirmed and five reversed.

Attorneys general of other states advise that their courts are reversing fewer cases each year, the decrease being from fifty to one hundred per cent. For one reason or another the tendency has been exactly in the opposite direction in our own state.

During this biennial period there were 104 criminal cases disposed of. Of this number, 71 were argued. Of the number argued, 35 were affirmed and 35 reversed; one, however, was reversed at the instance of the state; 16 were affirmd per curiam and 14 dismissed.

During this period 31 civil cases pending January 1, 1915, have been disposed of; 35 new cases have been commenced in the state and federal courts and disposed of during the period, and there are now pending in the district, supreme and federal courts, 51 civil cases.

I am attaching herewith at the close of this statement entitled "Schedule A," a list of the criminal cases appealed, the title of the case, the county from which originating, the date of the decision, the character of the offense and the judge deciding the case.

When other states are making progress, Iowa should not go backward. The difficulty should be located and the evil corrected. If the courts refuse to take the broader attitude, the legislature should so direct. The authority of Canada, of England, of such states as New York, Indiana, Illinois, Wisconsin, Minnesota, California, Connecticut, Virginia, Delaware, Michigan, Idaho, Utah and Maryland is sufficient to show that it is not a sporadic effort of a few western states, but that the conservative east joins with the progress of the west; nor is the agitation carried on by a few of the more radical lawyers and public men. In addition to the action taken by the American Bar Association, law journals and magazines are filled with articles of men standing high in the profession and eminent judges pleading for this reform. Among this list may be counted Elihu Root, whom Mr. Roosevelt designated "the greatest mind in this or any other country during this generation;" Charles W. Eliot, president emeritus of Harvard University, the greatest living educator of his time; and ex-president and ex-federal judge, William Howard Taft.

I wish to quote a few sentences from the address of Charles W. Eliot before the Mississippi Bar Association at its annual meeting in 1913. Mr. Eliot, speaking as an observing layman, in the course of his address said:

> *"The common contentious attitude of counsel in a lawsuit, and the common attitude of the judge as the umpire in a game, have done much to discredit the administration of justice in the United States. Counsel do not seem to the American public to be officers of a court seeking for truth and justice, but players of an unethical, intellectual game. The judge seems to regard himself—often perforce—as a mere umpire between contending parties, and not as an agent of the Commonwealth to settle controversies on their merits.* The American public has lost some of its old faith in the judge as a protecting agent for carrying out the substantial requirements of law and justice. Some considerable portion of the public from time to time gets much interested, through the newspapers, in this game of counsel umpired by the judge. They admire and applaud the in-

genuity and spirit with which counsel take technical points for their clients, and the public press often sympathizes with and encourages this misdirected admiration."

Senator Root has made a number of addresses urging reform in court procedure, but nowhere did he express himself more clearly than before the American Bar Association, in which he said:

"Our trial practice in the admission and exclusion of evidence does not agree with the common sense, the experience or the instincts of any intelligent layman in the country. As a consequence, while we are aiming to exclude matters which our rules declare to be incompetent, or irrelevant or immaterial, we are frequently also excluding the truth. *The American man is intensely practical and direct in his methods. American procedure ought to follow as closely as possible the methods of thought and action of American farmers and business men.*"

Mr. Taft, while President of the United States, made an address on the defects of our criminal procedure in which he said:

"The statistics which show the crimes that go unpunished in this country as compared with those in England are startling and humiliating to any son of America who has pride in his fellow-countrymen as a law-abiding and law-enforcing people."

The eminent late Justice Brewer of the Supreme Court of the United States made the statement in a public address that "The reversing of a judgment by an appellate court upon a mere technicality is an outrage."

Authority of like nature could be greatly multiplied. With such authority, there can be no excuse for the legislature failing to enact a law substantially similar to that of Wisconsin, Michigan, New York and other states heretofore referred to; in other words, a law requiring the court to determine whether the jury arrived at a correct verdict in finding the defendant guilty, rather than whether the trial was conducted in exact harmony with all of the legal and technical niceties.

A reference to one Iowa case alone will show the importance both as a means of protecting the public against crime and likewise as a means of preventing delays and retrials and excessive court costs by reason of such delays and retrials.

Mathias Martin O'Donnell was charged with having murdered his wife, Inez O'Donnell, in the city of Keokuk on the 10th day of January, 1914. See *State v. O'Donnell;* 157 N. W., 870. He was found guilty by a jury and because of the brutality of the murder, the jury fixed the death penalty. The case was appealed to the supreme court of the state and arguments filed, and the case was finally submitted in May, 1915, and just one year thereafter the supreme court handed down an opinion, reversing the case, the court holding that notwithstanding the brutality of the murder, the evidence was insufficient to warrant a finding of a deliberate intent to kill. It has recently been proposed that the defendant be permitted to plead guilty to manslaughter, the punishment of which is eight years in the penitentiary; if, however, he earned his usual good time he would serve exactly five years and three months.

Considering that the punishment for the forging of a note, even of a nominal sum and passing the forged instrument, is fifteen years in the penitentiary, five years' punishment for the brutal murder of one's wife seems like a travesty upon justice.

If the old rule in mathematics still holds good that the whole is equal to the sum of its parts and includes all of its parts, then the jury not only found O'Donnell guilty of murder in the first degree, but they likewise found him guilty of murder in the second degree and all included offenses. If the jury said that he was guilty of deliberately killing his wife and that he should be hanged, can anybody conceive of any sane reason why it should be necessary that the case should be retried at an estimated expense of about two thousand dollars, taking the time and attention of the court for a long period of time and again reviewing to the community the horrible details of a horrible murder in order that a conviction may be had for murder in the second degree or manslaughter. If the court is right in finding that there was not sufficient evidence to warrant a conviction of murder in the first degree, which we do not admit but concede only for this purpose, undoubtedly then O'Donnell was guilty of murder in the second degree. Why then should it be necessary to have a retrial in order that judgment should be entered against defendant for murder in the second degree.

In the case of *State v. Baker,* 157 Iowa, 126, our supreme court upon the conviction of second degree murder, refused to let the

judgment stand as fixed by the lower court at twenty-two years, but on the petition for rehearing, reduced the punishment to fifteen years. Can there be any good reason why if the court felt that judgment for first degree murder with the death penalty could not stand, that a judgment should not be entered by the supreme court or directed to be entered by the trial court for second degree murder? Especially is this true, when, under the ruling of our court, it would be impossible to again put the defendant O'Donnell upon trial for first degree murder.

We submit that our supreme court has inherent authority to enter judgment or direct a trial court to enter judgment for any included offense, when the court finds that judgment may not stand for the higher offense. Since, however, the court has taken a different attitude with reference to the O'Donnell case, express authority and direction should be made by the coming general assembly. A retrial under the same circumstances as that shown in the O'Donnell case could not possibly happen in any other civilized country in the world, certainly not in Canada or England.

SUBSTITUTION OF SENTENCE.

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

> "If it appears to the court of criminal appeal that an appellant, though not properly convicted on some count or part of the indictment, has been properly convicted on some other count or part of the indictment, the court may either affirm the sentence passed on the appellant at the thial, or pass such sentence in substitution therefor as they think proper, and as may be warranted in law by the verdict on the count or part of the indictment on which the court consider that the appellant has been properly convicted.
>
> "Where an appellant has been convicted of an offense and the jury could on the indictment have found him guilty of some other offense, and on the finding of the jury it appears to the court of criminal appeal that the jury must have been satisfied of facts which proved him guilty of that other offense, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that offense, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offense, not being a sentence of greater severity.

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

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

INSANITY.

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

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

"When such special verdict is found the court shall order the accused to be kept in custody as a criminal lunatic, in such place and in such manner as the court shall direct till His Majesty's pleasure shall be known, and it shall be lawful for His Majesty thereupon, and from time to time, to give such order for the safe custody of the said person during pleasure, in such place and in such manner as to His Majesty may seem fit."

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

Massachusetts in 1909 passed the following law:

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

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

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

ADDITIONAL RECOMMENDATIONS.

In addition to these recommendations, the county attorney should be permitted to comment upon the fact that the defendant fails to testify in his own behalf.

If a defendant is found guilty of an included offense in the indictment and takes an appeal, and the case is reversed and re-

manded, the law should permit him to be tried for the offense charged in the indictment. This is permitted under the rulings of several courts of the states of the Union, but our court has ruled otherwise.

A change in our criminal procedure is of the utmost importance, but it is equally important to change the method of punishment.

CUSTODIAL FARM SHOULD BE ESTABLISHED.

I had previously recommended the purchase of a farm for misdemeanants, and succeeded in having written into the law the authorization for the purchase of such a farm, and the board of control, pursuant to the law, purchased over seven hundred acres of some of the best land in Iowa, but the legislature has not yet passed the necessary law authorizing the establishment of the farm and providing that misdemeanants shall be sent to the custodial farm instead of continuing to commit them to jail to remain in filth and idleness.

Permit me to direct attention to the fact that during the past year over thirty-three thousand persons were committed to our county and city jails, and in not a single one of them is there any construc-time work provided; that prisoners are maintained at the public expense, fed in a cage like a wild beast, in one promiscous assembly, the guilty with the innocent, the first offender with the hardened criminal, and in a large number of instances, while the husband and bread winner is serving out a sentence in jail, the man's wife and children are either living upon charity, half starving or attempting in one way or another to maintain body and soul together until the bread-winner has been returned.

This legislature can do no more important work than to pass the law establishing this farm which is already purchased and which has more than justified the wisdom of the act as shown by the fact that the land since the purchase has increased about fifty dollars.

ABOLITION OF CAPITAL PUNISHMENT.

The National Committee on Prison Labor has just issued a pamphlet, available to anyone on application, which conclusively demonstrates that a law authorizing capital punishment defeats its own ends; that there is less murder in those states where capital punishment is not allowed. Every student of this question knows

that the important thing is the certainty and promptness of punishment rather than the extreme severity, but theoretical and academic reasons are not needed. The O'Donnell case just referred to furnishes the most convincing proof. It is possible that if the death penalty had not been fixed, our court would have permitted a first degree murder to have stood. This is a fair inference from the fact that the court had the matter under consideration for a full year. I therefore recommend that the death penalty be abolished.

SUMMARY OF RECOMMENDATIONS.

Summarizing my conclusions, I recommend:

First: The passage of a law similar to the law of Wisconsin and the other states referred to providing that no judgment shall be reversed or set aside or new trial granted in any action, civil or criminal, unless it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

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

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

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

Fifth: The establishment of the custodial farm and other fundamental changes in the jail and penitentiary system in accordance with the report of the committee appointed by the governor to investigate conditions at Fort Madison and filed with the governor on the 25th day of May, 1912.

Sixth: A change in the law placing the direct control of the special agents in the hands of the attorney general where it now exists in actual practice.

Seventh: The abolishing of capital punishment.

Eighth: The automatic forfeiture of good time of any prisoner who either escapes or attempts to escape.

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

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

Eleventh: The state should be allowed to put the defendant on trial for the offense charged in the indictment in the event of a retrial at defendant's instance, after having been convicted of an included offense.

Twelfth: In view of the numberless complaints concerning gambling, lottery schemes and punch boards, a law should be passed prohibiting the manufacture, sale, the keeping for sale, or attempt to sell any gambling or lottery scheme or paraphernalia within this state.

Thirteenth: An amendment to the motor vehicle law providing that upon the payment of the annual license fee for the second and third years of the third year period, a small plate reading "License Fee Paid for the Year" shall be furnished by the secretary of state to each owner of a motor vehicle with the requirement that such plate be displayed on the motor vehicle in a conspicuous place, and providing a punishment for the failure thereof; otherwise the state will lose between twenty-five and fifty thousand dollars because of the non-payment of the license fee.

Fourteenth: The state should exercise supervision over private banks.

I leave the office with no unfinished business that could have been disposed of. I believe that the increased appropriations received by the department have been more than justified by the additional work assumed and the results accomplished.

I leave the office very efficiently organized. The work is classified and the persons are especially capable in the lines of work assigned to them.

I acknowledge with pleasure the ability of my assistants and special counsel—John Fletcher, C. A. Robbins, Henry E. Sampson and Earl M. Steer, and the efficiency, industry and loyalty of my law clerk, Miss Gilpin, and the ability of the two stenographers, Mrs. Shipley and Miss McClure, and I wish to make special men-

tion of the very capable and important services rendered by the three special agents who are now working, O. O. Rock, James E. Risden and Henry W. Terrell.

I think it is not too much to say that there is no more important branch of the state government than the Department of Justice, and the work accomplished is the best testimonial to the merits of the employees of the office.

SCHEDULE A—CRIMINAL CASES SUBMITTED.

The following is a list of criminal cases submitted to the supreme court, and also rehearings asked during the years 1915 and 1916 and the final disposition of cases:

Title of Case	County	Decision	Judge	Offense.
State v. Abbott, Ralph, appellee	Johnson	Dismissed Dec. 17, 1915	Salinger	Running a gambling house.
State v. Albert, Chas., et al., appellants	Appanoose	Reversed May 5, 1916	Evans	Arson.
State v. Asbury, John, appellant	Appanoose	Reversed Nov. 24, 1915	Salinger	Rape.
State v. Beck, Jacob F., appellant	Clay	Dismissed Nov. 23, 1915		Cheating by false pretenses.
State v. Benadon, W. A., appellant	Scott	Affirmed Nov. 24, 1916	Per Curiam	Practicing medicine without a license.
State v. Biewen, G. W., appellant	Keokuk	Affirmed Feb. 23, 1915	Ladd	Murder.
State v. Booher, Sam, appellant	Story	Affirmed Dec. 16, 1915	Preston	Practicing medicine without a license.
State v. Bosch, John, appellant	Taylor	Affirmed June 19, 1915 (Petition for rehearing overruled Oct. 6, 1915.)	Weaver	Larceny.
State v. Bosworth, Mark, appellant	Mahaska	Reversed May 14, 1915	Salinger	Malicious injury to electric railway.
State v. Brackey, Albert A., appellant	Winnebago	Affirmed April 7, 1916	Ladd	Assault with intent to inflict great bodily injury.
State v. Brazzell, Dorcas, appellant	Dubuque	Reversed Jan. 19, 1915	Weaver	Murder.
State v. Bricker, Oliver, appellant	Hamilton	Reversed Nov. 15, 1916	Gaynor	Breaking and entering.
State v. Brown, H. F., et al., appellants	Polk	Affirmed May 12, 1915	Per Curiam	Nuisance.
State v. Bullington, J. F., appellant	Polk	Dismissed Feb. 23, 1915		Larceny by embezzlement.
State v. Cameron, Chas. E., et al., appellees	Polk	Affirmed June 29, 1916	Preston	Nuisance.

State v. Cameron, G. H., appellant....	Black Hawk...	Reversed June 30, 1916...	Salinger.....	Seduction.
State v. Carr, G. C., appellant.....	Woodbury.....	Affirmed Sept. 28, 1915...	Per Curiam....	Assault with intent to commit murder.
State v. Cessna, Chas., appellant	Hamilton.....	Reversed June 23, 1915...	Ladd.....	Assault with intent to commit murder.
State v. Chesley, Albert, appellant...	Linn.....	Affirmed Nov. 24, 1915....	Per Curiam....	Uttering a forged instrument.
State v. Coghlan, Ray, appellee.....	Monroe.....	Dismissed May 4, 1915....		Seduction.
State v. Collins, Ira	Davis.....	Affirmed Oct. 18, 1915.....	Salinger.....	Practicing osteopathy without a certificate.
State v. Concord, Tom, appellant.....	Polk.....	Reversed Nov. 16, 1915....	Deemer.....	Burglary.
State v. Cooper, Chas., appellant.....	Scott.....	Modified and affirmed Mar. 17, 1915.....	Preston.....	False pretenses.
State v. Cooper, Harry, appellant.....	Monroe.....	Dismissed Sept. 29, 1916..		Murder.
State v. Deitrick, Harve, appellant...	Clarke.....	Reversed Oct. 17, 1916....	Gaynor.....	Refusing to make answer to enumerator of the census.
State v. Deviney, James, appellant...	Plymouth.....	Reversed Mar. 11, 1916....	Salinger.....	Prostitution.
State v. Dunn, A., appellant.....	Polk.....	Affirmed Nov. 16, 1915....	Ladd.....	Larceny from the person.
State v. Dunn, James, appellant.....	Decatur.....	Affirmed Dec. 15, 1916....	Gaynor.....	Incest.
State v. Edmund, H. A. A., et al., appellants	Story.....	Affirmed Oct. 26, 1915....	Evans.....	Practicing medicine without a license.
State v. Edmund, H. A. A., appellant	Story.....	Affirmed May 2, 1916.....	Deemer.....	Practicing medicine without a license.
State v. Fisher, Chester, appellant...	Cherokee.....	Affirmed Nov. 1, 1915.....	Preston.....	Assault with intent to commit great bodily injury.
State v. Flynn, Kate, appellant.....	Webster.....	Affirmed Dec. 16, 1915.... (Petition for rehearing overruled April 7, 1916.)	Weaver.....	Keeping a house of ill fame.
State v. Fontose, Pietro, appellant....	Polk.....	Affirmed Oct. 28, 1916....	Per Curiam....	Larceny as bailee.
State v. Freeman, Lawyer, appellant..	Monroe.....	Dismissed May 2, 1916....		Incest.
State v. Gardner, James, appellant...	Plymouth.....	Reversed Mar. 11, 1916..	Salinger.....	Prostitution.
State v. Glaze, Ben, appellant.....	Clarke.....	Reversed Sept .23, 1916..	Salinger.....	Larceny by embezzlement.
State v. Grim, Chas. D., appellant....	Jones.....	Dismissed April 22, 1915..		Nuisance.
State v. Guidice, Francisco, appellant.	Mills.....	Reversed June 23, 1915...	Ladd.....	Murder.

SCHEDULE A—CONTINUED.

Title of Case	County	Decision	Judge	Offense.
State v. Hawkins, Bob, appellant.....	Polk.....	Dismissed May 4, 1915....		Nuisance.
State v. Hess, Frank, appellee.....	Howard.....	Reversed Jan. 19, 1915.... (Petition for rehearing overruled May 15, 1915.)	Salinger.....	Bastardy.
State v. Hesse, Wm., appellant.....	Monroe.....	Reversed Oct. 19, 1915....	Ladd.....	Murder in the first degree.
State v. Hingst, John, appellant.....	Woodbury.....	Affirmed Sept. 28, 1915....	Per Curiam...	Rape.
State v. Huber, H. H., appellant.....	Fayette.....	Dismissed Jan. 25, 1916...		Nuisance.
State v. Kiefer, Adam, appellant.....	Buchanan ...	Reversed Mar. 17, 1915.... (Petition for rehearing overruled Oct. 25, 1915.)	Ladd.....	Cheating by false pretenses.
State v. Knapp, Charles T., appellant.	Cherokee.....	Reversed June 29, 1916... (Petition for rehearing overruled Sept. 30, 1916.)	Deemer.....	Nuisance.
State v. Kruppa, Joe, appellant.....	Appanoose.....	Affirmed June 24, 1916...	Deemer.....	Incest.
State v. Ledford, W. F., appellant....	Appanoose.....	Reversed Sept. 26, 1916...	Weaver.....	Adultery.
State v. Levich, Harris, appellant....	Polk.....	Affirmed Mar. 11, 1916....	Preston.....	Keeping a house of ill fame.
State v. Lewis, Harrison B., appellant	Jefferson.....	Reversed Oct. 19, 1915.... (Petition for rehearing overruled Jan. 21, 1916.)	Ladd.....	Assault with intent to rob.
State v. Linzig, C. G., appellant.....	Scott.....	Affirmed Nov. 21, 1916..	Weaver.....	Breach of the Sabbath.
State v. Louneer, Hurley, appellant..	Woodbury.....	Affirmed Oct. 21, 1916.....	Per Curiam...	Rape.
State v. Lounsbury, L. A., appellant..	Adair.....	Affirmed Nov. 22, 1916....	Deemer.....	Incest.
State v. Lumley, Mel, et al., appellants	Osceola.....	Dismissed Nov. 23, 1916...		Grand larceny.
State v. Lyon, Luther, appellant.....	Lyon.....	Affirmed May 5, 1916.....	Preston.....	Perjury.
State v. McAnich, J. E., et al., appellants	Jasper.....	Affirmed Oct. 5, 1915.....	Salinger.....	Practicing medicine without a license.
State v. McAnich, C. S., appellant....	Jasper.....	Affirmed Jan. 22, 1916....	Per Curiam...	Practicing medicine without a license.

State v. McCaskill, J. T., appellant....	Black Hawk...	Reversed Jan. 20, 1916....	Ladd.....	Murder.
State v. Madden, Earl, appellant.....	Union.....	Petition for rehearing overruled May 12, 1915..	Preston.....	Conspiracy.
State v. Miller, Jake, et al., appellants	Hardin.....	Reversed April 4, 1916....	Deemer.....	Nuisance.
State v. Miller, Wm., appellant.....	Henry.....	Affirmed Oct. 28, 1916....	Per Curiam...	Larceny.
State v. Minella, Addie, appellant....	Monroe.....	Reversed June 29, 1916...	Salinger.....	Murder in the first degree.
State v. Mulhollen, George, et al., appellants		Affirmed Dec. 17, 1915....	Per Curiam... Evans.....	Keeping a house of ill fame.
State v. Melvin, James, appellant....	Clinton..... Dubuque.....	Affirmed Nov. 24, 1916....		Breaking and entering a railway car.
State v. Nelson, George, appellant....	Buchanan.....	Affirmed Mar. 15, 1916....	Per Curiam...	Practicing medicine without a license.
State v. Newman, John, Appellant....	Woodbury.....	Affirmed Nov. 17, 1916....	Per Curiam...	Murder.
State v. Nicola, C. L., appellant.....	Mahaska.....	Reversed Feb. 17, 1915....	Deemer.....	Murder.
State v. Norman, F. J., appellant.....	Taylor... ...	Dismissed Jan. 19, 1915...		Practicing medicine without a license.
State v. Nott, Henry, appellant.....	Taylor.....	Petition for rehearing overruled Jan. 26, 1915...	Ladd.....	Murder.
State v. O'Donnell, Mathias Martin, appellant	Lee.....	Reversed May 13, 1916....	Salinger.....	Murder.
State v. Peirce, Geo., appellant.....	Woodbury.....	Reversed Nov. 17, 1916...	Salinger.....	Conspiracy.
State v. Perkins, Earl, appellant.....	Mills.....	Reversed June 23, 1915...	Deemer.....	Rape.
State v. Phillco, A. E., appellant.....	Polk.....	Affirmed Mar. 11, 1916....	Preston.....	Keeping a house of ill fame.
State v. Rand, Wm., appellant.....	Union.....	Affirmed April 8, 1915....	Preston.....	Larceny from the person.
State v. Rayburn, Harry, appellant...	Wayne.....	Affirmed June 18, 1915...	Preston.....	Resorting to house of ill fame for purpose of lewdness.
State v. Richards, Lon, appellant.....	Marion.....	Affirmed Dec. 18, 1916....	Per Curiam...	Soliciting another to have carnal knowledge of a female person.
State v. Riley, G. L., appellant.....	Pottawattamie.	Affirmed June 29, 1916...	Ladd.....	Adultery.
State v. Robinson, Joe, appellant.....	Lyon.....	Reversed May 13, 1915....	Gaynor.....	Rape.
State v. Roden, Harry, appellant.....	Pottawattamie.	Affirmed Dec. 13, 1916....	Evans.....	Assault with intent to commit murder.

SCHEDULE A—CONTINUED.

Title of Case	County	Decision	Judge	Offense.
State v. Rowell, L. J., appellant	Cedar	Reversed Oct. 19, 1915	Salinger	Larceny by embezzlement.
State v. Saling, James, appellant	Union	Reversed Sept. 28, 1916	Salinger	Conspiracy.
State v. Sayles, Wm., appellant	Pottawattamie	Affirmed Jan. 11, 1915	Ladd	Murder.
State v. Schell, Phil, appellant	Marion	Affirmed June 19, 1915 (Petition for rehearing overruled Oct. 5, 1915.)	Evans	Assault with intent to rob.
State v. See, Sherman, appellant	Appanoose	Affirmed June 29, 1916	Preston	Nuisance.
State v. Shelly, Alva, appellant	Wapello	Dismissed Sept. 20, 1916		Breaking and entering.
State v. Shultz, John, appellant	Poweshiek	Reversed June 29, 1916	Salinger	Incest.
State v. Stalker, Wm., appellant	Polk	Affirmed Mar. 15, 1915	Deemer	Incest.
State v. Stanton, Wm., appellant	Polk	Affirmed Nov. 16, 1915	Ladd	Breaking and entering.
State v. Tate, Wm., et al., appellants	Wapello	Dismissed Oct. 20, 1915		Nuisance.
State v. Thomas, Alfred, appellant	Polk	Reversed Mar. 18, 1915	Ladd	Murder.
State v. Thomas, Alfred, appellant	Polk	Affirmed Nov. 17, 1915	Gaynor	Murder.
State v. Treganza, J. A., appellant	Hancock	Dismissed Feb. 3, 1915		Indecent exposure.
State v. Towne, E. L., appellant	Guthrie	Affirmed Nov. 23, 1916	Deemer	Manslaughter.
State v. Valvoda, Frank, appellant	Howard	Reversed April 10, 1915	Ladd	Seduction.
State v. Vochoski, Otto, appellant	Jones	Petition for rehearing overruled May 11, 1915	Evans	Rape.
State v. Volicke, Steve, appellant	Appanoose	Affirmed Jan. 20, 1916	Per Curiam	Resisting an officer.
State v. Ward, L. C., appellant	Pottawattamie	Reversed May 8, 1915	Evans	Illegal killing of a deer.
State v. Weese, Wm., appellant	Polk	Affirmed May 8, 1915	Per Curiam	Forgery.
State v. Will, Walter A., appellant	Story	Reversed Sept. 23, 1915	Per Curiam	Desertion.
State v. Yates, J. Albert, appellant	Lucas	Affirmed Oct. 5, 1916	Per Curiam	Murder.

SCHEDULE B—CRIMINAL CASES PENDING.

The following is a list of the criminal cases pending in the supreme court of Iowa on January 1, 1917:

Title of Case.	County.	Offense.
State v. Brooks, Oliver, appellant	Wapello	Rape.
State v. Carter, C. C., appellant	Marion	Fraudulent banking.
State v. Chamberlain, A. W., appellant	Hamilton	Nuisance.
State v. Chambers, H. A., appellant	Boone	Obtaining money under false pretenses.
State v. Clark, John, appellant	Black Hawk	Rape.
State v. Clay, James, et al, appellants	Monroe	Grand larceny.
State v. Cochran, Ulysses, appellant	Linn	Carrying concealed weapons.
State v. Jensen, Andrew, appellant	Hamilton	Seduction.
State v. Kiefer, Adam, appellant	Buchanan	Fraudulent banking.
State v. Meyer, Fred, appellant	Madison	Murder.
State v. Meyer, Ida E., appellant	Madison	Murder.
State v. Olsen, O. C., appellant	Winneshiek	Practicing medicine without a certificate.
State v. Pelser, Chas. W., appellant	Pottawattamie	Incest.
State v. Powers, E. F., appellant	Carroll	Assault with intent to commit rape.
State v. Powers, Fred, appellant	Cherokee	Carrying concealed weapon.
State v. Richardson, Frank, appellant	Poweshiek	Assault with intent to inflict great bodily injury.
State v. Sherman, L. H., appellant	Jasper	Cheating by false pretenses.
State v. Stevenson, Chas., et al., appellants	Pottawattamie	Larceny.
State v. Walters, Wm., appellant	Polk	Nuisance.
State v. Ward, J. P., appellant	Polk	Sodomy.
State v. Wegener, Ed., appellant	Polk	Robbery.

SCHEDULE C—OLD CASES DISPOSED OF.

Civil cases pending January 1, 1915, which have since been disposed of:

IN DISTRICT COURT.

H. J. Toenningsen, County Treasurer, v. Merchants National Bank of Clinton;
N. F. Miller v. George Donohoe, Superintendent of State Hospital;
State of Iowa v. B. F. Swanson and L. W. Smith;
Ernest R. Abrams & Co. v. W. S. Allen, Secretary of State;
C. H. Cuchman v. Adair County and the State of Iowa, ex rel G. W. Clarke, Governor, and George Cosson, Attorney General;
George I. Snider v. Frank Gibson and George Donohoe, Superintendent of State Hospital;
State of Iowa, ex rel John T. McCutchen, County Attorney, v. John L. Bleakly, Auditor of State;
State of Iowa, ex rel George Cosson, Attorney General, and W. B. Barney, Dairy and Food Commissioner of Iowa, v. Shores-Mueller Company;
C. J. Hawley and William G. Ray v. R. E. Betz and J. W. Eldridge;
Catherine Baxter Miller, et al., v. Mary Elizabeth Miller, et al.;
In the Matter of the Estate of Thomas L. Whittaker, deceased, Charles W. Whittaker, Executor;
Mary M. Crouch v. Kate Armstrong;
State of Iowa v. S. B. Gardner, et al.;
J. W. Dougherty v. Town Council of Anita;
State of Iowa v. The Hanford Produce Company.

IN SUPREME COURT.

Commercial National Bank, et al., v. Pottawattamie County;
State of Iowa, ex rel George Cosson, Attorney General, and W. C. Edson, County Attorney, v. Terrence Thomas;
In the Matter of the Estate of Alexander Moynihan, deceased;
Des Moines Independent School District of Salt Creek Township, Davis County, Iowa, v. J. Mose McClure;
State of Iowa, ex rel John B. Hammond, v. Mrs. Maurice Lynch, Iowa Loan & Trust Company, and the building and the premises described in this petition.
In re Estate of Honora Daly, deceased; in re Estate of Bryan Ward, deceased; in re Estate of Hugh Rodden, deceased, v. W. C. Brown, Treasurer of State.
Earle G. Jones v. Charles C. McClaughry;
The Fairmont Creamery Company v. H. C. Darger and G. H. Tellier;
William Schubert, et al., v. Claus Barnholdt, et al.,
State of Iowa, ex rel Nels Thompson, v. W. A. Booth, William Donoghey, Art Hildreth, B. C. Briley and Ray J. Johnson;
Lucille Addis v. Dr. C. F. Applegate.

IN FEDERAL COURT.

Wm. M. Barrett, as President of the Adams Express Co., v. David J. Palmer, et al.;

Chauncey H. Crosby, as Vice President of the U. S. Express Co., v. Board of Iowa Railroad Commissioners, et al.;

James Fargo, as President of the American Express Co., v. Board of Iowa Railroad Commissioners, et al.;

Wells-Fargo & Company v. Board of Railroad Commissioners;

Union Carbide Sales Co. v. W. B. Barney, State Dairy and Food Commissioner.

SCHEDULE D—NEW CASES DISPOSED OF.

Civil cases which have been commenced and disposed of since January 1, 1915:

State of Iowa v. Illinois Central Railroad Company;

State of Iowa v. Trans-Mississippi Grain Company;

N. C. Hatfield v. Iowa State Board of Medical Examiners, Dr. Walter L. Bierring, Dr. George F. Severs, Dr. John L. Tamisiea and Dr. Guilford H. Sumner;

A. G. Obrecht v. Board of Supervisors of Pocahontas County, Iowa, W. P. Hopkins, C. T. Nolan, M. J. Dooley, Robert Klein, et al.;

In the Matter of the Establishment of Drainage District No. 120, Wright County, Iowa;

J. C. Wallace, et al., v. Unknown Heirs of Daniel Wales, deceased;

State of Iowa, ex rel George Cosson, Attorney General, v. The Guarantee Mutual Hail Association of Sioux City, F. D. Babcock, President and Director, John V. F. Babcock, Secretary-Treasurer;

State of Iowa v. Chas. T. Knapp and Maggie Cleary;

Josie E. Julian for T. M. Julian v. M. C. Mackin, Superintendent of Iowa State Hospital for Inebriates;

Matt Callahan v. Humboldt County, Iowa, J. L. Parsons, H. Legried, Robert Sayers and A. Marston, J. W. Holden, H. Beard, et al.;

Charles McReynolds v. Frank Beatty;

Henry Pyle v. National Life Association, James P. Hewitt, John L. Bleakly, C. S. Byrkit, J. A. McKellar, George Cosson;

State of Iowa, ex rel R. T. Burrell, County Attorney, v. District Court of Taylor County and Hon. Thos. L. Maxwell, Judge;

Story County, Iowa, v. Fred E. Hansen;

In the Matter of the Condemnation of certain real estate for the purpose of an addition to the Reformatory grounds;

In the Matter of the Condemnation of certain real estate for the purpose of extending the S. U. I. Grounds and to provide sites for a dental building and detention hospital;

In the Matter of the Condemnation of certain real estate for the purpose of an addition to the College for the Blind;

In the Matter of the Condemnation of certain real estate for the purpose of an addition to the Mt. Pleasant State Hospital Grounds, and for right of way for railway switch thereto;

First National Bank of Council Bluffs, Iowa, v. J. D. Hannan, County Auditor of Pottawattamie County and J. P. Christensen, County Treasurer of Pottawattamie County, Iowa;
Robert Abeles v. The Board of Railroad Commissioners;
State of Iowa v. John Keck and Louis Keck;
Charles Ford v. E. G. Dilley, Sheriff of Woodbury County, Iowa;
Hutchinson Ice Cream Company, et al., v. State of Iowa;
In the Matter of the Estate of Robt. H. Parmlee;
In the Matter of the Estate of Sarah Plumer;
Sophia Searl, for the use and benefit of Frank S. Searl, v. The State Hospital for Inebriates at Knoxville, Iowa, and M. C. Mackin, Superintendent of said Hospital;
The State of Iowa, ex rel C. H. Taylor, County Attorney, v. Beulah Cleveland;
H. A. A. Edmund v. E. C. Gretten, Sheriff of Story County, Iowa;
State of Iowa, ex rel George Cosson, Attorney General of Iowa, v. Iowa Legion of Honor;
State of Iowa v. E. E. Carmichael, et al.;
State of Iowa v. King Land & Loan Company, E. J. Quirk and J. N. King;
D. T. Blodgett v. George W. Clarke, W. S. Allen, Frank S. Shaw, Wm. C. Brown, Executive Council;
State of Iowa v. Illinois Central Railway Company;
In the Matter of the Application on behalf of James Rand for a writ of habeas corpus;
Carrie Shonka, v. State of Iowa, State University of Iowa, Iowa State Board of Education.

SCHEDULE E—PENDING CASES.

Cases pending in the several courts of the state and the United States, January 1, 1917:

CASES PENDING IN DISTRICT COURT.

In the Matter of the Drainage Assessment of Drainage District No. 60;
State of Iowa, ex rel George Cosson, Attorney General, v. E. J. Hauser, E. W. McCulley and Henry Grovert, Jr., Members Board of Supervisors of Benton County, Iowa, and Alexander Runyon, County Auditor;
In the Matter of the Last Will and Testament of C. J. Ericson, deceased,
Sodra Vi Parish of Sweden, v. State of Iowa and W. C. Brown, Treasurer of State;
R. F. Graeber v. A. B. Noble;
In re Estate of T. J. Mitchell;
In re Estate Jeanette Sims;
State of Iowa, ex rel George Cosson, Attorney General, v. Capital and Merchants and Bankers Insurance Company;
In the Matter of the Estate of Sarah Plumer;
State of Iowa v. F. R. Hutchinson;

State of Iowa, ex rel George Cosson, Attorney General, v. The Meservey Creamery Company;
In the Matter of the Estate of Margaret Garmoe;
In the Matter of the Estate of Margaret McHugh;
In the Matter of the Estate of Belle R. Hamilton;
In re Estate of John C. Dvorak;
In re Estate of Henry Breen;
In re Estate of Eldora E. Myers;
In re Estate of Harry Higgins;
In re Estate of Sarah L. Utt;
State of Iowa, ex rel George Cosson, Attorney General, v. Joel Hoskins, et al., Trustees White's Labor Institute;
Ida B. Wise-Smith v. Executive Council of the State of Iowa;
George C. Lawrence v. C. C. McClaughry, Warden;
Sara Ann Shortall, et al., v. Des Moines Electric Co., City of Des Moines, and P. E. Marsh Construction Co., State of Iowa, Intervenor;
L. G. Troutman v. Milda Smith, et al.;
Ella Powell, by Thomas Powell, her father and next friend, v. The Board of Control of State Institutions of Iowa, Wm. J. Dixon, Chairman of said Board, and George Mogridge, M. D., Superintendent;
State of Iowa, ex rel George Cosson, Attorney General of Iowa, v. Iowa State Mutual Automobile Assn. of Grundy Center, Iowa, E. A. Crary, M. H. Thielen, R. S. Taft and Vernon H. Wilson;
In re Estate of Thomas Wilson;
In re John Herrington Estate;
In re Estate of Christian Peterson;
Guy A. Braadie v. M. C. Mackin, Superintendent Inebriate Hospital.

CASES PENDING IN SUPREME COURT.

W. C. Brown, State Treasurer, v. Hattie N. Gulliford;
J. A. Haines v. Board of Directors of Consolidated Independent School District of Wright, Iowa;
John Forbes, County Treasurer of Pocahontas County, Iowa, and Pocahontas County, Iowa;
T. E. Watters v. Anamosa—Oxford Junction Light & Power Co., Eastern Iowa Consolidated Light & Power Co.;
George Miller v. Marshall County, Iowa;
C. A. Payette, et al., v. Wells S. Rice, et al.;
In re Trust for Charitable and Public Uses under the Last Will of Max D. Peterson, deceased;
Dan Coleman v. James Tierney, Deputy Game Warden;
W. C. Brown, Treasurer of State, v. Nels Peterson;
T. J. Dunahoo v. Sim T. Huber;
State of Iowa v. Len Silka;
Burlingame v. Hardin County, et al.

CASES PENDING IN THE SUPREME COURT OF THE UNITED STATES

Ernst Emil Nilson, et al., v. A. M. Duus, Administrator;
In the Matter of the Estate of Anna Margrethe Anderson, deceased, Wilhelmina Elizabeth Peterson, et al., Legatees, v. C. L. Hanson, Administrator, State of Iowa, ex rel State Treasurer;
J. C. Hawkins v. John L. Bleakly, Auditor of State, Warren Garst, Iowa Industrial Commissioner;
Rudolph Davis v. William H. Berry, John E. Howe, David C. Mott, Board of Parole and J. C. Sanders;
In the Matter of the Estate of John Peterson, deceased.

CASES PENDING IN UNITED STATES DISTRICT COURT.

Daniel B. Luten v. J. B. Marsh Engineering Co., et al.;
In re Taxation Mississippi River Power Company;
C. R., I. & P. and seven others v. Jno. A. Guiher and Edw. D. Chassell (Successors in office to N. S. Ketchum and D. J. Palmer), Clifford Thorne, George Cosson and J. H. Henderson.

CASES PENDING IN UNITED STATES CIRCUIT COURT OF APPEALS.

Theo. Hamm Brewing Company v. Chicago, Rock Island & Pacific Railway Company;
Thacher v. Polk County, et al.

STATE OF IOWA

1916

REPORT OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1916

GEORGE COSSON
Attorney General

Published by
THE STATE OF IOWA
DES MOINES

ATTORNEY GENERAL'S DEPARTMENT

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JOHN FLETCHER.....*Assistant Attorney General*
C. A. ROBBINS.....*Assistant to the Attorney General*
HENRY E. SAMPSON.....*Assistant to the Attorney General*
EARL M. STEER.....*Special Counsel*
ZEPHYR B. GILPIN..... *Law Clerk Stenographer*
RUTH MCCLURE..... *Stenographer*
ETHEL SHIPLEY.....*Stenographer*

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Isaac L. Allen.....1865-1866
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Smith McPherson.....1881-1885
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John Y. Stone.....1889-1895
Milton Remley.....1895-1901
Charles W. Mullan.....1901-1907
Howard W. Byers.....1907-1911
George Cosson.....1911-1917

LETTER OF TRANSMISSAL.

HON. GEORGE W. CLARKE, Governor:

SIR: I have the honor to submit herewith, in accordance with law, my report of the transactions of the Legal Department of the State of Iowa, for the biennial period ending December 31, 1916.

GEORGE COSSON, *Attorney General.*

Des Moines, December 31, 1916.

REPORT OF THE ATTORNEY GENERAL

The work of the department has very greatly increased both because of increased burdens and duties placed upon the attorney general by statute, and the important work assumed by the department, which was considered to be of very great interest to the public welfare and in harmony with the statutory and common law powers of the attorney general.

The past few years has witnessed the passing by our legislature of a number of new laws in the interest of social justice which have been challenged upon the ground of their constitutionality. A number of these laws were contested during the first four years of my incumbency, the state being successful in almost every instance.

IMPORTANT CASES.

In the case of *State v. J. N. Jones, et al,* the title to the non-navigable meandered lakes was in controversy, it being contended that they passed to private parties under the Swamp Land Act. The state's contention, however, that they belonged to the state for the use and benefit of the people was sustained by the supreme court of Iowa and the supreme court of the United States.

State of Iowa v. J. N. Jones, et al, 143 Iowa, 399;

Marshall Dental Manufacturing Co. v. State of Iowa, 226 U. S., 460.

Another case of importance involved the right of the state to compel a reshipment of cars of coal without unloading and reloading the same into the local equipment of the railway company. Again the state's contentions were sustained in the supreme court of Iowa and the supreme court of the United States.

State v. Chicago, Milwaukee & St. Paul Ry. Co., 152 Iowa, 317;

Chicago, Milwaukee & St. Paul Ry. Co. v. State of Iowa, 233 U. S., 334.

Another case involved the constitutionality of the unfair discrimination law. The state was successful in this case.

State v. Fairmont Creamery Co., 153 Iowa, 702.

Another case of great importance was the *Standard Stock Food Company v. Wright,* involving the constitutionality of the stock food law passed by the thirty-second general assembly. Again the state was successful in both the United States district court and the supreme court of the United States.

Standard Stock Food Co. v. Wright, 225 U. S., 540.

Another case involving the constitutionality of the jurisdiction of the state over the waters of the Mississippi river was that of Enos Moyer. The state was successful in its contentions in this case.

State v. Enos Moyer, 155 Iowa, 678.

Another case of great importance was the case involving the constitutionality of the teachers' minimum wage law. The state was again successful in sustaining the validity of the law.

Bopp v. Clark, 165 Iowa, 697.

The constitutionality of the capitol extension act was likewise attacked with great confidence. The state as you know was successful in both of these contests, the supreme court overruling the district judges in each instance and sustaining the state's contention entirely.

Rowley, et al v. Clarke, et al, 162 Iowa, 732.

The state likewise won the express cases, the express companies being denied a temporary injunction. The rates as prescribed by the commission were put in full force and effect. During this biennial period the state succeeded in having the complainants' bills in the express rate cases dismissed. The sustaining of the rates as fixed by the Iowa commission for express charges for all points in Iowa has meant the saving of hundreds of thousands of dollars to the merchants and citizens of this state.

The state has been successful in sustaining the validity and constitutionality of the workmen's compensation act in the United States district court. This same case has been appealed to the supreme court of the United States and submitted by both written and oral arguments. Every indication points to a verdict in favor of the state.

The state has likewise been sucessful in its co-operation with Polk county and the city of Des Moines in holding invalid the Thacher patent, the result of which will save the municipalities and the people of the state thousands of dollars in royalties which would otherwise be exacted by reason of these invalid patents held by Mr. Thacher.

An immense amount of evidence has been taken in the Luten patent contest and the state looks forward with confidence to a verdict in its favor in connection with these patents.

REMOVAL OF PUBLIC OFFICIALS.

During this biennial period ten public officials have either been removed or caused to resign because of a failure to perform the duties of their office, and at the suggestion of the attorney general, the city council suspended one chief of police for the period of sixty days for neglect of duty.

During my administration in office thirty-four public officials have been ousted or caused to resign in order to avoid prosecution because of misfeasance or nonfeasance in office.

AMENDMENT TO REMOVAL LAW.

We have recently discovered, however, in a very striking manner the necessity of being able to remove superintendents of public safety who have actual charge of the police force. Under the present removal law, the mayor, chief of police and all police officers, the county attorney and sheriff may be removed for a failure to perform their duties, but the superintendents of public safety, who under the commission form of government, may be directly responsible for the inactivity or inefficiency of a police force, may not be removed except under the old jury system.

I therefore recommend that the Cosson removal law should be amended so as to include city, county and township officers, elective or appointive. No reason can be offered why the removal law, which has produced such far-reaching and beneficial results, should not apply to all city and county officers.

The merit of the Cosson removal law and the red light injunction and abatement law is attested by the fact that twenty-two states have adopted the latter statute and the former is now being urged for passage in a number of states.

SPECIAL AGENTS LAW.

The original laws, however, including the additional power given to the attorney general, were found to be not entirely adequate, and hence in my 1913 and 1915 biennial reports I strongly urged the passage of a special agents bill and made a state-wide campaign in the interest of such a law. The last general assembly passed the act recommended except, however, the act placed the control in the hands of the governor instead of the attorney general. I am strongly of the opinion that these special agents should be placed under the charge of the attorney general with a reserve power in the governor to direct action, if necessary. As a matter of practice under the existing statute, they are under the charge of the attorney general. There is no governor who will personally care to direct the special agents in the enforcement of the law. This criticism aside, the law has more than justified itself. The full number of agents were not appointed until the first of January, 1916, the time the repeal of the mulct law became effective.

WORK OF SPECIAL AGENTS.

We have, however, secured evidence against fifteen bank robbers, nine murderers, thirteen white slavers, three men operating a confidence game known as wire tapping, over four hundred bootleggers, and over one hundred gamblers, in addition to a large number of other men convicted of serious crimes from highway robbery to the lesser offenses.

In one county alone, the fines for liquor nuisances amounted to nearly eight thousand dollars; in another county, the fines for liquor nuisances amounted to over six thousand dollars and in still another county, the fines aggregated nearly four thousand dollars. In one county the fines for gambling amounted to fifteen hundred dollars; in another county, five hundred dollars.

Over twenty-five confirmed criminals are now in the penitentiary as a result of the work of our special agents and assistants sent out from this office. These men received sentences ranging from life to three years. In a very large number of cases the evidence has been so well secured that the defendants pleaded guilty, thus relieving the state and county of any costs in the matter of prosecution. In one county with forty-seven persons indicted, there was not a case contested.

For over three months I have kept two men exclusively at work investigating violations of the motor vehicle law. As a result of this over seven hundred persons have been arrested or cited to appear and thousands of dollars have been paid into the state treasury. In the last two months alone, over ten thousand dollars have been paid into the state and county treasuries as a result of the activity of this department.

During the past week our special agents secured evidence against one of the most prominent restaurants in the state for maintaining a liquor nuisance. The defendants pleaded guilty, paid a fine of $500, and consented to permanent injunction.

REFORM IN COURT PROCEDURE.

The past few years has witnessed a great protest throughout the country against the miscarriage of justice due to technicalities in the law and a real desire to see the several states of the Union follow the lead of England and Canada in simplifying their procedure.

In 1907 the legislature of Wisconsin passed a law providing in substance that no judgment should be reversed or set aside or new trial granted in any action or proceeding, civil or criminal, on the ground of misdirection of the jury or the improper admission of evidence or for any error as to any matter of pleading or procedure, unless after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in the miscarriage of justice.

Section 3072-m, Laws of Wisconsin, 1907.

This reform, however, is not confined to Wisconsin alone, but has made progress in a large number of the states of the Union; and in 1914, the American Bar Association by a unanimous vote recommended the passage of a law of this nature in the several states. This has been the law of England for a number of years.

Michigan in 1915 (see act No. 89 of the Laws of Michigan, 1915) passed a law in almost the exact language of the Wisconsin law.

California has a similar statute. See section 960 Penal Code of California, 1915, and it was proposed to place it in the constitution.

Kansas, Colorado, Montana, Tennessee, Utah, Idaho, Washington, Kentucky, North Dakota, Indiana and New York likewise have statutes similar to the Wisconsin law—all in substance holding that

error should not be presumed to be prejudicial but it must affirmatively appear to the court that such error resulted in a miscarriage of justice, or that the verdict would have been otherwise; in other words, the court under these statutes determines whether the jury was warranted in finding the defendant guilty, rather than whether the rules of a game had been played with all the precision which custom has engrafted on to the law by way of precedent.

See session laws of Utah, 1915, chapter 113;

See chapter 32, acts of the session laws of Tennessee, 1911;

Sections 9415 and 9548 Revised Code of Montana, 1907;

Section 8236 Revised Code of Idaho;

Section 542, Code of Crim. Pro. of New York.

See Section 1752 Rem. & Bal. Code of Washington, wherein it is provided that all technicalities shall be disregarded and that all amendments shall be considered as made which should have been made.

We find then that this reform is not confined to the western states, but has been placed upon the statute books of the eastern, central and southern states as well.

Virginia and Maryland have no such law, but the court has adopted the more liberal view irrespective of the statute.

The supreme court of Virginia, in the absence of a statute, has taken the view that they are to determine the guilt or innocence of the defendant as shown by the record.

In the case of *Hanger v. Commonwealth,* 107 Va., 872, the supreme court of Virginia in response to objections made by counsel for defendant on page 875, said:

> "As we view the case, it is needless to consider the instructions given or refused, since it appears plainly from the evidence that no other verdict could have been rendered thereon than that rendered by the jury."

In other words the court held that since they found from the record the jury was warranted in finding the defendant guilty, the court would refuse to consider errors of law which did not result in a miscarriage of justice.

In my opinion the position taken by the Virginia court is eminently sound and should be followed, but since our court takes a

different view, I recommend in the most solemn manner a law similar to that of Wisconsin and the states above referred to.

The importance of such a law will be recognized when it is known that Wisconsin, with larger cities and over a hundred thousand more population than Iowa, during the biennial period for 1913 and 1914 (the statistics for the last year not being available), had only twenty-two cases appealed and of this number fifteen were affirmed and only four reversed.

Kansas, another mid-western state, which has a law similar to Wisconsin, affirmed forty-nine criminal appeals and reversed three during the past year.

Minnesota, another state with substantially the same population as Iowa, and larger cities, during its last biennial period, had fifty cases appealed, forty of which were affirmed and but ten reversed, but five reversals a year.

Maryland, during the last biennial period, had but twenty-two criminal cases appealed, of which fourteen were affirmed and only six reversed.

Connecticut, during the last biennial period, had but twelve criminal cases appealed, of which nine were affirmed and three reversed.

South Dakota had a total of twenty-two criminal appeals of which seventeen were affirmed and five reversed.

Attorneys general of other states advise that their courts are reversing fewer cases each year, the decrease being from fifty to one hundred per cent. For one reason or another the tendency has been exactly in the opposite direction in our own state.

During this biennial period there were 104 criminal cases disposed of. Of this number, 71 were argued. Of the number argued, 35 were affirmed and 35 reversed; one, however, was reversed at the instance of the state; 16 were affirmd per curiam and 14 dismissed.

During this period 31 civil cases pending January 1, 1915, have been disposed of; 35 new cases have been commenced in the state and federal courts and disposed of during the period, and there are now pending in the district, supreme and federal courts, 51 civil cases.

I am attaching herewith at the close of this statement entitled "Schedule A," a list of the criminal cases appealed, the title of the case, the county from which originating, the date of the decision, the character of the offense and the judge deciding the case.

When other states are making progress, Iowa should not go backward. The difficulty should be located and the evil corrected. If the courts refuse to take the broader attitude, the legislature should so direct. The authority of Canada, of England, of such states as New York, Indiana, Illinois, Wisconsin, Minnesota, California, Connecticut, Virginia, Delaware, Michigan, Idaho, Utah and Maryland is sufficient to show that it is not a sporadic effort of a few western states, but that the conservative east joins with the progress of the west; nor is the agitation carried on by a few of the more radical lawyers and public men. In addition to the action taken by the American Bar Association, law journals and magazines are filled with articles of men standing high in the profession and eminent judges pleading for this reform. Among this list may be counted Elihu Root, whom Mr. Roosevelt designated "the greatest mind in this or any other country during this generation;" Charles W. Eliot, president emeritus of Harvard University, the greatest living educator of his time; and ex-president and ex-federal judge, William Howard Taft.

I wish to quote a few sentences from the address of Charles W. Eliot before the Mississippi Bar Association at its annual meeting in 1913. Mr. Eliot, speaking as an observing layman, in the course of his address said:

> *"The common contentious attitude of counsel in a lawsuit, and the common attitude of the judge as the umpire in a game, have done much to discredit the administration of justice in the United States. Counsel do not seem to the American public to be officers of a court seeking for truth and justice, but players of an unethical, intellectual game. The judge seems to regard himself—often perforce—as a mere umpire between contending parties, and not as an agent of the Commonwealth to settle controversies on their merits.* The American public has lost some of its old faith in the judge as a protecting agent for carrying out the substantial requirements of law and justice. Some considerable portion of the public from time to time gets much interested, through the newspapers, in this game of counsel umpired by the judge. They admire and applaud the in-

genuity and spirit with which counsel take technical points for their clients, and the public press often sympathizes with and encourages this misdirected admiration."

Senator Root has made a number of addresses urging reform in court procedure, but nowhere did he express himself more clearly than before the American Bar Association, in which he said:

"Our trial practice in the admission and exclusion of evidence does not agree with the common sense, the experience or the instincts of any intelligent layman in the country. As a consequence, while we are aiming to exclude matters which our rules declare to be incompetent, or irrelevant or immaterial, we are frequently also excluding the truth. *The American man is intensely practical and direct in his methods. American procedure ought to follow as closely as possible the methods of thought and action of American farmers and business men.*"

Mr. Taft, while President of the United States, made an address on the defects of our criminal procedure in which he said:

"The statistics which show the crimes that go unpunished in this country as compared with those in England are startling and humiliating to any son of America who has pride in his fellow-countrymen as a law-abiding and law-enforcing people."

The eminent late Justice Brewer of the Supreme Court of the United States made the statement in a public address that "The reversing of a judgment by an appellate court upon a mere technicality is an outrage."

Authority of like nature could be greatly multiplied. With such authority, there can be no excuse for the legislature failing to enact a law substantially similar to that of Wisconsin, Michigan, New York and other states heretofore referred to; in other words, a law requiring the court to determine whether the jury arrived at a correct verdict in finding the defendant guilty, rather than whether the trial was conducted in exact harmony with all of the legal and technical niceties.

A reference to one Iowa case alone will show the importance both as a means of protecting the public against crime and likewise as a means of preventing delays and retrials and excessive court costs by reason of such delays and retrials.

Mathias Martin O'Donnell was charged with having murdered his wife, Inez O'Donnell, in the city of Keokuk on the 10th day of January, 1914. See *State v. O'Donnell;* 157 N. W., 870. He was found guilty by a jury and because of the brutality of the murder, the jury fixed the death penalty. The case was appealed to the supreme court of the state and arguments filed, and the case was finally submitted in May, 1915, and just one year thereafter the supreme court handed down an opinion, reversing the case, the court holding that notwithstanding the brutality of the murder, the evidence was insufficient to warrant a finding of a deliberate intent to kill. It has recently been proposed that the defendant be permitted to plead guilty to manslaughter, the punishment of which is eight years in the penitentiary; if, however, he earned his usual good time he would serve exactly five years and three months.

Considering that the punishment for the forging of a note, even of a nominal sum and passing the forged instrument, is fifteen years in the penitentiary, five years' punishment for the brutal murder of one's wife seems like a travesty upon justice.

If the old rule in mathematics still holds good that the whole is equal to the sum of its parts and includes all of its parts, then the jury not only found O'Donnell guilty of murder in the first degree, but they likewise found him guilty of murder in the second degree and all included offenses. If the jury said that he was guilty of deliberately killing his wife and that he should be hanged, can anybody conceive of any sane reason why it should be necessary that the case should be retried at an estimated expense of about two thousand dollars, taking the time and attention of the court for a long period of time and again reviewing to the community the horrible details of a horrible murder in order that a conviction may be had for murder in the second degree or manslaughter. If the court is right in finding that there was not sufficient evidence to warrant a conviction of murder in the first degree, which we do not admit but concede only for this purpose, undoubtedly then O'Donnell was guilty of murder in the second degree. Why then should it be necessary to have a retrial in order that judgment should be entered against defendant for murder in the second degree.

In the case of *State v. Baker,* 157 Iowa, 126, our supreme court upon the conviction of second degree murder, refused to let the

judgment stand as fixed by the lower court at twenty-two years, but on the petition for rehearing, reduced the punishment to fifteen years. Can there be any good reason why if the court felt that judgment for first degree murder with the death penalty could not stand, that a judgment should not be entered by the supreme court or directed to be entered by the trial court for second degree murder? Especially is this true, when, under the ruling of our court, it would be impossible to again put the defendant O'Donnell upon trial for first degree murder.

We submit that our supreme court has inherent authority to enter judgment or direct a trial court to enter judgment for any included offense, when the court finds that judgment may not stand for the higher offense. Since, however, the court has taken a different attitude with reference to the O'Donnell case, express authority and direction should be made by the coming general assembly. A retrial under the same circumstances as that shown in the O'Donnell case could not possibly happen in any other civilized country in the world, certainly not in Canada or England.

SUBSTITUTION OF SENTENCE.

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

> "If it appears to the court of criminal appeal that an appellant, though not properly convicted on some count or part of the indictment, has been properly convicted on some other count or part of the indictment, the court may either affirm the sentence passed on the appellant at the thial, or pass such sentence in substitution therefor as they think proper, and as may be warranted in law by the verdict on the count or part of the indictment on which the court consider that the appellant has been properly convicted.
>
> "Where an appellant has been convicted of an offense and the jury could on the indictment have found him guilty of some other offense, and on the finding of the jury it appears to the court of criminal appeal that the jury must have been satisfied of facts which proved him guilty of that other offense, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that offense, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offense, not being a sentence of greater severity.

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

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

INSANITY.

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

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

"When such special verdict is found the court shall order the accused to be kept in custody as a criminal lunatic, in such place and in such manner as the court shall direct till His Majesty's pleasure shall be known, and it shall be lawful for His Majesty thereupon, and from time to time, to give such order for the safe custody of the said person during pleasure, in such place and in such manner as to His Majesty may seem fit."

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

Massachusetts in 1909 passed the following law:

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

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

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

ADDITIONAL RECOMMENDATIONS.

In addition to these recommendations, the county attorney should be permitted to comment upon the fact that the defendant fails to testify in his own behalf.

If a defendant is found guilty of an included offense in the indictment and takes an appeal, and the case is reversed and re-

manded, the law should permit him to be tried for the offense charged in the indictment. This is permitted under the rulings of several courts of the states of the Union, but our court has ruled otherwise.

A change in our criminal procedure is of the utmost importance, but it is equally important to change the method of punishment.

CUSTODIAL FARM SHOULD BE ESTABLISHED.

I had previously recommended the purchase of a farm for misdemeanants, and succeeded in having written into the law the authorization for the purchase of such a farm, and the board of control, pursuant to the law, purchased over seven hundred acres of some of the best land in Iowa, but the legislature has not yet passed the necessary law authorizing the establishment of the farm and providing that misdemeanants shall be sent to the custodial farm instead of continuing to commit them to jail to remain in filth and idleness.

Permit me to direct attention to the fact that during the past year over thirty-three thousand persons were committed to our county and city jails, and in not a single one of them is there any construc-time work provided; that prisoners are maintained at the public expense, fed in a cage like a wild beast, in one promiscous assembly, the guilty with the innocent, the first offender with the hardened criminal, and in a large number of instances, while the husband and bread winner is serving out a sentence in jail, the man's wife and children are either living upon charity, half starving or attempting in one way or another to maintain body and soul together until the bread-winner has been returned.

This legislature can do no more important work than to pass the law establishing this farm which is already purchased and which has more than justified the wisdom of the act as shown by the fact that the land since the purchase has increased about fifty dollars.

ABOLITION OF CAPITAL PUNISHMENT.

The National Committee on Prison Labor has just issued a pamphlet, available to anyone on application, which conclusively demonstrates that a law authorizing capital punishment defeats its own ends; that there is less murder in those states where capital punishment is not allowed. Every student of this question knows

that the important thing is the certainty and promptness of punishment rather than the extreme severity, but theoretical and academic reasons are not needed. The O'Donnell case just referred to furnishes the most convincing proof. It is possible that if the death penalty had not been fixed, our court would have permitted a first degree murder to have stood. This is a fair inference from the fact that the court had the matter under consideration for a full year. I therefore recommend that the death penalty be abolished.

SUMMARY OF RECOMMENDATIONS.

Summarizing my conclusions, I recommend:

First: The passage of a law similar to the law of Wisconsin and the other states referred to providing that no judgment shall be reversed or set aside or new trial granted in any action, civil or criminal, unless it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

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

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

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

Fifth: The establishment of the custodial farm and other fundamental changes in the jail and penitentiary system in accordance with the report of the committee appointed by the governor to investigate conditions at Fort Madison and filed with the governor on the 25th day of May, 1912.

Sixth: A change in the law placing the direct control of the special agents in the hands of the attorney general where it now exists in actual practice.

Seventh: The abolishing of capital punishment.

Eighth: The automatic forfeiture of good time of any prisoner who either escapes or attempts to escape.

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

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

Eleventh: The state should be allowed to put the defendant on trial for the offense charged in the indictment in the event of a retrial at defendant's instance, after having been convicted of an included offense.

Twelfth: In view of the numberless complaints concerning gambling, lottery schemes and punch boards, a law should be passed prohibiting the manufacture, sale, the keeping for sale, or attempt to sell any gambling or lottery scheme or paraphernalia within this state.

Thirteenth: An amendment to the motor vehicle law providing that upon the payment of the annual license fee for the second and third years of the third year period, a small plate reading "License Fee Paid for the Year" shall be furnished by the secretary of state to each owner of a motor vehicle with the requirement that such plate be displayed on the motor vehicle in a conspicuous place, and providing a punishment for the failure thereof; otherwise the state will lose between twenty-five and fifty thousand dollars because of the non-payment of the license fee.

Fourteenth: The state should exercise supervision over private banks.

I leave the office with no unfinished business that could have been disposed of. I believe that the increased appropriations received by the department have been more than justified by the additional work assumed and the results accomplished.

I leave the office very efficiently organized. The work is classified and the persons are especially capable in the lines of work assigned to them.

I acknowledge with pleasure the ability of my assistants and special counsel—John Fletcher, C. A. Robbins, Henry E. Sampson and Earl M. Steer, and the efficiency, industry and loyalty of my law clerk, Miss Gilpin, and the ability of the two stenographers, Mrs. Shipley and Miss McClure, and I wish to make special men-

tion of the very capable and important services rendered by the three special agents who are now working, O. O. Rock, James E. Risden and Henry W. Terrell.

I think it is not too much to say that there is no more important branch of the state government than the Department of Justice, and the work accomplished is the best testimonial to the merits of the employees of the office.

OFFICIAL OPINIONS

Formal Opinions Rendered by the Attorney General for State Officials During 1915 and 1916.

SECRETARY OF STATE does not have to attach seal to report made of succeeding general assembly showing publication of a proposed amendment and agreed to by a previous general assembly.

Sir: I am in receipt of your communication of the 30th instant requesting to be advised as to whether your report made to a succeeding general assembly showing publication of a proposed amendment adopted and agreed to by a previous general assembly must be authenticated by the seal of the secretary of state.

Section 55, supplement to the code, 1913, provides in part:

> "Whenever any proposition to amend the constitution has passed the general assembly and been referred to the next succeeding legislature, the secretary of state shall cause the same to be published, once each week, in two newspapers of general circulation in each congressional district in the state, for the time required by the constitution; and proof of the publication shall be made by the affidavits of the publishers thereof, and such affidavits, with the certificate of the secretary of state of the selection of such newspapers therefor, shall be filed in his office, recorded in a book kept for that purpose, and preserved, and he shall report to the following legislature his action in the premises."

It will be observed that the formal proof of publication, together with the certificate, is filed in the office of the secretary of state, but the secretary is required to make a report of his actions to the legislature; it does not say said report shall be in the form of a certificate or under seal.

I am therefore of the opinion that the report in question is not required to contain the seal of the secretary of state. No prejudice, however, could result by attaching the seal to said report if it was desired so to do. Respectfully submitted,

GEORGE COSSON, *Attorney General of Iowa.*

January 30, 1915.

HON. W. S. ALLEN, *Secretary of State.*

MEMBERS OF LEGISLATURE—COMPENSATION OF.—Person holding certificate of election and seated by committee on credentials entitled to compensation during first half of session.

SIR: I am in receipt of your communication of the 11th instant enclosing certificate showing that John M. Lindly was seated as senator from the tenth district by the committee on credentials, and that Henry W. Grout was seated by the committee on credentials as senator from the thirty-eighth district. You request to be advised whether in view of this fact it would be legal for you as auditor of state to issue warrants for the first half of their salaries for the session now being held.

It is the holding of this department that the senators holding the certificate of election and seated by the committee on credentials are entitled to receive compensation for the first half of the session, and that you will therefore be authorized to issue warrants accordingly. Yours very truly,

GEORGE COSSON, *Attorney General.*

February 12, 1915.

HON. FRANK S. SHAW, *Auditor of State.*

STATE PRINTER OR BINDER.—Either office may be abolished by the legislature or the compensation changed by that body.

SIR: I am in receipt of your communication of the 13th instant in which you submit the following questions:

> "1. Is it in the power of the present general assembly to abolish the offices of state binder and state printer?
>
> "2. Can the emoluments of either of said offices be reduced during the period of time for which the holders of said offices have been elected?"

Replying to your first question, inasmuch as the offices in question are not constitutional offices, it is within the power of the general assembly to abolish the offices of state binder and state printer.

Replying to your second question, it is fundamental that unless there is a constitutional provision relating to the compensation of officers, there is nothing in the law to prevent either an increase or a decrease in the compensation received by a public officer.

In my opinion it is within the power of this general assembly to change the compensation allowed for various kinds of work of either the state binder or state printer. Of course this does not refer to services already performed. Yours very truly,

GEORGE COSSON, *Attorney General.*

April 13, 1915.

HON. H. C. RING, *House Chamber.*

LABOR COMMISSIONER—COMPENSATION—AMOUNT OF HELP AND COMPENSATION.—Entitled to two clerks in addition to deputy at salary of $1,000 each.

SIR: You call attention to the letter of the treasurer of state addressed to you of date April 2d, and propound the question as to whether or not under the laws of the state and the acts and resolutions of the last general assembly you are entitled to more than one clerk in your department and whether or not an appropriation for the compensation of more than one clerk was made by the last general assembly.

By section 3 of chapter 196 of the acts of the thirty-fifth general assembly it is provided,—

> "The commissioner of the bureau of labor statistics shall receive a salary of eighteen hundred dollars ($1,800) per annum and shall be allowed a deputy at a salary of fifteen hundred dollars ($1,500) per annum payable monthly; he shall also be allowed three (3) factory inspectors, one of whom shall be a woman, at a salary of one hundred dollars ($100) per month each, *one office clerk* at a salary of one thousand ($1,000) per annum."

By joint resolution No. 15 it is provided,—

> "Until July 1, 1915, the number of employes for the various offices at the seat of government, unless otherwise provided by law, shall at no time exceed the number named herein, and their compensation shall be amounts herein fixed.
>
> "For the bureau of labor statistics, one clerk and statistician at a salary of not to exceed $1,000."

By section 1 of chapter 321 of the acts of the thirty-fifth general assembly it is provided,—

"There is hereby appropriated out of any money in the state treasury, not otherwise appropriated, an amount sufficient to pay the salaries of the *various officers, whose salaries are fixed* by law, for a term of two years, ending June 30, 1915, and payable from the state treasury, and the auditor of state shall draw warrants therefor in favor of the officers entitled thereto, in monthly installments, when not otherwise provided by law.

"To the office of the bureau of labor statistics, for the period ending June 30, 1915, as per joint resolution No. 15, the sum of two thousand dollars ($2,000.00)."

Construing all of these provisions together it would seem that section 1 of chapter 321 was intended to provide compensation for the labor commissioner, his deputy and the office clerk provided for in and whose salary was fixed by section 3 of chapter 196 of the thirty-fifth general assembly, and section 2 of chapter 321 is intended to provide an appropriation for the clerk and statistician authorized to be employed by joint resolution No. 15. Hence it would seem clear that you would be entitled to two clerks in addition to the deputy at a salary of $1,000 each per year.

Respectfully submitted,

GEORGE COSSON, *Attorney General.*

April 14, 1915.

HON. A. L. URICK, *Commissioner of Labor.*

BOARD OF CONTROL.—Has authority to operate farm, to employ a manager, to work prisoners of either penitentiary or reformatory under the immediate charge of guard sent out by warden, but general work shall be under the supervision of general manager employed by board of control.

GENTLEMEN: I am in receipt of your communication of the 22d instant directing attention to the tract of land purchased pursuant to the provisions of chapter 17, acts of the thirty-fifth general assembly, authorizing the use of the millage tax, among other purposes, for the purpose of a district custodial farm, and requesting to be advised as to whether you are authorized to employ a superintendent or manager, purchase the equipment, establish a camp of prisoners from the penitentiary or reformatory, and if so, who shall have jurisdiction thereof and from what funds the same shall be paid.

In an official opinion given your board under date of September 15, 1913, I held that you were authorized to purchase the farm in question and that from the use of the millage tax "you may secure the services of a foreman or manager for the purpose of establishing and maintaining industries at one or more of the institutions in question."

It follows from the provisions of chapter 17, acts of the thirty-fifth general assembly, that you have general jurisdiction and supervision over the land in question. You are authorized under the provisions of chapter 134, acts of the thirty-fifth general assembly, to employ the prisoners from either the penitentiary or reformatory upon any public works. Inasmuch as this farm is now owned by the state you may employ the prisoners from either institution to work upon the farm and establish a camp from either of said institutions. A like authority is given to the board of control in House File No. 628. This law provides in part that "The board of control is hereby authorized and empowered to establish such industries as it may deem advisable at said penitentiary, and at said reformatory and at *or in connection with* any of the penal, reformatory or other institutions under its jurisdiction, and the inmates may render service as herein limited and defined at or away from any of said institutions with the consent of said board of control," so that this farm may be operated in connection with either the reformatory or penitentiary. The bill in question contained a publication clause.

While the general supervision and control of the farm is under the jurisdiction of the board of control, the prisoners themselves will be under the immediate charge of a guard sent out by the warden of one of the penal institutions.

Summarizing, I hold that you have authority to operate the farm, to employ a general manager, that you have jurisdiction over the farm; that a prison camp may be established from either of the penal institutions; that the farm may, if you desire, be operated in connection with either of the penal institutions; that the prisoners so working shall be under the immediate charge of a guard sent out by the warden of one of the institutions, but the general work at the farm shall all be under the supervision of the general manager or superintendent employed by you. Respectfully submitted,

GEORGE COSSON, *Attorney General.*

April 23, 1915.

HONORABLE BOARD OF CONTROL, *of State Institutions.*

STATE PRINTER—FEES—Work actually performed to be paid at rates prescribed in law at time work was performed.

SIR: I am in receipt of your communication of the 11th instant enclosing a letter from the state printer, Robert Henderson, in which he directs attention to the fact that House File No. 637, acts of the thirty-sixth general assembly, prescribing new rates to be paid for printing became effective on the 10th instant; that he is, therefore, in doubt as to whether the old or the new rates apply to work on hand and not complete at this time.

I am of the opinion that all of the work actually performed up to the time House File No. 637 became effective should be paid for at the rates prescribed in the law at the time the work was actually performed, and so much of the work as is performed thereafter should be paid for at the new rate. It may not be possible to make the separation with strict accuracy, but there is no reason why a close approximation along the lines herein indicated may not be made. Yours very truly,

GEORGE COSSON, *Attorney General.*

May 13, 1915.

HON. W. S. ALLEN, *Secretary of State.*

EXECUTIVE COUNCIL—Section 18 of general appropriation bill gives ample authority to expend $11,800 on repairs to capitol. Not mandate, however.

GENTLEMEN: I am in receipt of the communication of your secretary under date of the 3d instant in which you advise that in the general appropriation bill section 18 contains the following paragraph:

> "There is hereby appropriated the sum of $11,800 to be expended under the direction of the executive council as recommended by joint committee under date of April 2, 1915."

You request an opinion as to whether or not this appropriation is a sufficient approval of the report of the special committee on improvements and repairs to the state capitol so that the report may be authority for or a mandate to the executive council to carry out the recommendations contained in said report.

In my opinion the appropriation is ample authority for the executive council to expend the sum of $11,800 under the direction of the executive council and in harmony with the report of said special committee on improvements and repairs to the state capitol, but that the same does not amount to a mandate. I should add, however, that since the legislature made the appropriation it was evidently intended that said appropriation would be expended as per the terms of the appropriation, together with the report of the committee. Respectfully submitted,

GEORGE COSSON, *Attorney General.*

May 13, 1915.

HONORABLE EXECUTIVE COUNCIL.

BOARD OF AUDIT.—Claims of assistant veterinary surgeons filed subsequent to April 15, 1915, with approval as required by H. F. 603, 36th G. A., should be paid.

GENTLEMEN: I am in receipt of your communication of the 29th ultimo requesting an opinion as to whether the board of audit will be justified in approving claims filed with the secretary of the executive council subsequent to April 15, 1915, for services and expenses of assistant veterinary surgeons in connection with the quarantine and destruction of stock affected with the foot and mouth disease, under the provisions of House File 603 of the thirty-sixth general assembly.

Section 2 of said act provides in part:

> "Any person who has rendered or who shall hereafter render service or incur expense at the requests of the state veterinarian in connection with the quarantine, care, destruction, or burial of the stock in any districts under quarantine for the disease herein referred to, may file with the secretary of the executive council a verified and itemized statement of his claim for such services and expenses, which statements shall bear the personal approval of the state veterinarian *and of the persons for and on account of whom such services were rendered,* except that claims filed under the provisions of this section prior to April 15, 1915, shall not be required to bear the endorsement of the person or persons for and on account of whom such services were rendered," etc.

Said act then requires in general and positive terms that all verified claims for services rendered contain the personal approval of the state veterinarian, and in addition thereto the approval of the person for and on account of whom such services were rendered, with the one exception that this shall not be required if the claims are filed under this act prior to April 15, 1915.

It follows then that if the claims are filed subsequent to April 15, 1915, regardless of what we may think of the advisability of the provisions of the act, the statute must be complied with, and that such claims must contain both the approval of the state veterinarian and the person for and on account of whom such services were rendered. Respectfully submitted,

GEORGE COSSON, *Attorney General of Iowa.*

June 2, 1915.

STATE BOARD OF AUDIT.

BOARD OF CONTROL—VASECTOMY LAW.—Law passed by 36th G. A. is constitutional although it does apply only to persons confined in the insane hospitals.

GENTLEMEN: I am in receipt of your communication of the 21st ultimo directing attention to the act passed by the thirty-sixth general assembly repealing chapter 19-B, title 12 of the supplement to the code, 1913, and enacting a substitute therefor, and directing my attention to the fact that the law does not apply generally but to persons confined in the insane hospital.

As a general rule, officers should assume the constitutionality of a law unless it appears clearly unconstitutional. This law is a repeal of the old law which was rather drastic and compulsory in its form, and provides for no more than a mere authorization to perform the operation of vasectomy in the event that it is found to be in the interest of the patient; provided further that the husband or wife, if the patient is a married person, shall consent in writing; or if an unmarried person, the written consent of the parent, guardian or next of kin, if any there be within this state, shall be obtained.

It is not at all improbable that the superintendent and medical staff would have the authority to perform the operation under

such circumstances without any law, but it was thought well to enact a statute so as to furnish a complete protection to the officers in the event they found it advisable to perform the operation.

Respectfully submitted,

GEORGE COSSON, *Attorney General of Iowa.*

July 1, 1915.

HONORABLE BOARD OF CONTROL OF STATE INSTITUTIONS.

BOARD OF AUDIT—AUDITOR OF STATE—When extra help is provided by statute and salary fixed by the legislature, or commission designated to fix such salary, claim need not be audited by board of audit.

SIR: I am in receipt of your communication of the 29th ultimo requesting an official opinion as to the payment of the salaries of extra help in various offices in the event that the amount of salary is not expressly designated in the statute; that is to say, you request an opinion whether or not in such event the claim may be submitted directly to you, or whether it must pass through the board of audit.

I am of the opinion that wherever a particular employment is designated by statute, including reference in the omnibus bill, and the salary is also fixed by the legislature, or some officer, board or commission is expressly designated with authority to fix the salary or compensation, the claim for services need not go to the board of audit but may be submitted directly to the auditor of state.

In the event, however, that the compensation is not designated by the legislature, nor the salary fixed by the legislature or by some board, officer or commission designated by the legislature to fix the salary or compensation, but the statute merely authorizes some department or officer to employ help and pay for the same out of a contingent fund or other revenues of the state, such claims should be submitted to the board of audit.

I am further of the opinion that wherever the statute authorizes the employment of services and the legislature fixes the salary, or designates some officer or commission and gives them express authority to fix the salary, the compensation or salary thus fixed by the officer, board or commission expressly author-

ized to fix salary or compensation, may not be reviewed by the board of audit, but that the responsibility in such case devolves upon the legislature and the officer, board or commission designated by the legislature to fix such compensation.

Respectfully submitted,

GEORGE COSSON, *Attorney General of Iowa.*

August 7, 1915.

HON. FRANK S. SHAW, *Auditor of State.*

CODE EDITOR, SALARY—Opinion as to the salary to be paid Chas. S. Wilcox.

SIR: I am in receipt of your communication of the 23d instant in which you enclose bill filed by Charles S. Wilcox for $2,040, it being claimed that this amount remains due pursuant to the provisions of section 224-j, Supplemental Supplement, 1915, the same being House File 110 of the thirty-sixth general assembly.

In your letter you call attention to the fact that the attorney general was officially advised that Charles S. Wilcox was discharged as code editor by the supreme court on the 14th day of July. You, therefore, by direction of the court, request an opinion as to the duty of the chief justice with reference to the certification of the bill filed by Charles S. Wilcox in the sum of $2,040.

Chapter 1 of the acts of the thirty-fifth general assembly, which provides for the compiling of the acts of a general nature of the thirty-third, thirty-fourth and thirty-fifth general assemblies, and the laws as they appear in the Supplement to the Code, 1907, also provides that the committee shall elect some competent and suitable person as editor, and that "in case of neglect or inability to act on the part of the editor, said committee may discharge him and elect another in his stead."

Section 224-j of the Supplemental Supplement, 1915, provides in part:

> "The supreme court shall be substituted for the code supplement supervising committee appointed under the authority of chapter one of the acts of the thirty-fifth general assembly and the editor therein chosen as provided therein, shall under supervision of said court, aid the supreme court reporter in the preparation of said supplemental supplement for 1915," etc.

It follows, therefore, that all of the power and authority given to the code supplement supervising committee by the thirty-fifth general assembly was transferred to and inheres in the supreme court of Iowa.

Mr. Wilcox being discharged for cause by order of the supreme court of Iowa on the 14th day of July and all of the work rendered by the said Charles S. Wilcox, code editor, being paid for by the state, I am of the opinion that neither the chief justice nor any other member of the court by order of the court should certify the bill presented by the said Charles S. Wilcox, and that the same should not be allowed and paid by the state of Iowa. Respectfully submitted,

GEORGE COSSON, *Attorney General of Iowa.*

October 1, 1915.

TO THE HONORABLE CHIEF JUSTICE HORACE E. DEEMER.

GAMBLING—COUNTY FAIRS—Description of two devices given and each declared gambling.

SIR: I am in receipt of your communication of the 23d instant in which you detail the nature of games operated at the county fairs in Lyon and Chickasaw counties, and upon this statement of fact you request to be advised as to whether or not such scheme as was operated in either or both instances constitutes gambling. At the Chickasaw county fair you say:

> "Device is a platform or table on which there are circles or spots. The person wishing to play the game pays ten cents for a five cent package of gum. For this consideration he gets three disks. If they cover the circles or spots on the table or platform, the number in the spot or circle entitles the player to certain merchandise of a value from ten cents to more than one dollar, according to how lucky the thrower is. The player always receives his five cent package of gum for his ten cents and he may receive merchandise to the value of one dollar or more besides."

At the Lyon county fair you say:

> "The person wishing to play the device as run at the Lyon county fair bought a five cent lead pencil for twenty-five cents. With this pencil he got one chance, of which the ex-

hibit attached, No. 5724, is a ticket, and was actually used in playing the device. For every twenty-five cents which the person playing the game paid, they got one pencil of the value of not more than five cents. The mechanical device used was a wheel which turned around over numbers. If the indicator stopped on any of the four numbers held by the person playing the game, as in this case 23, 24, 53 and 54, stopped at any of these, then the person playing the game not only got his five or ten cent lead pencil, for which he paid twenty-five cents, but he also got a doll which wholesales at $2.69 and retails for $5.00. He always got his pencil and sometimes, if he was lucky, he got the doll besides. There is evidence in this case that in many instances no pencils were sold, but the tickets themselves were sold for twenty-five cents each. Not taking into consideration the last statement, that is in a good many instances no pencils were sold, but considering solely the first question, is it gambling under the Iowa statute?''

Under the circumstances detailed by you in both Chickasaw and Lyon counties, the schemes operated were clearly gambling and lottery schemes.

I direct your attention to my opinion given on this subject under date of November 6, 1911. After calling attention to the holdings of our supreme court and the opinion of former Attorney General Remley and citing a number of cases in support of these holdings, I restate the whole matter as follows:

> ''Therefore, all schemes or transactions for which a consideration is paid, and in which the person paying the consideration receives something each time, but the amount received depends upon luck or chance, are gambling transactions, as well as the recognized gambling transactions where the game is purely one of chance for a money consideration.''

Respectfully submitted,

GEORGE COSSON, *Attorney General of Iowa.*

December 27, 1915.

HON. FRANK S. SHAW, *Auditor of State.*

INSANE—SENTENCE OF SUSPENDED—Board of control has authority to transfer an insane convict to another institution for treatment.

SIR: I am in receipt of your communication of the 23d instant in which you state that the board of control has made application that you suspend the sentence of a female convict in the reformatory at Anamosa who has been found to be insane to the end that she may be transmitted to one of the state hospitals for the insane.

You direct attention to section 5709-d, Supplemental Supplement, 1915, which provides:

> "No convict confined in the reformatory at Anamosa found to be insane shall be removed to any other institution except upon order of the board of control and after an examination of such convict and report to said board warranting the same, made by a superintendent of one of the hospitals for the insane."

I concur with you that regardless of any private intention which the draftsman of the law may have had in mind there is nothing in the language which indicates that the words "any other institution" referred to the penitentiary only. On the contrary I can see many reasons why it would not be desirable to transfer an inmate of a penal institution to the hospital for the insane, except upon order of the board of control and after an examination of such convict made by a superintendent of one of the hospitals for the insane.

Speaking broadly, the governor's fundamental power would go to the release of the convict, but the board of control has the general supervision over the hospitals for the insane in addition to the penal institutions.

In making a transfer from a penal institution to the hospital for the insane, in the event the person was found to be insane, no constitutional question could arise as the punishment (if looked upon as a punishment) would be less; however, it is not looked upon as a punishment except as it may be considered a continuation of the original sentence.

After a careful consideration I concur with you that the board of control has the authority to make the transfer under the conditions pointed out in section 5709-d, Supplemental Supplement, 1915. Respectfully submitted,

GEORGE COSSON, *Attorney General of Iowa.*

December 31, 1915.

HON. GEORGE W. CLARKE, *Governor of Iowa.*

MEANDERED LAKES—SURVEY—HIGHWAY COMMISSION—Highway Commission not limited to hiring employes of engineering department of Ames and Iowa City, but may appoint others if necessary.

DEAR SIR: I am in receipt of your communication of the 27th instant directing my attention to chapter 2-B of the Supplemental Supplement, 1915, relative to the survey of meandered lakes by the highway commission, and requesting an opinion as to whether the commission is limited by said act in the hiring of employees to the persons designated in said act, viz: employees of the engineering departments of the Iowa State College and of the State University and other employees at said colleges.

In my opinion the chapter in question should be construed as a grant of power and for the purpose of making available employees of the engineering departments of the State Agricultural college or of the State University, and was not intended to be construed as one of prohibition and limitation.

You will note that in section 2900-d, the statute reads: "The highway commission is *authorized*" and farther on in the section it says: "The highway commission may appoint any of said employees." There is no language which limits the appointment to these men only. Undoubtedly, however, it was the intention of the general assembly to use such employees of the state colleges as were available for the work. Yours very truly,

GEORGE COSSON, *Attorney General.*

January 31, 1916.

THOS. H. MACDONALD, *State Highway Engineer, Ames, Iowa.*

BOARD OF CONTROL—Authorized to expend $5,000 annually for the collection and dissemination of information regarding tuberculosis—May employ visiting nurses for social survey work.

GENTLEMEN: I am in receipt of your communication of the 3d instant directing my attention to section 2727-a89, supplement to the code, 1913, which provides that:

> "There is hereby appropriated out of any funds in the state treasury not otherwise appropriated the sum of five thousand dollars annually, or so much thereof as may be necessary, to be used by the board of control of state institutions for the collection and dissemination of information regarding tuberculosis. Said board of control may arrange exhibits, employ lecturers, co-operate with other institutions or oganizations or use any means necessary to give to the people of the state a practical knowledge of tuberculosis. Said board of control shall, with the superintendent or such assistance as it may deem advisable, stimulate the organization of, and assist in establishing hospitals or dispensaries or make other provisions, in the various counties or large centers of population, for the treatment of patients in the advanced stages of tuberculosis."

You further direct attention to the organization known as the Iowa Association for the Prevention of Tuberculosis; that the association in question is composed of seventy-one leading physicians, clergymen, editors, professional men, state officers and publicists, including the Honorable George W. Clarke as one of the honorary vice presidents; that said organization desires to co-operate with the board of control in spreading the necessary information and educating the people in regard to the prevention of this disease, and to that end they propose to the board of control that the said board of control employ two visiting nurses with social training for organization work for the purpose of making a survey of different localities, showing the number of tuberculosis cases, housing conditions, instructing teachers in the different schools concerning turberculosis, advising said teachers how to instruct scholars concerning the disease and to get school authorities to correct insanitary conditions. They further desire to establish a monthly bulletin for the prevention of tuberculosis, also distribute literature for school work, industrial work and to inform the general public in regard to the prevention of this disease.

You request an opinion as to whether or not this work may be carried on by the board of control pursuant to the provisions of section 2727-a89 of the supplement aforesaid, and paid for under said section.

The act in question makes an appropriation of five thousand dollars which may be expended annually, or so much thereof as may be necessary, by the board of control for the collection and dissemination of information regarding tuberculosis. It gives the board authority to arrange exhibits, employ lecturers, co-operate with other institutions or organizations *or use any means necessary* to give the people of the state a practical knowledge of tuberculosis and, after providing for organization work and assisting in establishing hospitals or dispensaries, further provides that the board may co-operate in the treatment of patients.

I am of the opinion that the work outlined by you comes clearly within the provisions of section 2727-a89 and that payment for said work may properly be made under the authority granted in said section. Respectfully submitted,

GEORGE COSSON, *Attorney General.*

March 4, 1916.

TO THE HONORABLE BOARD OF CONTROL OF STATE INSTITUTIONS.

EMPLOYEES—EXPENSES OF—Heads of department should require employees to reside at place of work. Employees entitled to expenses while away from home on official business.

SIR: Replying to yours of the 9th ultimo relative to the expenses of an employee, I am of the opinion that the heads of departments should require employees to reside at the place where it is most advantageous for them to carry on their work, and while at the home of their residence they could not of course be allowed expenses. While away from their residence, if engaged in official business for the state, they are entitled to their expenses.

It is for you to determine whether the major portion of your examiner's work is in Des Moines, and therefore whether he must consider his residence as in Des Moines; if so, he will not

be allowed his expenses here in the city, but will be allowed his expenses elsewhere if engaged in official business. Yours very truly,

GEORGE COSSON, *Attorney General of Iowa.*

April 6, 1916.

HON. FRANK S. SHAW, *Auditor of State.*

SPECIAL AGENTS—Entitled to their expenses when actually engaged in work. Expenses paid under provisions of section 170-i, supplement to the code 1913.

GENTLEMEN: I am in receipt of your communication of the 5th instant in which you direct attention to the special agents employed by the attorney general and paid from the contingent fund of the attorney general, and specifically as to what fund the expenses of such agents may be paid.

Section 211, Supplement to the Code, 1913, provides that the attorney general "shall be provided with an office in the capitol building" and after fixing his salary states: "And *whenever he is required by the duties of his office,* or by direction of the governor or general assembly, to attend any of the courts of this state, or any of the federal courts, *or transact other business for the state,* he shall receive his actual expenses when so engaged elsewhere than at the seat of government."

Section 208-a of said Supplement provides in part:

> "It shall be the duty of the attorney general to appear for the state * * when requested to do so by the governor, executive council or general assembly, *or when in his judgment the interests of the state require it,* he shall appear for the state before any other court or tribunal, prosecute or defend all actions *and proceedings,* civil *or criminal,* in which the state may be a party or interested; * * to exercise supervisory powers over county attorneys in all matters pertaining to the duties of their offices."

The attorney general then is not only given authority but it is made his duty to appear not only in the supreme court but in any other court or tribunal, and prosecute or defend all actions and proceedings, civil or criminal, in which the state may be a party or interested. It is clear that he may appear either per-

sonally or by an authorized representative and in the discharge of an official duty, either personally or through an authorized representative, he shall be entitled to receive his actual expenses when so engaged; hence I am of the opinion that the statute clearly authorizes the payment of the expenses of said special agents which may be legally employed to perform the services enjoined upon the attorney general pursuant to the provisions of section 211, Supplement to the Code, 1913.

Section 170-i of said Supplement to the Code, 1913, also provides:

> "The executive council of the state of Iowa is hereby authorized to allow and pay any costs taxed to the state of Iowa or other expenses incurred in any suit or proceeding brought *by* or *against* any of the state departments or in which the state is a party *or interested*, to be paid out of any moneys in the state treasury not otherwise appropriated."

You will observe that the section does not limit the expenses to costs which are *taxed* to the state, but includes "other expenses incurred in any suit *or proceeding* brought by or against any of the state departments *or in which the state is a party or interested.*"

Wherever suits or proceedings are brought or defended, either in a court of record or before a magistrate or grand jury, such expenses, including all of the expenses of the special agents, may be paid under the provisions of section 170-i of said Supplement. I have not however construed this to include the payment of attorney fees, but all other expenses incident to the work may be included.

Respectfully submitted,

GEORGE COSSON, *Attorney General of Iowa.*

August 14, 1916.

HONORABLE BOARD OF AUDIT.

ELECTIONS—SOLDIERS' RIGHT TO VOTE IN FIELD.—Provided by chapter 29, ninth general assembly, extra session, as amended by chapter twenty-eight, tenth general assembly, is still in force.

DEAR SIR: I am in receipt of your communication of the 13th instant in which you say:

"I desire to submit to you as the head of the legal department of the state of Iowa, the following question, to-wit:

"Is Chapter 29 of the Acts of the extra session of the Ninth General Assembly, together with the amendment thereto found in Chapter 28 of the Acts of the Tenth General Assembly, applicable to the situation which now exists with reference to the Iowa troops now doing duty under the order and direction of the Federal Government on the border between the United States and Mexico, and do the said soldiers so located have the right under the provisions of said chapters to vote in accordance with the provisions therein provided at the next general election to be held in this state and throughout the country on the 7th day of November A. D. 1916?"

The law in question was passed by the extra session of the ninth general assembly of the state of Iowa and became effective by publication on the 17th day of September, 1862. The law was, of course, passed to permit the soldiers then in the field serving their country in the Civil War to exercise the high prerogative of citizens. However, the act is not limited by its terms to any period of time. It was duly and regularly passed and is today the law of Iowa, unless (a) it has been expressely repealed by a legislative act, (b) it has been repealed by the adoption of the Code of 1873 or the Code of 1897, (c) it has been repealed by implication or subsequent legislation covering the same subject-matter or is repugnant thereto, (d) or there is something in the act itself which renders it invalid.

The mind does not readily adjust itself to the thought that a legislative act, which did not appear either in the code of 1873 or in the Code of 1897, may still be a part of the valid and existing law of this state. On the other hand, every patriotic citizen of the state is anxious to see our boys, who are maintaining the honor of the nation by service upon the border, given the same right as every other citizen of the state to exercise the privileges of an elector if there is any legal method permitting them so to do. The question, however, is too important to be determined by either feeling, impulse or sentiment; it may be determined only by correct legal principles. We shall, therefore, discuss the possible objections to the act in the order named.

1. An examination of the session laws shows that the act has never been expressly repealed by the legislature of this state.

2. Has the act been repealed by reason of the adoption of the Code of 1873 or the adoption of the Code of 1897?

The act does not appear in either of said statutes. An examination of the report of the code commissioners, preparatory to the adoption of the Code of 1873, shows that said commissioners omitted from said revision chapter twenty-nine of the acts of the extra session of the ninth general assembly as amended by chapter twenty-eight of the acts of the tenth general assembly. On page 25 of the report of the commission is listed the acts of the extra session of the ninth general assembly and appears on page 25 tabulated as follows:

Session and Chapter.	*Place in Reported Code.*
Extra session of Ninth General Assembly (1862)	
Chap. 8, Part I	Title 6, Ch. 1
Chap. 20, Part I	Title 11, Ch. 3
Chap. 25, Part I	Title 4, Ch. 10
Chap. 26, Part I	Title 12, Ch. 3
Chap. 27, Part I	Title 4, Ch. 2
Chap. 27, Part I	Title 5, Ch. 5
Chap. 34, Part I	Title 4, Ch. 1

It will be observed that chapter twenty-nine is omitted from the list of acts to appear in the revision.

On page 26 of the report, under the list of the acts of the tenth general assembly, it will be observed that chapter twenty-eight is omitted from the list.

Whether or not the act has been repealed, therefore, depends upon the proper construction to be placed upon section 47 of the code of 1873 and section 49 of the code of 1897.

Section 47 of the code of 1873 provides that:

> "All public and general statutes passed prior to the present session of the general assembly, and all public and special acts, the subjects whereof are revised in this code, or which are repugnant to the provisions thereof, are hereby repealed, subject to the limitations and with the exceptions herein expressed."

And section 49 of the code of 1897 provides that:

> "All public and general statutes adopted prior to the present extra session of the general assembly, except acts appropriating money when the same has not been fully paid out, and all public and special acts the subjects whereof are herein revised or which are repugnant hereto, are repealed, subject to the limitations and exceptions hereinafter expressed, but local acts are repealed only by express terms or on account of repugnancy."

The act then not appearing in either the code of 1873 or the code of 1897, it follows that if the act in question was a public and general statute, it was repealed by the adoption of the code of 1873 and by the adoption of the code of 1897; but, on the contrary, if the act was a public and special statute, it has not been repealed by the adoption of either of said codes.

Is the law a public and general statute, or is it a public and special statute? We believe the act is a public and special statute rather than a public and general statute. In making this statement, we are not unmindful of the fact that legislation referring to particular classes, or covering a particular subject-matter, may be general in nature. We have laws relating to hotelkeepers, auctioneers, doctors and lawyers, railway and express companies, and numberless like instances where legislation deals with a particular class and yet is general in nature, but these illustrations do not cover the point at issue. We are not dealing with soldiers in the abstract or soldiers generally, or the abstract right to vote away from one's residence. We have under consideration a statute passed for the express and exclusive purpose of permitting soldiers in the field, that is to say, while in the service of their country to exercise the elective franchise. Such a statute is not general in its purpose or character, but special in its nature and limited in its character, and undoubtedly it was because of this special purpose which caused the code commissioners to fail to incorporate the act in the code of 1873. The same thing was true in the adoption of the code of 1897. The act not appearing in the code of 1873, it received no consideration whatever in the preparation of the code of 1897.

Fortunately, however, we are not without authority on this question. Our supreme court has had under consideration the construction of section 47 of the code of 1873 and section 49 of the

code of 1897 upon several occasions, and in the case of *State v. Mullen*, 35 Iowa 199, it was held that an act relative to the jurisdiction of counties bordering on the Mississippi river was not repealed because the same was not found in the code of 1873, it being of a public and special rather than of a public and general nature.

But a case which we think is conclusive of the proposition involved is that of *Gray v. Mount et al*, 45 Iowa 591. This case involved a construction of certain sections of the code found in the revision of 1860 known as the swamp land act. By an act of congress all of the swamp lands within the state of Iowa were conveyed to the state of Iowa. Subsequently, the general assembly conveyed the swamp lands to the several counties of the state, wherein the same were situated. (Said act relating to the swamp lands is found in chapter 47 of title 7 of the revision of 1860.) The act does not relate to swamp lands in a particular county but generally to all the swamp lands of the state.

The legislature provided, among other things, that from the proceeds of the sale of the swamp lands certain public buildings might be constructed if, after submission to the people, a majority favored the proposition. The court in discussing the question said:

> "Under enactments relating to the swamp lands of the state and the appropriation of their proceeds by the counties, it is provided, that, upon an affirmative vote of the people, at any *general or special* election, upon a proposition submitted to them, the lands or proceeds arising therefrom may be devoted to the erection of county buildings and buildings devoted to the purposes of education. Revision of 1860, chap. 47, title 7, secs. 925, 957, 986, and secs. 250, 251, chap. 77, acts ninth general assembly, and chap. 135, acts thirteenth general assembly. Counsel for plaintiffs maintain that these provisions are superseded and repealed by the code. This position presents the only disputable question involved in this point of the case. If these statutes are in force the vote of the people upon the subject of the appropriation of the swamp land fund may be had at a special election; if they are repealed, such vote must be at a general election.
>
> "We must inquire, then, whether these statutes are in force. They are not revised or incorporated in the code. They are public in their nature and special in their provisions, for

they apply to a special subject and none other. Their provisions, so far as the appropriation of the swamp land fund is concerned, are applicable to no other fund or public moneys. They are special statutes applicable to the acquisition, disposition and sale of swamp lands, and the appropriation of their proceeds by the counties; they are public, because their subjects are public property and public funds. They are, then, public and special statutes.

"Code, sec. 47, provides that 'all public and general statutes, passed prior to the present session of the general assembly, and all public and special acts, the subjects whereof are revised in this code, or which are repugnant to the provisions thereof, are hereby repealed.'

"The statutes in question, being public and special, and the subjects thereof not being revised in the code, as we have seen, are not repealed, unless their provisions are repugnant to enactments in the code. But no such repugnancy exists," etc. *Gray v. Mount,* 45 Iowa 593.

It follows, then, both upon reason and on the authority of our supreme court, as announced in this case, *Gray v. Mount,* that the act under consideration is of a public and special nature, and therefore not repealed by the code of 1873 or the code of 1897.

3. Is the act repealed by implication?

The last general assembly passed what is commonly known as the absent voters law (see ch. 3-B, title 6, supl. sup., 1915).

Section 1137-b provides that:

"Any qualified elector of the state of Iowa, *having duly registered where such registration is required,* who through the nature of his business, is absent or expects in the course of said business, to be absent from the county in which he is a qualified elector on the day of holding any general, special, primary, county, city or town election, may vote at any such election as hereinafter provided."

And section 1137-c of said supplemental supplement, 1915, provides that:

"This act shall be deemed to provide a method of voting in addition to the method now provided by statute, and, to such extent, as amendatory of existing statutes relating to the manner and method of voting."

Without quoting further from the act, it will be observed that the act could not apply to the soldiers in the field, because registration is required in all cities of thirty-five hundred or more, and no provision is made for registration by mail or otherwise, and the soldier on duty in the field would have no opportunity of registering; and further, that said act does not undertake to repeal any other law but expresses a contrary intent. That is to say, it expressly states that it is amendatory of existing statutes relating to the manner and method of voting, and was passed for the purpose of providing a method of voting "*in addition to the method now provided by statute.*"

In this connection it may be well to call attention to the fact that said chapter twenty-nine of the acts of the extra session of the ninth general assembly makes reference to the election laws as found in title four of the revision of 1860, and other references to the general election laws of the state, and further that additional acts have been passed amendatory of the election laws of the state. This objection, however, has been settled in an opinion by our own supreme court in the case entitled *State v. Higgins,* 121 Iowa 19. The court in that case in substance held that a special act which was omitted from the code of 1897 should be construed in connection with subsequent general legislation. The court said: "Any reasonable construction will be adopted to avoid a repeal by implication, and that repeals by implication are not favored."

It was there held that a special statute relating to the holding of court and the drawing of grand and petit jurors in Pottawattamie county was not repealed by reason of the fact that said provisions were not re-incorporated in the code of 1897, but that said special provisions should be construed in connection with more general legislation relating to the holding of district courts in Pottawattamie county. And this is the doctrine of the courts generally.

Under the title "Statutes" in 36 Cyc. at page 1092, under the paragraph on elections, the doctrine is announced as follows:

> "An act special in its nature and applying only to a particular class of elections is not repealed by a general election law unless an intent so to do is plainly manifest."

4. Does the use of the word "white" invalidate the act in question?

Section 1 of chapter twenty-nine provides:

> "That every white male citizen of the United States, of the age of twenty-one years, and who shall have been a resident of Iowa six months, and of some county therein sixty days next preceding his entering the military service of this state, or of the United States, shall be entitled to vote at all the elections authorized by law, as provided in this act, and every citizen shall thus be entitled, in the manner herein prescribed, whether at the time of voting he shall be within the limits of the state or not."

The section harmonizes entirely with our constitution as it now exists, except for the use of the word "white." This will be found by comparing section one of article two of our constitution, which reads as follows:

> "Every male citizen of the United States, of the age of twenty-one years, who shall have been a resident of this state six months next preceding the election, and of the county in which he claims his vote, sixty days, shall be entitled to vote at all elections which are now or hereafter may be authorized by law."

Does the word "white" appearing in section one of chapter twenty-nine invalidate the act? The act in question antedates the adoption of the fourteenth amendment to the constitution of the United States. This being true, it contained the same provision as statutes of other states of the Union and other constitutional provisions existing during the days of slavery; the negro was expressly disfranchised.

This provision, however, relating to white male citizens rather than male citizens, while it might seem to be serious on first blush, neither invalidates the act nor operates as a discrimination against the colored soldier, if any such there may be. The adoption of the fourteenth amendment to the federal constitution had the effect of modifying the constitutions and the statutes of the several states to the same extent as though the word "white" had been eliminated by constitutional amendment or statutory enactment. This doctrine is announced by the supreme court of the United States in the case of *Ex parte Yarbrough*, 110 U. S. 651. At page 665 the supreme court of the United States said:

"While it is quite true, as was said by this court in *United States v. Reese*, 92 U. S. 214, that this article gives no affirmative right to the colored man to vote, and is designed primarily to prevent discrimination against him whenever the right to vote may be granted to others, it is easy to see that under some circumstances it may operate as the immediate source of a right to vote. In all cases where the former * * states had not removed from their constitution the words 'white man' as a qualification for voting, *this provision did, in effect, confer on him the right to vote,* because, being paramount to the state law, and a part of the state law, it annulled the discriminating word *white,* and thus left him in the enjoyment of the same right as white persons. And such would be the effect of any future constitutional provision of a state which should give the right of voting exclusively to white people, whether they be men or women. *Neal v. Delaware,* 103 U. S. 370."

I have examined chapter twenty-nine, providing a method of soldiers voting in the field while in the service of their country, as amended by chapter twenty-eight of the tenth general assembly, and find that every serious objection that I am able to discover is disposed of by the decisions of our supreme court or the supreme court of the United States.

I reach the conclusion, therefore, that the statute, having never been expressly repealed and not being repealed by the adoption of the code of 1873 or the code of 1897, and not being repugnant to any subsequent legislation, that the same is in full force and effect and is to be construed as being in harmony with our general laws relating to elections; that subsequent legislation shall apply so far as applicable, and that nothing inheres in the law itself which renders it invalid or inoperative.

I therefore reach the conclusion that as governor of the state you are authorized to appoint the commissioners as provided by chapter twenty-eight of the acts of the tenth general assembly to see that the terms of the act are carried out, and that the soldiers are permitted to vote in accordance with said law.

Respectfully submitted,

GEORGE COSSON, *Attorney General of Iowa.*

October 18, 1916.

HONORABLE GEO. W. CLARKE, *Governor of Iowa.*

DEPARTMENT CORRESPONDENCE

Letters Written by the Department to County Officials and Others During the Year 1915.

SCHOOL DISTRICT.—If village constitutes an independent school district separate and apart, it is entitled to a vote even though not incorporated.

January 1, 1915.

C. C. HAMILTON, *County Attorney,* Sigourney, Iowa.

DEAR SIR: Replying to yours of the 31st ult. will say that in the case to which you refer, if Hayesville constitutes an independent school district separate and apart from all those surrounded by another rural independent district, then, in my judgment, it would be entitled to a vote even though the village of Hayesville is not incorporated. However, if it is simply one of several rural independent districts located within a congressional township then all such rural independent districts together are entitled to one vote to be cast by such person as may be selected by the presidents of the several rural independent districts located within such township.

Section 2794 providing for the formation of independent districts other than rural reads in part as follows:

> "Upon the written petition of any ten voters of a city, town, *or village* of over 100 residents to the board of the school corporation in which the portion of the town plat having the largest number of voters is situated, such board shall establish the boundaries of a proposed independent district including therein all of the city, town or village and also contiguous territory as is authorized by written petition of a majority of the resident electors of the contiguous territory proposed to be included in said district," etc.

This would seem to indicate that where a village of 100 or over is included that the corporation thus formed would be an independent district rather than a rural independent district.

C. A. ROBBINS, *Assistant Attorney General.*

SCHOOL BOARD.—Has right to employ broker to sell school bonds.

January 5, 1915.

H. A. STEARNS, *Secretary, Marion Public Schools,* Marion, Iowa.

DEAR SIR: Replying to yours of the 2d inst. in which you quote from my letter of the 30th ult,. will say that the paragraph which you quote should have read:

> "I would *not* want to hold, however, that a reasonable attorney's fee or commission might not be paid from the contingent fund."

The real intention was not to pass upon the question as to the amount which might be paid for services rendered by a broker or attorney in disposing of these bonds. I know of no statute bearing directly on the matter and am unable to find any decision of our supreme court. However, there is no statute authorizing the employment of attorneys and yet attorneys are frequently employed by school districts who appear for them in our district and supreme courts and I have no doubt that under their general power, the board would have the authority to employ an attorney in a proper case and pay him a reasonable compensation from the contingent fund, and, on the same theory, I think the board would have the right to employ a broker to make sale of its bonds where such services are required and to pay from the contingent fund a reasonable amount therefor.

C. A. ROBBINS, *Assistant Attorney General.*

PHARMACISTS.—Permit holders cannot sell malt liquors for any purpose.

January 7, 1915.

AL. FALKENHAINER, Algona, Iowa.

DEAR SIR: You have orally requested an opinion on the following question:

> "Can a registered pharmacist, holding a permit to sell intoxicating liquors, sell malt liquor for any purpose."

Section 2385 of the code reads 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 re-

sale 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. Registered pharmacists, physicians holding certificates from the state board of medical examiners and manufacturers of proprietary medicines may buy from permit holders intoxicating liquors (not including malt) for the purpose of compounding medicines, tinctures and extracts that cannot be used as a beverage, 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."

You will observe that this section absolutely prohibits in effect the sale of malt liquor by permit holders for any purpose and while the section permits sales by permit holders of intoxicating liquors to registered pharmacists for use in compounding medicines, tinctures, etc., it specifically prohibits the sale of malt to such pharmacists. In my opinion the statute clearly prohibits the dealing in malt liquors for any purpose by a permit holder and the only persons in this state who can make sales of such liquors without being subject to prosecution are persons who have complied with all the provisions of the mulct law.

JOHN FLETCHER, *Assistant Attorney General.*

INTERNAL REVENUE ACT.—War revenue stamps not required to be placed on receipts issued to Iowa School of Agriculture for shipments of hog cholera serum and virus manufactured by state.

January 7, 1915.

T. J. WORTHMAN, *Superintendent, American Express Company,* Des Moines, Iowa.

DEAR SIR: Your letter of the 6th instant, addressed to the attorney general, has been referred to me for reply.

You make request for an opinion on the following statement:

"Will you please advise as to whether the Internal Revenue Act passed by Congress on Nov. 22d, 1914, required the placing of War Revenue stamps on receipts issued to the Iowa

State School of Agriculture at Ames, Iowa, for shipments of hog serum and virus manufactured by the state and sold at cost to residents in the state for purposes of protection to live stock?''

For the purpose of protecting the live stock of the state it was deemed best by the legislature to place under state control the matter of the sale of hog cholera serum and virus and also to provide that it might be manufactured by the state and sold at cost to residents of the state. It is simply one of the many matters that are looked after by the state under what is known as its ''police power'' to better protect the general welfare of the inhabitants.

In the manufacture and sale of serum and virus the state is acting in a governmental capacity and because of the general rule that the federal government is without power to tax the operations of the state I do not think the matter you refer to is subject to the war revenue measure passed by the federal government on November 22d, 1914. I am enclosing a copy of a general opinion given by me to the executive council of the state which covers in a general way the question of the power of the federal government to tax the instrumentalities, agencies and properties of the state.

JOHN FLETCHER, *Assistant Attorney General.*

CITIES AND TOWNS.—Only cities can levy a tax for a grading fund. Incorporated towns cannot.

January 19, 1915.

R. P. SCOTT, *Attorney,* Marshalltown, Iowa.

DEAR SIR: Replying to yours of the 14th inst. addressed to the attorney general will say that in my judgment incorporated towns are not authorized to levy a tax for a grading fund in addition to the improvement fund, but that the right to levy the tax for grading fund is limited to cities. (See sub-division 1, section 894, supplement to the code, 1913.)

If it is desirable that this fund be made available to incorporated towns, you should call the matter to the attention of your senator or representative.

C. A. ROBBINS, *Assistant Attorney General.*

SALE OF MEDICINES by persons other than registered pharmacists.

January 27, 1915.

HON. MILTON REMLEY, Iowa City, Iowa.

DEAR SIR: Your letter of the 20th instant, addressed to Attorney General Cosson, has been referred to me for reply.

You request to be advised as to whether this department has interpreted the clause in section 2588 of the code relating to the sale of medicines by others than registered pharmacists which reads 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."

I have had occasion to consider this section a great deal with the pharmacy commission and with the retail grocers association, and it has always been my interpretation that the limitation "as do not contain intoxicating liquors or poisons" applies to both proprietary medicines and domestic remedies, and from the reading of the section and the manner in which it is punctuated I am inclined to believe that this is what was intended by the legislature.

JOHN FLETCHER, *Assistant Attorney General.*

COUNTIES the size of Polk may enter into contract with an institution to care for unfortunate girls during confinement; also may employ a visiting nurse to help the sick and poor.

February 10, 1915.

COUNTY ATTORNEY GEORGE A. WILSON, Des Moines, Iowa.

DEAR SIR: I am in receipt of your communication of the 9th instant directing my attention to section 2238 of the Code and requesting an opinion as to whether or not in a county of the size of Polk, where there are a number of unfortunate girls needing medical attention during confinement and no means to pay for same, the board of supervisors may enter into a contract with an institution to care for such cases and pay them a definite yearly sum for such care; and further, whether or not the board may hire a visiting nurse to look after sickness among the poor of the city.

I agree with you that the board has the authority to enter into a contract under section 2238 of the Code. I suggest, however, that the contract provide for a given amount in the event that there are fifteen or not to exceed twenty girls during the year; and a further sum in the event that there are twenty and not to exceed twenty-five; and still additional sum if there are over twenty-five and not to exceed thirty. A contract of this nature would show that there is a real relation between the services rendered and the amount of money to be paid, and in my judgment will be fully within the law and entirely proper as well as legal. If a specific sum is stipulated without reference to the number of girls cared for, it might look as though it were meant as a donation or appropriation, but a contract of the nature suggested will be free from this objection.

I am further of the opinion that the board is authorized to employ a visiting nurse to look after sickness in the families of the poor; in fact this authority seems to be as clear as the employment of a physician. The services of a nurse in a number of instances will probably render unnecessary the services of a physician.

You submit the further question: "If you answer these two propositions in the affirmative, then from what fund would the money be taken by the board of supervisors?"

Section 2247, Supplement to the Code, 1913, provides:

> "The expense of supporting the poor shall be paid out of the county treasury in the same manner as other disbursements for county purposes; and in case the ordinary revenue of the county proves insufficient for the support of the poor, the board may levy a poor tax, not exceeding two mills on the dollar, to be entered on the tax list and collected as the ordinary county tax."

GEORGE COSSON, *Attorney General.*

INTERNAL REVENUE ACT.—Revenue stamps not required on deed where property conveyed is a gift and consideration in deed is love and affection. Quit claim deed would be subject to tax according to value of property interest conveyed where consideration is received. Where no consideration passes but quit claim deed is given to correct title no tax is required.

February 12, 1915.

W. L. SPENCER, *President, Oakland Savings Bank,* Oakland, Iowa.

DEAR SIR: Your letter of February 10th, addressed to Attorney General Cosson, has been referred to me for reply.

You make inquiry as to whether it will be necessary to affix internal revenue stamps to a deed conveying property to the children of the grantor as a gift.

While there is no specific provision in the revenue law exempting from taxation deeds of the character referred to by you, the treasury department in 1900, in construing a similar enactment, held that a deed of conveyance of real estate to a trustee or other person without a valuable consideration was not taxable and that only those where a valuable consideration, capable of estimation in money passes, are taxable. If the consideration is "love and affection," as it would be in the case referred to by you no revenue stamp would be required.

In answer to your other inquiry as to how such a deed should be made, would say that any form of deed would be sufficient. A conveyance of the title in fee simple, if the grantor desires conveyance to become effective at once is all that is necessary, or it could be made reserving to the grantor a life estate with the remainder to the children.

Under the new revenue law a quit claim deed would be subject to taxation according to the value of the property interest that is conveyed. That is to say, where the quit claim deed is executed simply for the purpose of completing the chain of title and no consideration passes, no tax should be required to be paid. If the consideration for the deed is $100.00 it should be taxed on that basis. It does not depend on the value of the property conveyed by the quit claim deed but upon the interest that the grantor may have in the property.

JOHN FLETCHER, *Assistant Attorney General.*

SCHOOL CORPORATION.—Property of, is subject to assessments for street improvements, sidewalk and the like.

February 23, 1915.

J. W. MORTON, *Independent School District,* Washington, Iowa.

DEAR SIR: Replying to yours of the 17th inst. will say that our supreme court has held that the property of school corporations is subject to assessment for street improvements, sidewalks and the like. See *Sioux City vs. Independent School District,* 55 Iowa, 150, and *E. & W. Construction Co. vs. Jasper County,* 117 Iowa, 366. Hence, I see no illegality in the terms of the contract which you enclose, and, as it seems to be fair in its provisions as to the method of determining the amount, in my judgment the school board would have the right to execute such a contract.

C. A. ROBBINS, *Assistant Attorney General.*

WEEDS.—Where a railroad parallels a public highway with no private land intervening, the company must destroy the weeds along the highway.

February 16, 1915.

THOS. H. MACDONALD, *Highway Engineer, State Highway Commission,* Ames, Iowa.

DEAR SIR: Replying to yours of the 22d inst. and to your inquiry contained therein which reads as follows:

> "If a railroad right of way parallels the public highway and there is no privately owned land intervening, upon whom does the duty rest to destroy the weeds along such highways on the side adjoining the railroad right of way?"

will say that, in my judgment, it is the duty of the railroad company owning and occupying or in control of the right of way. I call your attention to section one of the new weed law found in chapter 128, acts of the thirty-fifth general assembly and quote therefrom as follows:

> "It shall be the duty of each owner, occupant, person, company or corporation in control of any lands within the state of Iowa, whether the same shall consist of improved or unimproved lands, town or city lots, lands used for *railway right*

of way or depot grounds * * * to cause to be cut near the surface, all weeds on the streets or highways *adjoining said lands* between the fifteenth day of July and the fifteenth day of August of each year. But nothing herein shall prevent the landowner from harvesting the grass grown upon the roads along his land in proper season."

C. A. ROBBINS, *Assistant Attorney General.*

CITIES AND TOWNS.—Can enact an ordinance establishing a flat rate for dwelling houses and requiring business houses to instal meters for measuring water supply. Cities and towns owning their own water supply works can cut off water supply for non-payment of water rental.

February 26, 1915.

GEO. N. REMINGTON, Neola, Iowa.

MY DEAR MR. REMINGTON.—Your letter of the 18th instant, addressed to the attorney general, has been referred to me for reply.

You propound two inquiries as follows: (1) Will an ordinance be legal which provides that certain premises, such as livery barns, garages, hotels, etc., must use meters, while ordinary householders may be charged the uniform flat rate? and (2) Does the Iowa law permit the town to cut off water supply from a dwelling occupied by a tenant with a family for non-payment of water rentals?

In answer to your first inquiry will say that I believe it would be entirely legal for a city or town to enact an ordinance establishing a flat rate for dwelling houses and requiring business houses, especially such places as hotels, restaurants, garages, livery barns, etc., to instal meters for the measuring of the water supply.

In reply to your second question will say that so far as the state law is concerned a city or town owning its own waterworks system can provide for the cutting off of water supply for non-payment of water rental.

JOHN FLETCHER, *Ass't Att'y Gen'l.*

LIBRARY TRUSTEES.—Report to be made to city council at close of fiscal year, which is March 31st.

February 26, 1915.

MISS JULIA A. ROBINSON, *Secretary State Library Commission.*

DEAR MADAM: Your letter of the 20th instant, addressed to Mr. C. A. Robbins, has been referred to me for the reason that you have gone over with me the matters referred to in your letter.

Section 731 of the code requires the library trustees to make a report to the council for the year ending December 31st, and I do not find any section of the law that conflicts with this provision. As stated to you when you were in the office recently, I believe the misunderstanding has arisen because the 31st day of March is considered the close of the fiscal year for cities and towns and all reports where no time is fixed for filing would be due at that time for filing. This statute, however, is definite as to date and should be observed.

JOHN FLETCHER, *Ass't Att'y Gen'l.*

GOPHERS.—Crime to capture birds by poisoned food but this does not apply to gophers.

March 2, 1915.

H. I. THOMPSON, Webster City, Iowa.

DEAR SIR: Replying to yours of the 27th ult. addressed to the attorney general will say that code section 2558 makes it a crime to capture birds by the use of medicated or poisoned food, but this provision seems to apply only to the fowls of the air and not to the creeping things under the earth, such as gophers, etc.

C. A. ROBBINS, *Assistant Attorney General.*

AUDITOR may correct errors in assessment but cannot revalue property.

March 2, 1915.

ROBT. E. BARR, *Assessor,* Wapello, Iowa.

DEAR SIR: Replying to yours of recent date addressed to the attorney general will say that the only authority possessed by the auditor to correct errors in the assessment of property for purpose of taxation is provided by section 1385 of the code and section

1385-b supplement to the code. The power to make corrections is limited to the current year and he is not authorized to revalue the property.

C. A. ROBBINS, *Assistant Attorney General.*

JURY EXEMPTION.—A member of a paid or voluntary fire company is exempt without regard as to how long he has been a member.

March 2, 1915.

CHARLES RICE, Lake City, Iowa.

DEAR SIR: Replying to yours of the 21st ult. addressed to the attorney general will say that no length of service in the fire company is required to render the member exempt from jury service. All that is required is that the person be, at the time, an active member of a fire company nor is it required that such member be a member of a paid company. The exemption applies to volunteer members as well.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

SCHOOL OFFICER ELECTION.—The official ballot described in chap. 245, 35th G. A. is the only one that may be lawfully used at such election.

March 3, 1915.

A. L. CLINITE, *Secretary School Board,* Des Moines, Iowa.

DEAR SIR: Replying to your question concerning chapter 245, acts of the thirty-fifth general assembly relating to the election of school officers will say that in my judgment the official ballot described in this section is the only one that may be lawfully used at such election. In the latter part of this chapter it is provided:

> "In all other respects the said school election * * * * shall be conducted under the general election laws of the state of Iowa so far as the same may be applicable."

By section 1122 of the code it is provided:

> "No ballot *furnished by the proper officer* shall be rejected for any error in stamping or writing the endorsement thereon by the officials charged with such duties nor because of

any error on the part of the officer charged with such duty in delivering the wrong ballot at any precinct or polling place, but any ballot delivered by the proper official to any voter shall, if properly marked by the voter, be counted as cast for all candidates voted for whom the voter had the right to vote and for whom he has voted."

By this language it is clearly implied that any ballot not delivered by the proper official should be rejected.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

SCHOOL OFFICER NOMINATIONS.—In 1915, March 1st is the last day for filing nominations.

March 3, 1915.

W. L. STERN, Logan, Iowa.

DEAR SIR: Yours of the 27th ult. addressed to the attorney general has been referred to me for reply. You call attention to the fact that some newspapers had published a statement to the effect that Saturday, February 27th, was the last day for filing nominations for school officers and also to the fact that one year ago you applied to this department and received a ruling to the effect that Monday of the week preceding the Monday on which the election is to be held was the day for such filing and your inquiry, briefly stated, is whether or not our former ruling is adhered to and whether the newspapers have any warrant for stating that Saturday was the last day.

The statute covering the matter is found in chapter 245, acts of the thirty-fifth general assembly and reads as follows:

"The names of all persons nominated as candidates for office in all independent city or town districts shall be filed with the secretary of the school board not later than seven days previous to the day on which the annual school election is to be held."

The school election is required to be held on the second Monday in March, which would this year be March 8th. See section 2754, supplement to the code.

The rule in counting time, whether forward or backward, is to exclude the first day and include the last; hence, in this matter,

the day of the election would be excluded and, counting backwards seven days, would land us on Monday, March 1st. Hence, you will see our former opinion is adhered to.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

BOARD OF CONTROL.—The federal law pertaining to dispensing opium, coca leaves and derivatives is not intended to interfere with or apply to drugs mentioned by state of Iowa for use of inmates in institutions under board of control.

March 13, 1915.

BOARD OF CONTROL.

GENTLEMEN: Replying to your recent inquiry as to the effect of the recent federal law relating to the sale and dispensing of opium or coca leaves, and derivatives and preparations thereof, will say that in section one of the act, which requires the person engaged in such sale to register and to pay a special tax, is found the following language:

> "Provided further, that the person who employs him shall have registered and paid the special tax as required by this section. Provided further, that officers of the United States Government who are lawfully engaged in making purchases of the above named drugs for the various departments of the Army and Navy, the Public Health Service, and for Government hospitals and prisons, and officers of any state government, or of any county or municipality therein, who are lawfully engaged in making purchases of the above named drugs for state, county, or municipal hospitals or prisons, and officials of any territory or insular possession or the District of Columbia or of the United States who are lawfully engaged in making purchases of the above named drugs for hospitals or prisons therein shall not be required to register and pay the special tax as herein required."

In section two, which prescribes that the distribution must be made on written order and that such order should be subject to inspection and that the purchaser shall return duplicate orders, it is further provided:

> "Nothing contained in this section shall apply * * * * (d) To the sale, barter, exchange, or giving away of any of the

aforesaid drugs to any officer of the United States Government or of any state, territorial, district, county, or municipal or insular government lawfully engaged in making purchases thereof for the various departments of the Army and Navy, the Public Health Service, and for Government, State, territorial, district, county, or municipal or insular hospitals or prisons."

Hence, I am of the opinion that this law would not interfere with, or apply to, the distribution of the drugs mentioned by the state of Iowa for the use of inmates in any of its institutions under the control of your board.

However, I would suggest that a like inquiry has been made by the educational institutions under the control of the Board of Education as to whether or not this law will prohibit the use of such drugs in the clinics conducted in said institutions. This is a question of more doubt and upon which I will ask the ruling of the commissioner of internal revenue, and, in view of the fact that this inquiry is to be made to the commissioner, it might be wise to submit your question to him also, and, with that end in view, I would like to have you favor this department with a written statement showing the institutions in which it may be desired to dispense the drugs mentioned and the manner in which it is desired to use or dispense the same in each of such institutions.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

JUSTICE OF PEACE AND CONSTABLE—FEES.—Cannot demand fees in advance of prosecuting witness before making arrest.—Costs cannot be taxed to prosecuting witness unless information was issued without justification.

March 16, 1915.

JOHN SCHULTZ, Hornick, Iowa.

DEAR SIR: Your letter of the 15th instant, addressed to the attorney general, has been referred to me for reply.

I note that you say a former justice of the peace and deputy sheriff refused to act in making an arrest of a person charged with an offense unless certain fees were paid them in advance. Upon filing an information before a justice of the peace properly charging a person with an offense, it is the duty of the justice to issue a warrant based on such information and to place the war-

rant in the hands of an officer for service, and it is the duty of the officer in whose hands it is placed to act in the matter and he cannot exact fees from the person starting the prosecution in advance, nor can any costs be taxed to the complaining witness unless it is shown upon the trial of the case that the information was filed and warrant issued thereon without any justification whatever, but this provision only applies to a certain class of cases. In your case the officers had no right under the law to demand payment of their fees in advance.

JOHN FLETCHER, *Ass't Att'y Gen'l.*

NOMINATION PAPERS—DE FACTO OFFICERS.—Irregularity of filing would not affect actions of such officers in event of election and qualification at municipal election.

March 26, 1915.

J. M. C. HAMILTON, *City Solicitor,* Ft. Madison, Iowa.

DEAR SIR: I am in receipt of your communication requesting an opinion as to whether or not an irregularity in the filing of nomination papers by candidates for a municipal office would affect the actions of such officers in the event that they are duly elected at the municipal election and qualify as such municipal officers.

Section 1103 of the Code provides in part:

> "All objections or other questions arising in relation to certificates of nomination or nomination papers shall be filed with the officer with whom the certificate of nomination or nomination papers to which objection is made are filed. * * * * Objections filed with the city or town clerk shall be considered by the mayor and clerk and one member of the council chosen by the council by ballot, *and a majority decision shall be final;* but if the objection is to the certificate or nomination papers of either of said city or town officials, he shall not pass upon said objection, but his place shall be filled by a member of the council against whom no such objection exists, chosen as above provided."

In the case of State of Iowa, ex rel, *George Pratt, Relator, vs. The Secretary of State, W. C. Hayward,* 141 Iowa, 196, our supreme court held that the decision of the officers named in section

1103 of the Code to pass upon the validity of the nomination papers was final and that the court had no jurisdiction thereof.

You will notice that I appeared of counsel in that case; in fact, I had charge of the case both in the lower court and in the supreme court.

Aside however from the question of irregularity, if an officer is elected and qualifies and acts as such, it is elementary that all of his actions are valid and binding, and that no such actions may be attacked in a collateral proceeding. This is the holding of the supreme court of the United States, our own supreme court and in fact the proposition is so well established that no lawyer thinks of controverting the proposition; see, however, the cases of

Nofire vs. United States, 164 U. S. 667;
Lufkin & Wilson vs. Preston, 52 Iowa, 235;
Stickney vs. Stickney, 77 Iowa, 702;
Walcott vs. Wells, 9 L. R. A., 59;
Peterson vs. Benson, 32 L. R. A., 949.

GEORGE COSSON, *Attorney General.*

ILLEGAL TO HOLD BOXING CONTEST OR SPARRING EXHIBITION FOR A PRIZE, REWARD OR ANYTHING OF VALUE AT WHICH AN ADMISSION FEE IS CHARGED.—Wrestling matches not prohibited.

March 29, 1915.

P. V. PLUMB, *Mayor,* Silver City, Iowa.

DEAR SIR: Your letter of the 26th instant, addressed to the attorney general, has been referred to me for reply.

You state that a number of wrestling and boxing matches have been held in your town and ask if there is any way to prevent a recurrence of these matches.

It is a violation of the law to hold any boxing contest or sparring exhibition for a prize, reward or anything of value at which an admission fee is charged or received either directly or indirectly. You will find the statute on this in section 5038-a, supplement to the code, 1907.

There is no law in this state, however, prohibiting wrestling matches. Any person who makes a bet or wager for money or any other property of value is guilty of a misdemeanor and subject to a fine not exceeding $500.00 or imprisonment not exceeding one year in jail.

JOHN FLETCHER, *Ass't Att'y Gen'l.*

CONSOLIDATED DISTRICT.—Sec. 2757 covers organization of board following formation. If already organized, then new organization would be July 1st.

March 31, 1915.

F. R. BARGLOF, Greenville, Iowa.

Dear Sir: Replying to yours of the 27th inst. addressed to the attorney general will say that in my judgment section 2757 covers the organization of the board of directors for consolidated independent districts after the first organization following the formation of the consolidated district and if your board has already been once organized, then the time for the new organization would be July 1st as provided in section 2757.

This construction is confirmed by the fact that in the present general assembly senate file No. 156 which has been duly passed, but which will not become a law until July 4th, changes this rule and puts consolidated districts in the same class with other independent city, town and village corporations and requires their organization to be on the third Monday in March; hence, it follows that the member of the old board would be the one who would have the right to vote in the selection of county superintendent.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

COUNTY ATTORNEY—HOG CHOLERA.—It is the duty of the county attorney to prosecute actions for violation of the hog cholera serum act except suits on bonds or to recover penalties, then attorney general acts.

April 1, 1915.

C. H. STANGE, *Director, Iowa State Biological Laboratory,* Ames, Iowa.

DEAR SIR: Replying to yours of the 31st ult. will say that there is no provision in the hog cholera serum law making it the duty of the director of the laboratory or any other person to enforce the provisions of the law or to prosecute violations thereof and you are right in assuming that this duty would fall primarily to the county attorney in the county where the violation occurs.There is a provision authorizing the attorney general to proceed against offenders where their bond is forfeited or penalty incurred thereunder but this has no reference to criminal prosecutions. By

section 8 of the law certain violations are made indictable misdemeanors and in my judgment each separate shipment of serum by an individual or concern operating without the permit required by law would constitute a separate offense under the law.

I am enclosing you duplicate of this letter in order that you may forward the same to Mr. Kennedy if you so desire.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

MAYOR—BOARD OF EQUALIZATION.—Mayor not member of council but is presiding officer of council, also board of equalization. In absence a president pro tem may be elected.

April 5, 1915.

FRANK G. PIERCE, Marshalltown, Iowa.

DEAR SIR: Replying to the question propounded by F. E. Patton of Coggon, Iowa, enclosed in yours of the 1st inst. will say that in my judgment the mayor, although no longer a member of the council, is the presiding officer thereof and is the proper person to preside over the council during its sessions as a board of equalization. However, his presence is not absolutely essential and a president pro tem may be elected from the members of the council.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

PENSION—POLICEMAN.—Under Sec. 2932-n, code sup., policeman must be permanently injured or disabled, either physically or mentally. Having locomotor ataxia to that extent would entitle him to pension.

April 5, 1915.

T. F. TRUE, *Secretary, Trustees Policemen's Pension Fund,*
Council Bluffs, Iowa.

DEAR SIR: Replying to yours of the 2d inst. addressed to the attorney general will say that a policeman in order to be entitled to a pension under section 2932-n supplement to the code, 1913 "must be injured or *disabled,* and upon an examination by a physician appointed by the board of supervisors, be found to be physically or mentally permanently disabled so as to render him unfit for the performance of the duties of a policeman." The

term "disabled" as used in accident and life insurance policies has been construed to mean "deprived of ability; the state of being disabled or incapacitated. Any bodily infirmity by which a person is incapacitated from pursuing his usual vocation is a disability within the policy." See *Miller vs. American Mutual,* 21 S. W., 39; 20 L. R. A., 765.

Hence, I am of the opinion that one who is afflicted with incurable locomotor ataxia to such an extent as to render him unable to perform his duties would be disabled within the meaning of this section and hence entitled to the benefits thereof.

However, I would say that this department could not advise you officially on this matter and you should procure and be governed by the advice of your city attorney upon the question.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

SCHOOL DIRECTORS—AGENTS—SCHOOL BOOKS.—Under Sec. 2834 directors, teachers and members of board of education cannot act as agents for school books and supplies. Violation is an indictable offense. It is a question if this applies to members of board who are stockholders in the corporation. Possibly such members might sell to school district.

April 5, 1915.

J. H. BEVERIDGE, *Supt., City Schools,* Council Bluffs, Iowa.

DEAR SIR: Yours of the 3d inst. addressed to the attorney general has been referred to me for reply. You call attention to section 2834 prohibiting school directors, teachers or members of the board of education from acting as agents in the sale of school books and supplies and you inquire whether the purpose of the law is simply to avoid an overcharge being made for such books and supplies. Doubtless this was one of the purposes but it may not have been the sole purpose. Violation of this section has been held to be an indictable offense. See *State vs. Wick,* 130 Iowa, 31. You inquire whether or not this provision would apply to members of the board who happen to be stockholders in the corporation. This is a question of greater doubt. Under a similar statute, but one a little more definite in its provisions against the officer being interested directly or indirectly, this department has held that a manager of a corporation, who was also a member of

the city council, might sell materials to the town where he was a mere employee and not a stockholder but that if he was such stockholder he would be at least indirectly interested within the meaning of the statute.

I am inclined to the view that the court might hold that a corporation in which one or more members of the school board were stockholders might lawfully sell to the school district. However, I call your attention to the language of our supreme court which condemned such transaction as being against public policy, the same being found in the case of *Bay vs. Davidson,* 133 Iowa, 688.

You will understand that this is a matter concerning which this department could not advise you officially.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

AUTO NUMBERS.—If registration has been applied for and license fees paid and new number not received, old number may be used.

April 5, 1915.

THOMAS CAUFIELD, *Sheriff*, Jefferson, Iowa.

DEAR SIR: Replying to yours of the 3d inst. addressed to the attorney general relative to the right of automobile owners to operate the same upon the public highway after having applied for registration of their car I call your attention to the case of *State vs. Gish* found in 150 N. W. Reporter at page 39 wherein this question was recently passed upon by our supreme court, the opinion having been filed September 18, 1914 in which it was held:

> "That the gist of the offense was not the operation of a motor vehicle, but rather the failure to attach and display the number plates while so operating; and hence, where defendant had properly re-registered his machine for the year 1913, with the secretary of state, been assigned a number and had paid the necessary license fee, but because of inability of the secretary to furnish plates, none had been received by defendant, his operation of his automobile with the plates for the previous year attached, by which it was properly identifiable until those for the year 1913 could be obtained, did not constitute a violation of the statute."

C. A. ROBBINS, *Ass't Att'y Gen'l.*

CLERK OF SUPERIOR COURT—It is a question of fact as to whether under Sec. 265, code supplement 1913, the judge of the superior court should have a clerk or act as his own clerk.

April 9, 1915.

E. H. BURLINGHAM, *City Clerk,* Oelwein, Iowa.

DEAR SIR: Replying to yours of the 8th instant, addressed to the attorney general will say that section 265, supplement to the code, 1913, provides:

> "As long as the business of the court can be done without a clerk, the judge shall be the clerk of said court and the city recorder or city clerk shall be deputy clerk of said court and may perform the duties of his principal as clerk of said court. Whenever, from the accumulation of causes and other demands upon the court, a clerk becomes necessary, the city recorder or clerk shall be the clerk thereof. He shall give bonds as required when the judge acts as clerk, and perform the same services as required by law of the clerk of the district court."

Section 280-c of the same supplement provides:

> "In all such cities there may be appointed by the city council, a deputy clerk of the court, who shall receive such compensation as the city council may allow."

Hence, in my judgment it would be a question of fact depending upon whether or not the court had decided on the necessity for having a clerk as distinguished from a deputy, and if the decision has been made to have a clerk as provided in the latter part of the first section quoted and the city recorder or clerk acts in that capacity he would be the clerk rather than the deputy clerk and that the deputy clerk referred to in the last section quoted is one who is to be appointed in addition to the regular city clerk.

However, I will say that this matter is one concerning which this department could not officially advise you and that you should be governed by the direction of the court and your city solicitor in this matter.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

PARKS-VILLAGE IMPROVEMENT—5 per cent of the general fund may be used for park improvement when the city or town does not have a park board.

April 10, 1915.

LENOX COMMERCIAL CLUB, Lenox, Iowa.

GENTLEMEN: Replying to yours of the 8th instant addressed to the attorney general will say that by sections 850-k and 850-l, supplement to the code, it is provided:

> "In cities and towns not having a park board the council may appropriate each year not exceeding five per cent of the general fund for the improvement and maintenance of public parks."
>
> "Said fund so appropriated shall be expended under the direction of a committee of three persons, consisting of the mayor, one member of the council appointed by the council, and one resident property owner of such city or town appointed by the council, which committee shall receive no compensation for their services."

Hence, if your council will comply with these sections, there is no reason why this 5 per cent of the general fund should not be available for the improvement and maintenance of your park.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

AUTO DEALER—Where a firm changes hands in December the new firm should be assessed if change complete before January 1. The entire stock may be listed or each machine registered.

April 13, 1915.

W. C. LYNCH, *City Assessor,* Marengo, Iowa.

DEAR SIR: Replying to yours of the 12th instant will say that this department has heretofore held that two methods are open to the automobile dealer. He may either list his entire stock on hand on January 1st, the same as other vehicles, or he may register each individual machine. In the latter event he would not need the dealer's license. By registering each individual machine he could sell registration with the machine and transfer the same upon the payment of $1.00 fee and he could add the amount of the registration fee to the price of the machine. The dealer should

not be charged with machines not on hand on January 1st for a that time he probably has his property in money or in some other form and should be assessed in that form.

With reference to the case you mention where the firm changed hands in December the new firm should be assessed with the stock if the change was complete before January 1st. The fact that some members of the firm may be assessed in another township for other property they have in that township should make no difference. However, if the change is not complete on January 1st, then assessment should be made to the old firm.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

SANITARY ENGINEER.—Under Sec. 2575-a7, and a9, code sup. 1913, as amended by the 36th G. A. no free analysis can now be required. State board of health will be required to pay if it orders same. State board of health could follow suggested methods as to epidemics or not. Can act in preventing same. $6,000 total appropriation.

April 21, 1915.

LAFAYETTE HIGGINS, *Sanitary Engineer.*

DEAR SIR: I have yours of the 20th instant, addressed to the attorney general in which you call attention to section 2575-a7 and 2575-a9, supplement to the code, 1913, as amended by senate file 637 of the acts of the thirty-sixth general assembly and concerning the same you propound the following questions:

1. How much free analysis, if any, may the state board of health require of the bacteriological laboratory?

In my judgment, no free analysis can now be required by the board of health of the bacteriological laboratory. The last sentence of the first cited section now reads: "Such examinations shall be made without charge except for transportation charges and actual costs of *examinations* not to exceed two dollars." The word "examinations" might possibly have been intended only to apply to the bacteriological and chemical examinations of water provided for by senate file 637. However, as stated before, this provision as to the charges for the examination is separated from the rest of the section and is a complete sentence, and the more reasonable interpretation would be to make the word "examination" to

apply also to "scientific analyses and tests, chemical, microscopical," etc., referred to in the first section quoted before the same was amended by senate file 637. Hence, in my judgment, all such examinations as are hereafter required by the board of health at the hands of this laboratory should be paid for as stated, cost of transportation and actual cost of examination not to exceed two dollars, and when paid for at this basis there is no limitation as to the amount of such work which the state board may require.

2. Will the state board of health be required to pay out of its funds the fee for all water analyses which it may order done?

In my judgment, this question should be answered in the affirmative.

3. Will the provision of the second paragraph of section 2575-a7 interfere with the administrative powers and duties of the state board of health relative to the control of epidemics and the investigation of such. This inquiry is prompted by the last sentence of this section, which says, "A copy of the report of every epidemiological investigation shall be sent to the secretary of the state board of health," and which seems to imply that such report is for purposes of record only to inform the secretary as to just what had been done in any case by this laboratory?

In my judgment, there is no necessary conflict or interference unless the method suggested by the laboratory for overcoming epidemics when made to a local board of health might conflict with the rules or suggestions of the state board of health concerning the same matter and made to the local board of health over which the state board of health has supervision. In other words, if there should be a disagreement between the laboratory and the state board of health as to the propriety of the methods suggested for overcoming the epidemic there might be a tendency on the part of the local board of health to follow the suggestions of the laboratory rather than the rules of the state board of health. The state board of health, when such methods are suggested to it, could follow the same or not as it sees fit, and the same might be said where the suggestions are made to the executive officer of a state institution.

4. Would section 2575-a8 be affected by the provision of the second paragraph of the preceding section as amended rel-

ative to the investigation and control of epidemics, thereby lessening or weakening the power of the state board of health relative to such epidemics?

In my judgment, this question should be answered in the negative, except as already indicated by the answer to the last interrogatory.

5. Will the epidemiologist, water analysts and other assistants provided for by senate file 637 be paid out of the $6,000 now provided for this laboratory, or just what does this amendment mean? Also what would be the application of the $5,000 spoken of in the amendment at the close of this paragraph? Will this $5,000 add $5,000 to the $6,000 above mentioned or will the $5,000 become a part of the $6,000? (You will notice that this appropriation of $5,000 is already included in the State University appropriation made by the thirty-sixth general assembly, which appropriation was made a day or two previous to the introduction of senate file 637.)

In my judgment the $5,000 appropriation referred to would not be in addition to but would become a part of the $6,000 appropriation and that the only purpose of referring to the $5,000 appropriation in senate file 637 was to make the same available for one biennial period only for the additional purposes specified in senate file 637.

6. Does the publication clause make this act operative in requiring all analyses required by the state board of health to be asked for at the laboratory, if additional appropriations are not available until after July 1st?

In my judgment this question should be answered in the affirmative.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

CURATOR.—Permit holder may sell liquor to preserve a specimen for museum when request is so stated without O. K. of a practicing physician.

April 23, 1915.

E. R. HARLAN, *Curator,* Historical Bldg.

DEAR SIR: Replying to yours of the 22d inst. addressed to the attorney general will say that by section 2385 of the code persons holding permits may sell and dispense intoxicating liquor, not

including malt liquor, for pharmaceutical and medical purposes and also may sell and dispense alcohol for *specified chemical and mechanical* purposes and wine for sacramental uses.

In a recent case, our supreme court has held that where the liquor is desired for medical purposes it is sufficient that the request so state but that where the same is for chemical or mechanical purposes the exact purpose for the use of which the same is desired must be specified. See *Smith vs. Foster,* 153 Iowa, 664.

Any permit holder would have the right to sell the same to you for the purpose of preserving any specimen for your museum upon such purpose being so stated in the request, without the O. K. of any practicing physician or other person.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

COURT REPORTER—EXPENSES.—Allowed expenses not exceeding $200 per calendar year—not limited to 1-12 in any one month.

April 23, 1915.

J. J. FERGUSON, Clarinda, Iowa.

DEAR SIR: Yours of the 19th instant addressed to the attorney general has been referred to me for reply. In my judgment, Senate File 183, authorizing judges and reporters to be allowed living expenses and transportation expenses when in discharge of their duties in cities and towns other than the place of their residence, is not retroactive. However, as soon as the law takes effect, each reporter will be entitled to his actual and necessary hotel and living expenses not to exceed three dollars per day while engaged in the discharge of his official duties outside of the city of his residence, also actual transportation expenses, such living expenses and traveling expenses *"not exceeding in all two hundred dollars per year"* and is to be paid in the same manner as the per diem of the reporter, the same to be itemized and approved by the presiding judge.

I think it is not material when the fiscal year begins. The language is "not exceeding *in all* two hundred dollars per year." Our supreme court has construed the term "in any one year" to mean a calendar year. *Sawyer vs. Steinman,* 148 Iowa, 610 at 614, and in my judgment it would construe the term "per year" used in this statute to mean the same thing. Hence, reporters would be entitled to recover between the time the law takes effect and the

end of the calendar year 1915 their actual living and transportation expenses not exceeding two hundred dollars and would not be limited to one-twelfth of the said two hundred dollars for any one month.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

CITIES AND TOWNS.—Cities can require temporary sidewalk laid on natural surface of ground but can assess no more than 40c a linear foot.

April 26, 1915.

FRANK G. PIERCE, Marshalltown, Iowa.

DEAR SIR: I have yours of the 24th instant enclosing inquiry from W. E. Potter of Baldwin, Iowa, in which he propounds the question as to whether or not incorporated towns may require temporary sidewalks to be constructed at the expense of the adjacent property owner at an elevation other than upon the natural surface of the ground where no regular grade has been established.

As suggested by you, the matter is controlled by section 777, supplement to the code, 1913. Our supreme court considered this question in the case of *Hartrick vs. The Town of Farmington,* 108 Iowa, page 31, at which time the statute read:

> "They shall have power to provide for the laying of temporary plank sidewalks upon the *natural surface* of the ground without regard to grade on streets not permanently improved, at a cost not exceeding forty cents a lineal foot and to provide for the assessment of the cost thereof on the property in front of which the same shall be laid."

However, in that case the court says: "The case is controlled by the law as it stood prior to the present code and we quote from the code of 1873 as to the authority of a town council." In this case the power to compel the construction of the walk except upon the natural surface of the ground was denied.

In the rewriting of this section at the time of the adoption of the code of 1897 and by chapter 26 of the twenty-eighth general assembly same was so modified as to read:

> "They shall have power to provide for the laying, relaying and repairing of temporary sidewalks upon any street, avenue, public ground, wharf, land or market place within the limits of said city or town at a cost not exceeding forty

cents a linear foot, *to prescribe a uniform width thereof, and to regulate the grade of the same* and to provide for the assessment of the cost thereof on the property in front of which the same shall be laid, *in proportion to the special benefits conferred upon the property thereby and not in excess thereof.*''

After this change in the statute our supreme court again considered the question and affirmed a decree in which the trial court held ''that the defendant city has a right to regulate the grade of the sidewalk in question and to relay its south end and bring it to the same grade as the alley with which it connects * * * * and tax the cost thereof to the plaintiff and his said property, as provided by law, not exceeding, however, forty cents per linear foot'' and in passing upon the question the court said:

> ''Section 777 of the present code expressly confers on towns the power to regulate the grade of temporary sidewalks. It is a reasonable construction of this provision to say that it confers some discretionary power other than the establishment of a fixed and uniform grade'' and concluded by saying ''The trial court correctly construed section 777 as applied to this case.''

Hence, I am of the opinion that in the instant case the town could require the walk to be constructed at an elevation either above or below the natural surface of the ground provided that no more than forty cents per linear foot is assessed to the property, and provided further that the property is not charged with a greater portion of the entire expense of the improvement than its proportionate share of the benefits of the same would amount to.

I am enclosing herewith duplicate of this letter in order that you may send same to Mr. Potter, if you so desire.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

APPOINTIVE OFFICE—QUALIFICATION.—Appointive officers may be non-citizens. No incompatibility in office of deputy game warden and assistant state veterinarian.

April 26, 1915.

C. E. ANDERSON, Moville, Iowa.

DEAR SIR: Replying to yours of the 23d inst. addressed to the attorney general will say that while there is no provision of our

law fixing the qualifications of deputy game wardens or the assistant state veterinarian, yet our court has held that under our system of government *elective* officers should be citizens of the United States and of this state. Neither of these offices are elective offices and hence in my judgment they might be held by a non-citizen.

I see no incompatibility in the two offices and the duties of both might be performed by the same person.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

STATE, JUDGMENT AGAINST BARRED.—A judgment rendered in 1888 is by section 3439, code supplement 1913 barred if provision applies to state when suing in sovereign capacity. Otherwise action could still be maintained on same.

April 26, 1915.

R. P. SCOTT, *County Attorney,* Marshalltown, Iowa.

DEAR SIR: Replying to yours of the 22d inst. will say that the judgment rendered in 1888 would, by the provisions of section 3439 of the supplement to the code, 1913, be barred, if this provision applies to the state when suing in its governmental or sovereign capacity; otherwise, action could still be maintained on this judgment.

The question presented is one upon which the authorities in the various states are in conflict. For cases holding that the statute does not run against the state in matters of this sort, I call your attention to the following: *Eastern State Hospital vs. P. P. Winston* (Va.) 52 S. E. 837; 3 L. R. A. New Series, 746, where a note will be found collecting the authorities upon the question both pro and con. *State of Kansas vs. Ella G. Dixon, et al.,* 90 Kans., 594; 135 Pac., 568 and 47 L. R. A. New Series, 905, where a note will be found collecting the later authorities. It will be observed that this case was one brought to revive a judgment rendered in a liquor case and is very similar to the one which you mention. *Quinn vs. Baage,* 138 Iowa, 426.

For cases holding the contrary view see *Brown vs. Painter,* 44 Iowa, 368; *State vs. Henderson,* 48 Iowa, 242, and *Warren County vs. Minnie Hunt Lamkin* (Miss.) 48 So., 497; 22 L. R. A. New Series, 920 and note.

On the whole I am of the opinion that the question is a very close one and one which probably should be tested out by an action. Assuming that you have a case where a substantial amount could be collected in the event we were successful, I would advise the institution of an action to revive the judgment and to declare the same to be a lien by virtue of the original judgment which ceased to exist ten years after the rendition of the judgment.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

DEPUTY TREASURER, SALARIES.—Fixed by a board of supervisors and the only thing to consider is not to exceed the maximum which is governed by the population.

April 27, 1915.

W. R. ALLEY, *Deputy Treasurer,* Greenfield, Iowa.

DEAR SIR: Yours of the 26th inst. addressed to the attorney general has been referred to me for reply. You ask for an explanation of the new law governing the salaries of deputy treasurers. The material portion of the law reads as follows:

> "He shall receive a salary not exceeding nine hundred dollars a year, to be fixed by the board of supervisors, except that in counties having a population of twenty-five thousand or over, the salary of the first deputy and in counties in which the district court is held in two places, the salaries of the first and second deputies shall be one-half that of the principal, and in case additional deputies or clerks are needed, the board of supervisors may make such allowance therefor as they may deem reasonable, not exceeding the salary of the first deputy."

From this it will be observed that the salary of deputies is to be fixed by the board of supervisors at not exceeding nine hundred dollars per year except that in counties having a population of twenty-five thousand or over the salary of the first deputy is automatically fixed at one-half the salary of the treasurer and in counties where the district court is held in two places the salaries of both the first and second deputies are fixed automatically at one-half the amount of the treasurer's salary.

In counties the size of your county the only provision necessary to be considered is that the salary is not to exceed nine hundred dollars and is to be fixed by the board of supervisors.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

SUPERINTENDENT OF PUBLIC INSTRUCTION.—Sub-district below four sections may be reduced. Word "piece" in sec. 2794-a, as amended by the thirty-sixth general assembly, refers to part left after district is taken out. The word "heretofore" in line six refers only to consolidated school corporation formed prior to amendment.

April 28, 1915.

A. M. DEYOE, *Supt. of Public Instruction.*

DEAR SIR: Replying to yours of the 27th inst. addressed to the attorney general, will say that your first question, which is as follows:

> "Will it be permissible under the amendment to reduce a subdistrict below four sections in fixing the boundaries for a proposed consolidated independent district?"

should be answered in the affirmative. The recent amendment to section 2794-a does not in any way restrict the former provisions of the section as to the formation of consolidated independent districts but only seeks to dispose of the remaining territory in the school township.

Your second question reads as follows:

> "To what does the word 'pieces' refer in line nine; does it refer to each sub-district of the original corporation of the proposed consolidated district, or does it refer to a *piece* of territory left out containing not less than four government sections of land?"

In my judgment, the word "pieces" referred to has reference to that fraction or those fractions of the school township left remaining after there is carved therefrom a consolidated independent school district or a portion of such consolidated district and that it does not refer to the separate, previously existing sub-districts.

Your third question reads as follows:

> "How far is the word 'heretofore' in line six to be considered as applied to districts already formed?"

In my judgment, the word "heretofore," as used in this question, has reference only to consolidated school corporations formed prior to the enactment of the amendment and where the remaining territory had not been prior to the enactment of the amendment re-organized or included within some school corporation. It is true that this interpretation would read something into the statute by implication but it was certainly not intended to apply to all cases where a consolidated school corporation had been heretofore formed.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

TAXES, LAND, AGRICULTURE—Lands used continuously for horticultural or agricultural purposes in 10 acre lots or more are not liable for city or town taxes except road and library, unless within the original limits of the city or town.

April 28, 1915.

ANDREW BELL, JR., *County Attorney,* Denison, Iowa.

DEAR SIR: Replying to yours of the 26th inst. addressed to the attorney general, will say that by referring to section 616, supplement to the code, as amended, you will observe that lands not laid off in lots of ten acres or less and used in good faith for horticultural or agricultural purposes are not liable for city or town taxes except road taxes and public library taxes, where such lands have been taken into the limits of the incorporation by an extension of such limits, but if such lands are within the original limits of the city or town they are not exempt from city and town taxes. See *Perkins vs. Burlington,* 77 Iowa, 553.

If the horticultural or agricultural use is merely temporary then the property is still subject to municipal taxes. See *Alexander vs. Davenport,* 107 Iowa, 90. Neither does the exemption apply where the property is used for the purpose of a city residence, and where the property is used as a home and the horticultural and agricultural operations conducted thereon are not for the purpose of a source of profit or income but merely for the purpose of contributing to the comfort or convenience of the owner or for the beautification of the premises, then such property is not exempt even though horticultural and agricultural operations are conducted thereon to a considerable extent. See *Windsor vs. Polk County,* 109 Iowa, 156.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

CIVIL AND SANITARY ENGINEER.—Exhaustive discussion holding that Kenwood Park has right to construct a sewer extending beyond its corporate limits and traversing part of the corporate limits of Cedar Rapids.

April 29, 1915.

HON. LAFE HIGGINS, *Civil and Sanitary Engineer,* State Board of Health.

DEAR SIR: Your letter of the 16th inst. addressed to the attorney general has been referred to me for reply. You call attention to the desire of Kenwood Park to construct a sewer extending beyond its own corporate limits and traversing a part of the territory included within the corporate limits of the city of Cedar Rapids and to the contention of the city of Cedar Rapids substantially expressed in the letter of its attorney, F. F. Dawley, addressed to the mayor and city council of Cedar Rapids of date February 8th, 1915, in which he states:

> "There is no statute by which our city is expressly given the authority to permit another city or town to use or cross its streets or public places for the construction of sewers, and it has no implied power to do so unless such power is reasonably necessary for carrying out the express powers granted to the city. The granting of such privilege to the town of Kenwood Park, however desirable or convenient it might be, would not in any way aid in carrying out the powers possessed by this city for its own management and government, and therefore the city has no implied power to grant this privilege.
>
> "It is true that by section 881 of the code supplement, 1907, the town of Kenwood Park is given the power to acquire property for a sewer outlet outside its own limits, by purchase or condemnation. It may do the same for park purposes. But this does not give the power to condemn land which has already been appropriated to public purposes in another municipality. This would be contrary to the general rule that two municipal governments cannot exercise jurisdiction and control over the same territory, and it is not to be presumed that the legislature intended such a result unless it has expressly said so by statute."

You inquire whether or not the contentions of the attorney for Cedar Rapids are well founded and whether or not, under the circumstances, Kenwood Park could or could not condemn an outlet through a portion of the territory of Cedar Rapids.

I find upon examination that our Mr. Fletcher has, to some extent, considered this question, and on February 2nd, 1915, gave to W. A. Coon, President of the Kenwood Park Commercial Club, an opinion from which I quote the following:

> "I do not think that the fact that property through which the sewer passes is within the corporate limits of another municipality affects your right to construct such sewer so long as the construction of the sewer is not detrimental to the inhabitants of the other municipality. There is no provision in our statutes that exempts property of an individual located within the limits of one corporation from the right of eminent domain which may be exercised by another corporation or municipality, and the courts have gone so far as to say that property previously taken for public use may be condemned for another public use that does not interfere with the former use. It is my conclusion that you have the right to condemn land lying within the limits of another municipality for the purpose of constructing your sewer outlet and disposal plant if, as before stated, such use is not detrimental to the public."

I have given the question some further investigation and am unable to concur with the views expressed by Mr. Dawley, the attorney for the city of Cedar Rapids, but do concur in the views expressed by Mr. Fletcher, as above quoted. Section 18 of Article I of our constitution provides:

> "The general assembly may pass laws permitting the owners of lands to construct drains, ditches and levees for agricultural, sanitary or mining purposes across the lands of others * * * and provide by law for the condemnation of such real estate as shall be necessary for the construction and maintenance of such drains, ditches and levees."

Section 881, supplement to the code, 1913, to which Mr. Dawley has referred, provides:

> "Cities and towns shall have the power to acquire real estate within or *without* their territorial limits necessary for sewer outlets, garbage disposal plants, sewer disposal plants and dump grounds by purchase or condemnation, as in this chapter provided."

It will be observed that there is no exemption in favor of lands lying within the corporate limits of cities or towns from liability to such condemnation and while, in actual practice, cases would be rare where a necessity would exist for one municipality to condemn land for sewer or other purposes within the corporate limits of another municipality, yet, where such necessity in fact exists, it would be as imperative as though the second municipality did not exist. In other words, the term "within or without their territorial limits" includes all territory and the fact that part of the territory sought to be condemned by one municipality is within the territorial limits of another municipality does not render it any the less "without the territorial limits" of the condemning municipality.

It is true as stated by Attorney Dawley, that it is not to be presumed that the legislature intended two municipal governments to exercise jurisdiction and control over the same territory and there would be no necessity in such case for the city of Kenwood Park to extend its governmental jurisdiction over that part of the territory of Cedar Rapids traversed by the proposed sewer. Hence, there would be no conflict in authority in this respect.

The city of Kenwood Park, however, by reason of its ownership of the sewer, would have the right to enter the corporate limits of Cedar Rapids for the purpose of maintaining or keeping in repair said sewer, and to the same extent and in the same manner as would an individual, a railroad company or telegraph or telephone company or other corporation possessing the powers of eminent domain, would have the right to enter for the purpose of keeping its property in repair, and in such cases there would be no contention that there would be any clash of governmental authority for no governmental authority is possessed by such corporations.

The city of Cedar Rapids owns the fee title to the streets and alleys within its corporate limits and it is only to the extent that such streets and alleys may be traversed by the proposed sewer that the city, as such, is interested in this question, and the laying of the sewer through and across or along the streets of such city would not interfere with the public use of such streets to any greater extent than if the sewer was being constructed by the city of Cedar Rapids rather than by the city of Kenwood Park, and, as stated by Mr. Fletcher, it is well settled by authority that even without special authority land already devoted to one public use may be subjected to a second or further public use when such

second or further public use does not substantially interfere with the existing public use.

Rochester vs. Water Works, 66 N. Y., 413;
So. Pacific vs. So. Calif., 111 Calif., 221;
Scranton Gas Co. vs. Delaware R. R., 225 Pa. St., 152;
Wheeling-Belmont Bridge Co. vs. Wheeling Bridge Co., 139 U. S., 287;
Evergreen Cemetery Assn. vs. New Haven, 43 Conn., 234;
Pasadena vs. Stimson, 91 Calif., 238 at 256;
Steele vs. Empson, 142 Ind., 397;
Boston vs. Brookline, 156 Mass., 172;
Oregon Short Line vs. Idaho Postal Telegraph Co., 111 Fed., 842;
Chicago Ry. Co. vs. Starkweather, 97 Ia., 159; 15 Cyc, 614-16;
Grafton vs. St. Paul, M. & M. Ry. Co., 16 N. D., 313; 113 N. W., 598; 22 L. R. A. (N. S.), 1 and note;
Henderson vs. Lexington, 111 S. W., 318; 22 L. R. A. (N. S.), page 20, in connection with which case is an extensive note covering all phases of eminent domain, and on page 168 are collected the authorities bearing on sewers for municipal purposes;
Conn. College vs. Calvert, 87 Conn. 421; 88 Atl., 633; 48 L. R. A. (N. S.), 485; (especially the note at page 489 under the heading "Clash of public uses").

Hence, I am of the opinion that if the necessity exists the city of Kenwood Park would have the legal right to condemn a right of way through and across the lots, streets and alleys located within the corporate limits of the city of Cedar Rapids or any other municipality through or across which it is necessary for its line to pass.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

SCHOOL BONDS—DEPOSITORY.—A bank in which the proceeds of a school bond sale is deposited is liable for the interest while held.

April 30, 1915.

F. S. BRIDGER, *Cashier, Farmers State Savings Bank,* Fremont, Iowa.

DEAR SIR: Replying to yours of the 28th inst. addressed to the attorney general as to whether or not the bank in which school

bonds are deposited should be liable for the interest on the proceeds of a bond issue amounting to $30,000 or whether its liability for such interest extends only to the ordinary funds of the school corporation will say the provision for interest is found in section 2768, supplement to the code, 1913 and reads as follows:

> "It is hereby made the duty of the treasurer of each school corporation to deposit *all* funds in his hands as such treasurer in some bank or banks in the state at interest at the rate of at least two per cent per annum on ninety per cent of the daily balances payable at the end of each month, all of which shall accrue to the benefit of the contingent fund of such school corporation."

It will be observed that there is no exception made where unusual amounts of money are deposited for a short time as would be the case where bonds are sold and the money deposited until made use of by the district and it would seem that this was the purpose of requiring the interest to be computed based on the percentage of the daily balances; hence, I am of the opinion that the depository would be liable for the interest on all moneys including the proceeds of the bond sale.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

FISH AND GAME.—Where riparian owner gives only right to flood land and retains title to same, it is trespass to drive stakes for fishing purposes without getting his consent.

April 30, 1915.

E. C. HINSHAW, *Fish and Game Warden,* Spirit Lake, Iowa.

DEAR SIR: Replying to yours of the 27th inst. addressed to the attorney general also to the inquiry of R. E. Jameson of Nauvoo, Illinois, will say with reference to that portion of the land flooded by the water of the Mississippi river by reason of the construction of the Mississippi power dam at Keokuk that the rights of the riparian owner extend to the highwater mark as the same existed prior to the construction of such dam, and if it be true, as stated in the letter of Mr. Jameson, that the riparian owners only sold to the power company the right to flood this land without disposing of the land itself, then the title to the

land between the original highwater mark and the present highwater mark would still remain in the riparian owner and would not be public property as is the rest of the channel of the Mississippi river; and while the crossing of that portion of the river over such land or the driving of stakes, for the purpose of holding fish nets, into the soil under the water would be no serious injury to the riparian owner yet, in my judgment, it would nevertheless be a trespass for which he would have some remedy, and hence parties would have no right to fish over such land without the consent of such riparian owner.

I am this day sending a copy of this letter to Mr. Jameson.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

SCHOOLS—NOTICE OF BOND ELECTION—LENGTH OF PUBLICATION REQUIRED.—Code Supplement Section 2820-d3 only requires notice of election to be published four weekly insertions prior to the election even though twenty-eight days have not intervened between the first publication and the election.

May 8, 1915.

C. H. RECHSEEN, *Pres., Board of Education,* Madrid, Iowa.

DEAR SIR: Your recent inquiry addressed to the attorney general concerning the length of notice required of special school elections for the purpose of voting school bonds has been referred to me for investigation and reply.

The matter is governed by section 2820-d3, supplement to the code, 1913, the material portion of which reads as follows:

> "Four weeks' notice of such election shall be given by publication once each week, in some newspaper published in the said town or city, or if none be published therein, in the next nearest town or city in the county."

The question is whether or not four weekly publications of the notice, which would only cover a period of twenty-two days, would be sufficient notice so that the election might be held as early as the twenty-third day following the first publication, or whether the election must be fully four weeks or twenty-eight days after the day of the first publication. If the statute simply provided four weeks' notice, then in my judgment the first publication must be at least twenty-eight days before the day of the

election, but in this case it proceeds to specify how the notice shall be given by publication once each week, and it is evident that it only intended that the notice should be published four times, or once each week. Any other construction would require five publications and I think this was not contemplated.

A similar case was before the supreme court of Colorado and it was held that "A statute authorizing the service of summons by publishing at least once a week for four successive weeks does not mean four weeks of seven days each, but the publication is completed on the day on which the summons is published in the fourth successive week, though less than twenty-eight days have elapsed since it was first published." *Calvert vs. Calvert,* 24 Pac. 1043; 15 Colo., 430.

I am authorized to say that the attorney general concurs in this view.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

CLERK OF COURT—FEE.—Clerk not authorized to demand payment in advance in liquor injunction suit if plaintiff is citizen of the county.

May 10, 1915.

HUGH CLEMANS, Manchester, Iowa.

DEAR SIR: Replying to yours of the 6th inst. addressed to the attorney general will say that in my judgment the clerk of the court is not authorized to demand payment in advance of the filing fee where the plaintiff in the liquor injunction suit is a *citizen* of the county. See Section 2412 of the Code, also *Searles vs. Lux,* 86 Iowa at page 64.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

PARK COMMISSION.—Cannot sell brick or material to city but may sell it to a contractor who is doing work for the city.

May 11, 1915.

WILLIAM ORR, *Attorney,* Clarinda, Iowa.

DEAR SIR: Yours of the 7th inst. addressed to the attorney general has been referred to me for reply and your question briefly stated is whether or not a park commissioner of a city,

who is an elective officer, may lawfully deal with his city by making sales to it of cement, brick, sand or other materials made use of in public improvements made by such city in view of the provisions of section 879-q, supplement to the code, 1913, which reads in part as follows:

> "No officer, including members of the city council, shall be interested directly or indirectly in any contract or job of work, or material, or the profits thereof, or service to be furnished or performed for the city or town."

It will be observed that this language is practically the same as that found in sub-division 14, section 668, supplement to the code, 1913, which was construed by our supreme court in the case of *Bay vs. Davidson,* 133 Iowa, 688 as meaning that the officer could not so contract with his city, and that, independently of the statute, such contract is objectionable on the grounds of public policy. Hence, I am of the opinion that your question should be answered in the negative.

This department has already held that such an officer of the city might lawfully sell material to the contractor, even though the materials thus sold were to be used by the contractor in work done for the city.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

SCHOOL BUILDINGS—USE.—Where no direction has been made by the voters the school board has authority to permit proper use of building.

May 12, 1915.

J. J. HUGHES, *Secretary, Independent School District,* Council Bluffs, Iowa.

DEAR SIR: Yours of the 29th ultimo addressed to the attorney general has been referred to me for reply. Your question briefly stated is whether or not the board of education may permit a school building to be used for other public purposes without a vote of the people.

Section 2749 provides, among other things, that the voters assembled at the annual meeting shall have power to instruct the board that school buildings may or may not be used for a meeting of public interest. Where such question has been passed upon by the voters and the direction given, then such direction must

be observed by the board and if such direction prohibits the use of the building for public purposes, then the same may not be so used even with permission of the board. However, where such direction of the voters permits such use or where no direction has been made by the voters, then, in my judgment, the board of education would have authority to permit the use of school buildings for proper public purposes. See 35 Cyc., 941-944 inclusive; also *Davis vs. Boget,* 50 Iowa, 1.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

LIBRARY COMMISSION.—Any portion of the $11,000 under section 2888-h, supplement to the code, 1913, not expended for salaries in any one year would be available for other purposes.

May 14, 1915.

JULIA A. ROBINSON, *Secretary,* Library Commission.

DEAR MADAM: Replying to yours of the 11th instant addressed to the attorney general will say that, in my judgment, any portion of the $11,000 provided annually by section 2888-h, supplement to the code, 1913, for the expenses of the work of the library commission over and above the amount actually expended for salaries would be available for any and all of the same purposes for which that portion of such fund over and above the maximum amount of $7,600 provided for salaries is available. While not more than $7,600 could be used for salaries in any one year, there is no such restriction on the remainder of the $11,000, and, for example, if only $5,000 would be expended for salaries in any one year, the remaining $6,000 would be available for the other purposes contemplated by the act.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

CITIES AND TOWNS—MAYOR OR COUNCIL—Cannot be interested in any contract or job of work for the city.

May 14, 1915.

W. S. MOORE, *Attorney,* Manilla, Iowa.

DEAR SIR: Replying to yours of the 16th ult. will say that this department has heretofore held that members of the council are prohibited by sub-division 14 of code supplement section 668

from having any dealings with a city or town or being interested in any contract or job of work. The supreme court has so held. See *Bay vs. Davidson,* 133 Iowa, 688, and our supreme court has held that one violating a similar provision was guilty of an indictable offense. *See State vs. York,* 131 Iowa, 635.

By section 879-q, supplement to the code, 1913, it is now provided "No officer, including members of the city council shall be interested directly or indirectly in any contract or job of work, or material, or the profits thereof, or service to be performed for the city or town." Hence, the same rule would apply to mayors and other city officers as to members of the city council.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

GRAPE JUICE.—Person can sell pure, unfermented grape juice after new liquor law is effective but not wine, without permit.

May 14, 1915.

MRS. EMMA C. SENTI, Burlington, Iowa.

DEAR MADAM: Replying to yours of the 8th inst. addressed to the attorney general will say that it is possible you would have the right to sell pure, unfermented grape juice after the new liquor law goes into effect January 1st, 1916, but neither you nor any other person would have the right to sell wine without a permit from the court.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

FAIR APPROPRIATION.—One or more agricultural societies in any county entitled to aid under section 1661-a, supplement to the code, 1913. Total amount to be received $300.

May 15, 1915.

V. E. SODERQUIST, Ogden, Iowa.

DEAR SIR: Replying to yours of the 7th inst. addressed to the attorney general will say that by section 1661-a, supplement to the code, 1913, it is provided:

> "Any county or district agricultural society, upon filing with the auditor of state affidavits of its president, secretary, and treasurer showing what sum has actually been paid out

during the current year for premiums, not including races, or money paid to secure games or other amusements, and that no gambling devices or other violations of law were permitted, together with a certificate from the secretary of the state society showing that it has reported according to law, shall be entitled to receive from the state treasury a sum equal to forty per cent. of the amount so paid in premiums, up to five hundred dollars, and ten per cent. additional of the amount paid in premiums over five hundred dollars; but in no case shall the amount paid to any society, exceed the sum of three hundred dollars.''

My understanding of this provision is that any county agricultural society or any district agricultural society, even though in the same county, will be entitled to receive the aid provided for. However, the amount cannot exceed forty per cent. of the premium paid up to five hundred dollars. That is to say, if the premiums paid are just five hundred dollars or if they equaled one thousand dollars, still the society would only be entitled to forty per cent. on the first five hundred dollars or two hundred dollars. In addition to this, it would be entitled to ten per cent. on the additional premiums paid over five hundred dollars, but in no case shall the total aid exceed three hundred dollars to any society.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

PEACE OFFICER.—Power to enforce auto law. Local peace officers enforce auto laws the same as others. Only owners of new cars may operate them after they have paid license but have not received numbers.

May 15, 1915.

J. I. MCNAUGHT, *City Clerk,* Glidden, Iowa.

DEAR SIR: Replying to your letter of May 1st, addressed to the attorney general, will say that your local city officers have the same authority with reference to enforcing the laws relating to the operation of motor vehicles as they have with reference to the enforcement of any other law for which a penalty is prescribed.

With reference to your second inquiry will say that where parties have recently paid their license to the secretary of state but have not received their number plates they should not be permitted to operate the machine unless the machine was purchased

by them just prior to making application. The license fee upon automobiles is due January 1st of each year and application should be made at that time or before. There is no excuse for the man who waits until the first of April or the first of May to make application and then expects to receive his number plate at once or be permitted to operate his machine without the number plate or to operate it upon the number plate of the year previous. The supreme court, in the case of *State vs. Gish*, 150 N. W., 37, held that where the application had been made to the secretary of state and the owner had received from him a receipt for the money and everything had been done upon the part of such owner to meet the requirements of the law he could not then be deprived of the use of the machine because of the delay on the part of the secretary of state in furnishing the plates, but this would only apply where the owner had made application in due time and the failure to perform was entirely upon the part of the secretary of state's office. I do not think at this date persons who owned machines in the year 1914 should be permitted to operate their machines on the 1914 numbers.

JOHN FLETCHER, *Ass't Att'y Gen'l.*

WEBB-KENYON LAW—INTOXICATING LIQUOR.—Express Company delivering liquors to person for unlawful purpose violates law.

May 17, 1915.

R. W. BIRDSALL, Dows, Iowa.

DEAR SIR: Replying to yours of recent date addressed to the attorney general concerning the right of an express company to deliver liquors to the consignee after notice that such liquors are being received by the consignee for an unlawful purpose will say that in my judgment an express company delivering liquors to any person after having received such notice from any reliable source would be violating the law.

I call your attention to the recent case of *State vs. U. S. Express Company*, 145 N. W., 451 where the defendant was enjoined from conducting a liquor nuisance by delivering liquors to one J. Erbacher and I quote from the opinion of the court with reference to the notice the company had of the unlawful purpose for which the liquors were being received, as follows:

"The defendant at the time of the delivery of the beer and the liquors to J. Erbacher did not have notice or actual knowledge that he was buying or receiving the same with the intent and purpose of selling it in violation of law, but was in possession of such facts that, upon reasonable inquiry, it would have ascertained he was buying and receiving and holding the beer and liquor with intent to sell the same in violation of the laws of Iowa, and is therefore chargeable with such knowledge."

In this case, the effect of the Webb-Kenyon law taken in connection with our law was fully discussed and it would pay any one interested in the question to make a careful study of this case.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

GIRL LABORERS.—Girls under 16 prohibited from working more than 8 hours a day. No limit as to hours for girls over that.

May 17, 1915.

GOLDIE PAUP, Harlan, Iowa.

DEAR MISS PAUP: Replying to yours of recent date addressed to the attorney general will say that by the laws of the last legislature girls under sixteen years of age are prohibited from working more than eight hours per day but there is no limit fixed by law as to the number of hours girls over that age may be employed.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

PRINTING FEES—Discussion as to amount county should pay for publishing items paid out for bounty on gophers, crows, rattlesnakes, widows' pensions, county officers, laborers, etc.

May 21, 1915.

MR. H. L. RANN, Manchester, Iowa.

DEAR MR. RANN: Again referring to the matters concerning printing, I have taken the matter up with Mr. Wall and he reports that he and the committee representing the publishers at their conference agreed that where bounties were paid for gophers, crows or rattlesnakes and other bounties, and the items did not aggregate to any one claimant the sum of one dollar,

that the small individual claim should be paid by the auditor and he should receive a warrant from the county; but if the amounts paid to any claimant was of the value of one dollar or in excess thereof, then a warrant should be issued direct to the claimant. It was claimed that if only a few cents were paid to an individual claimant, that the expense would equal the amount paid out in the form of bounty, and this has been the instruction given by Mr. Wall to his examiners and accountants, and probably accounts for the confusion you suggest.

With reference to the amount allowed as to widows' pensions, undoubtedly the payment to each widow should be itemized separately. It would not do to say in the publication "Mary Kelly and others." I think the law, however, would be satisfied if it said: "Mary Kelly, one child, $——; Lulu Smith, three children, $——." The name of the widow, the number of children, and the amount paid should be stated in all instances.

With reference to the salaries of county officers and the payment to individuals who perform labor and services for the county, in my opinion there should be a separate warrant paid to each person who receives money from the county, and if the practice exists of allowing a lump sum to any individual to be distributed to others, it should be discontinued. It is subject to great abuse. Of course if one individual works for the county doing the same kind of work for a period of four weeks, there is no reason why the publication may not show, "John Jones, four weeks' labor on the public highways, $——."

While there has been delay in answering your letter, yet there is no desire to evade any question and if there is still doubt about any question, write me and I shall consider it further.

When Mr. Wall told you that each item should be considered separate giving the name, nature of the claim and the amount, he stated the correct rule to be followed, but as before stated, I find that they had agreed to waive a strict interpretation of the law in the payment of small bounties, wholly for practical and economical reasons.

GEORGE COSSON, *Attorney General.*

FLAG—ENSIGN.—A picture or presentation of the flag connected with an advertisement is unlawful.

May 22, 1915.

A. F. GALLOWAY, *Clarinda Trust & Savings Bank,* Clarinda, Iowa.

DEAR SIR: Replying to yours of the 21st inst. will say that I have examined the advertisement which you enclose and which you propose to use as a supplement to the Clarinda Journal. It bears upon its face a picture or representation of the United States flag even to the color thereof, and the advertisement is to the effect that your bank proposes to give away the flag of which it is a representation, of a specified size, to persons opening with your bank a savings account in the sum of fifteen dollars or more, and your inquiry is whether or not you will be within the law in making use of such advertisement.

In my judgment, your question must be answered in the negative. The purpose of the statute was evidently to prevent the cheapening of the United States flag by permitting its use or the use of any picture or representation thereof for advertising purposes. The material part of section 5028-a, supplement to the code, 1913, provides:

> "Any person who in any manner, for exhibition, or display, shall place or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement of any nature, upon any flag, standard, color or ensign of the United States or state flag of this state, or ensign, or shall expose or cause to be exposed to public view any such flag, standard, color or ensign, upon which shall have been printed, painted, or otherwise placed, or to which shall be attached, appended, affixed, or annexed, any word, figure, mark, picture, design, or drawing, or any advertisement of any nature."

If there was nothing further, then it might be said that this was designed to prevent the use of the real flag in the manner specified but later on in the section it is provided:

> "The words, 'flag, standard, color or ensign,' as used in this section, shall include any flag, standard, color, ensign, or any picture or representation of either thereof, made of any substance or represented on any substance, and of any size, evidently purporting to be either of said flag, standard, color or ensign of the United States of America, or a picture or a representation of either thereof, upon which shall be

shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, colors, standard or ensign of the United States of America."

If the picture or representation of the flag were omitted from the proposed advertisement, then I am of the opinion there would be no violation of the law.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

PURE FOOD—NAME OF MANUFACTURER.—If packed by manufacturer, it should show his name and place of business. If packed by another, it should bear name of packer or dealer.

May 28, 1915.

W. B. BARNEY, *Dairy and Food Commissioner.*

DEAR SIR: Replying to yours of the 27th inst. as to whether or not the address of the manufacturer is to be required on all packages of food bearing a label as specified in paragraph four of the Code Supplement section 4999-a3l-c, will say that the material portion of the section under consideration provides:

"Such label shall be placed upon the outside of the package and shall contain the name and place of business of the *manufacturer, packer or dealer.*"

Hence, I am of the opinion that if the article is packed by the manufacturer then the same should bear his name and place of business or the name and place of business of the dealer, but where the article is packed by a person other than the manufacturer then the same should bear the name and place of business of either the manufacturer or packer or the dealer. In other words, the name and place of business of either would make the package comply with the law.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

DRAINAGE DISTRICTS.—No deduction made from acreage on account of portions which are occupied by ditch traversing same, but taken into account in assessing entire tract.

May 29, 1915.

GUY E. MACK, *Attorney*, Storm Lake, Iowa.

DEAR SIR: Replying to yours of the 22d inst. relative to the deduction from assessable tracts of land, portions of which are occupied by drainage district ditches traversing the same will say that this department has heretofore held that no deduction in the acreage should be made on account thereof, but that the fact of the existence of such ditch should be taken into account in determining the assessable value of the entire tract.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

CITIES AND TOWNS—LIGHT PLANT—TRANSMISSION LINES.—Where municipalities use a plant for pecuniary profit and extend transmission lines beyond corporate limits, such transmission lines are taxable by act of the thirty-sixth general assembly.

May 29, 1915.

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

DEAR SIR: Replying to your recent inquiry as to whether or not Senate File 610, acts of the thirty-sixth general assembly, requires the taxation of transmission lines owned by municipalities to the extent that such lines are without the corporate limits of the municipality, will say that the act requires the taxation of lines owned or operated where located wholly or partly outside cities and towns when so owned or operated by any "company." Section 8 of the act provides:

> "The word 'company,' as used in this act, shall be deemed and construed to mean and include any person, copartnership, association, corporation or syndicate," etc.

The term "corporation" has frequently been construed to include municipal corporations as well as private corporations. Furthermore, it is provided in sub-division 1 of section 1304, supplement to the code, 1913, that

"The property of the United States and this state, including university, agricultural college and school lands; the property of a county, township, city, town or school district or militia company, when devoted *entirely to public use* and not for any pecuniary profit * * * are not to be taxed."

By chapters 66 and 67 of the acts of the thirty-fifth general assembly, cities and towns are authorized to enter into contracts with corporations or municipalities for the purchase and sale of electric current for either light or power purposes and the sale is not limited to residents of the municipality, but may be made to others, including corporations. By the same act they are authorized to erect and maintain the necessary transmission lines either within or without the corporate limits to the same extent and in the same manner and under the same regulations with the same power to establish rates and collect rents as cities having municipally owned plants. Hence, I am of the opinion that where such a plant is made use of for the purposes of pecuniary profit the transmission line would be taxable under the act of the thirty-sixth general assembly referred to.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

COUNTY FUNDS—INTEREST.—Section 1457, supplement to the code, 1913, provides as to deposit of county funds at interest to be at least 2%. Can receive more than 2%.

June 1, 1915.

JOHN MCCUTCHEN, *County Attorney,* Oskaloosa, Iowa.

DEAR SIR: Replying to yours of the 28th ult., will say that the law regulating the deposit of county funds at interest is found in section 1457, supplement to the code, 1913, and its material provisions are as follows:

"The county treasurer shall, with the approval of the board of supervisors as to place of deposit, by resolution entered of record, deposit such funds in any bank or banks in the state to an amount fixed by such resolution at interest at the rate of at least two per cent per annum, on ninety per cent of the daily balances, payable at the end of each month, all of which shall accrue to the benefit of the general county fund."

In my judgment, this would not prevent the treasurer, with the approval of the board of supervisors, from depositing money in the bond fund or any other specified fund at a higher rate of interest. However, the minimum two per cent received as interest should go to the benefit of the general county fund. The balance of such interest, however, might, and should, properly be retained in the bond fund. No deposit should be made for any specified length of time but there would be no objection to taking a certificate providing for the payment of a higher rate of interest than the minimum two per cent in the event the money was left on deposit for a certain specified period of time or longer.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

ELECTIVE OFFICERS.—Must be qualified electors of district which they serve. Bank cannot act as school treasurer.

June 1, 1915.

F. L. PEARSON, West Branch, Iowa.

DEAR SIR: Replying to yours of the 29th ult. addressed to the attorney general, will say that our supreme court has held that elective officers must be qualified electors of the district in and for which they are to serve. Hence, it follows that a banking corporation could not serve as a school treasurer, neither could an individual who was not a qualified elector in the school district. See *State vs. Van Beek,* 87 Iowa, 569.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

INTOXICATING LIQUOR—PURCHASE PRICE.—After July 4, 1915, purchase price not collectible if liquor purchased for illegal purposes.

June 2, 1915.

MR. W. W. MORTON, Modale, Iowa.

DEAR SIR: Replying to yours of the first inst., addressed to the attorney general, will say that you inquire whether or not an account which shows on its face to have been for purchase price of intoxicating liquors may be collected in this state. I am enclosing a copy of Senate File No. 425 which will become a law July 4th. You will note that it provides:

"Section 1. The collection of payment, the solicitation of payment, and all attempts directly or indirectly, to collect payment within this state for intoxicating liquor sold or shipped within or into this state to be *used for illegal purposes* within this state, is hereby prohibited and made illegal, and the violation hereof is hereby made a misdemeanor."

Hence, it would appear that after July 4th it would be unlawful to undertake the collection of an account such as the one you enclose if the liquors were intended to be used for illegal purposes. If, however, the liquors are intended for lawful purposes only, then accounts for the purchase price thereof may be collected now as well as after July 4th.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

LABOR COMMISSION—INSPECTION FEE.—To be paid by person asking for permit if not authorized inspection.

LABOR COMMISSIONER—MINORS IN BILLIARD HALL, ETC.—Law prohibiting employment of children under 16 in billiard halls, etc., does not affect law excluding minors from such places.

LABOR COMMISSIONER—ENFORCEMENT OF LAW.—Truant officers and labor commissioner both enforce law pertaining to act of employing children.

LABOR COMMISSIONER—EMPLOYMENT IN "PUBLIC PLACE."—Employment in public place means street, alley, park, etc., not hotel or store, etc.

LABOR COMMISSIONER—PARENT WORKING OWN CHILD.—Discussion as to when a parent may employ and work his own children; if working in separate establishment; house employed same as other children under sec. 3, chapter 2477, supplement to code ,1913.

June 5, 1915.

A. L. URICK, *Labor Commissioner.*

DEAR SIR: Yours of the 2nd instant addressed to the attorney general has been referred to me for reply. You call attention to section 1 of code supplement section 2477-a, as amended by the acts of the thirty-sixth general assembly, and especially to that portion thereof which reads as follows:

"Providing that nothing in this section shall be construed as prohibiting a child from working in any of the above establishments or occupations when such are owned or operated by their own parents."

You then inquire:

"Suppose a man with two, three or more children under the age of fourteen makes a contract for husking a quantity of corn in a canning establishment, such contract providing for space in the husking sheds in which the work of the contract is to be done. Would such contractor be permitted to work his own child or children under the age of fourteen in doing this work?"

In my judgment, if the space or shed in which the husking is to be done is separate and apart from the building in which the canning factory proper is located, then it might be treated as a separate establishment, and, if operated by the parent, his children might be permitted to work therein without violating the law. However, if merely space for husking is provided in the main institution, even though the parent does his work by contract rather than by the day, then he would not be said to be in operation of the establishment in such a sense as to permit his children, under the age specified, to perform such work.

Your next question is:

"Would the limitation of hours as provided for in section 3, amendatory to section 2477-c of the supplement to the code, 1913, apply with relation to his own children?"

In my judgment, this question should be answered in the affirmative.

Your next question is:

"Also, would the same section 3 apply to the child or children where there is no doubt of the amendment to section 2477-a, supplement to the code, 1913, permitting the employment of such child?"

In my judgment, this question should be answered in the negative.

Your fourth question is:

"What is intended by the clause in section 2 applying to street trades, as follows: 'Nor any other occupation in any street or *public place.*' Under this provision, would girls

under eighteen be permitted to work, for instance, behind cigar cases in hotel lobbies or in office building lobbies, and if not permitted to work in such places, then where must the line be drawn between these places and department stores? Or should the law be construed to apply a 'public place' to mean any place in the open air, such as the street, public square, park or boat landing, market place, which is frequented by the public?''

From the context in connection with which the language referred to is used, I am of the opinion that the ''public place'' referred to therein was not intended to apply to hotels, office buildings, department stores or the like, but to unenclosed public places like a street, an alley, park, open court or some place of the sort to which the whole public has access.

Your fifth question is:

''Section 2 also provides 'the truant or attendance officer of the public school shall enforce the provisions of this section,' while section 2477-f of the supplement to the code, 1913, and which is amended by the thirty-sixth general assembly provides as follows: 'It shall be the duty of the commissioner of the bureau of labor statistics to enforce the provisions of this act,' etc. Does this mean that section 2 of the act of the thirty-sixth general assembly shall be enforced exclusively by such truant and attendance officers of the public schools, or does section 2477-f make it the duty of the commissioner of labor to enforce section 2 when the truant or attendance officers fail to enforce the act relating to street trades?''

In my judgment, a proper construction of this section imposes the primary duty on the truant officer. However, I do not believe the labor commissioner is entirely relieved in the event the truant officer fails to perform his duty in that connection. In other words, that, while the duties of the truant officer are confined to the matter specified in this section, the duties of the labor commissioner to enforce the whole law, including this section, would necessarily give him some supervision over the truant officer in the enforcement of this law.

Your sixth question is:

''Section 3, act of the thirty-sixth general assembly amendatory of 2477-b, supplement to the code, 1913, includes among

prohibited employment for children under 16, as follows: 'Bowling alley, pool or billiard room.' Does this section in any way limit the operation of section 5002 of the code of 1897 with relation to exclusion of minors in such places?''

In my judgment this question should be answered in the negative.

Your seventh question is:

''The same section provides as follows: 'And no female under 21 years of age shall be employed in any capacity where the duties of the employment compel her to remain constantly standing.' What interpretation should be given this clause?''

In my judgment, this provision has reference to those employments where the work cannot be done except while the employee is standing.

Your eighth question is:

''Section 5, amendatory of section 2477-d, supplement to the code, 1913, changes the present form of certificates of age to a work permit issued by the superintendent of schools or some one delegated for that purpose. Does this invalidate the certificates of age under which children are working prior to July 4, 1915, or will a certificate which has been filed and under which a child has been working prior to July 4, 1915, be recognized after that date? This question is a rather serious one, for the reason that when the law becomes operative the schools will not be in session, undoubtedly many school superintendents will be taking their vacation, probably some of them will have left the service, some of them may even be dead. Under these circumstances, could certificates of age issued prior to July 4th be recognized in permitting the continuation of a minor at work?''

In my judgment, this provision should receive a liberal construction and a certificate in force when the law takes effect should be recognized until a reasonable opportunity is had to obtain the work permits.

Your ninth question is:

''Your section, sub-section 3, provides as one of the evidences that must be on file with the officer issuing work permits before such work permit can be granted: 'A certi-

ficate signed by a medical inspector of schools or if there be no such inspector then by a physician appointed by the board of education.' In the event of such physician being appointed, who will be required to pay the fee of examination, there being no provision in the law to take care of this feature?''

In my judgment, the examination fee should be paid by the person for whom the work permit is issued as it is primarily for his benefit. Of course, there would be nothing illegal in the employer's agreeing to pay the examination fee in connection with the employment.

Your tenth question is:

''Same section, concluding paragraph, provides that where a child is apparently under sixteen years of age and does not have a work permit on file, the employer is required within ten days to furnish documentary evidence of the age of child as is required upon the issuance of a work permit. Does this paragraph mean that when a child is employed under misrepresentation that the child is over sixteen years, the inspector having doubt, that then the employer must furnish documentary evidence of the age of the child and that this clause does in no other way apply, this evidence to be furnished to the inspector direct instead of to the school authorities?''

My idea is that this section gives the inspector the right to demand either the proof of age, where the age is questionable, or the work permit, and in such cases it might be furnished direct to the inspector instead of to the school authorities and, through them, to the employer.

I am returning herewith the letter of the secretary of the National Child Labor Committee, together with your copy of the law.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

LABOR COMMISSIONER.—Child of 12 may play violin at chautauquas.

June 7, 1915.

A. L. URICK, *Labor Commissioner.*

DEAR SIR: In yours of the 7th inst. your inquiry whether or not children of the age of twelve years would be prohibited from

playing the violin or other musical instruments introductory to the afternoon and evening programs of local chautauquas in this state by that portion of section 2777-a, supplement to the code, as amended by section 1 of the child labor law enacted by the thirty-sixth general assembly which prohibits the employment of persons under fourteen years of age, either with or without wages, in places of amusement. In my judgment this question should be answered in the negative. While the ordinary local chautauqua is, in some respects, an entertainment, yet it more generally is regarded as of an educational character rather than as an amusement and I hardly believe that such a transaction was within the legislative mind when this law was enacted.

Your second question is: "Would a child above fourteen years of age engaged in a like occupation require a work permit?" In my judgment this question should be answered in the negative.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

HIGHWAYS—ESTABLISHMENT—PAYMENT.—If made by petition supervisors can pay damages. If petitioners pay part, supervisors pay balance.

June 9, 1915.

W. H. MAXWELL, Winterset, Iowa.

DEAR SIR: Replying to yours of the 8th instant concerning the authority of the board of supervisors to purchase, or pay damages for, land required for the location of a new highway will say that where the establishment of the road is petitioned for in the usual way the board of supervisors have authority to pay all or any part of the damages covered by the taking of the land from the general fund. Sub-division 17 of code section 422, specifying the powers of the board, provides:

> "To lay out, establish, alter or discontinue any county highway heretofore laid out or hereafter to be laid through or within the county, as may be provided by law."

The power to establish necessarily includes the power to acquire the land upon which to establish the road. It is further provided in section 1501 under final action:

> "Said board may increase or diminish the damages allowed by the appraisers, and may make such establishment,

vacation or alteration conditioned upon the payment, *in whole or in part,* of the damages awarded, or expenses in relation thereto."

If the board may order the petitioners to pay a part only of the cost and still establish the highway, it necessarily follows that the board must pay the other part from the county's general fund.

I am enclosing you leaflet containing the laws relating to roads and highways which were passed by the thirty-sixth general assembly and call your attention to Senate File 8 appearing therein on page 8. If the road you have in mind would fall within the provisions of this act, which would not cover all highways, then, as you will observe, the county would have the right to pay for the land out of the county road or bridge fund, or out of both of said funds.

See pages 19 and 20 at the points checked.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

ASSESSORS—COMPENSATION.—Supervisors to fix maximum days for work and price per day of eight hours not to exceed $2.50 per day.

June 17, 1915.

M. J. YORAN, *County Attorney,* Manchester, Iowa.

DEAR SIR: Yours of the 10th instant addressed to the attorney general has been referred to me for reply. You request an interpretation of section 592, supplement to the code, 1913, relating to the compensation of assessors, the material portion of which reads as follows:

"Each township assessor shall receive in full for all services required of him by law, a sum to be paid out of the county treasury, and fixed annually by the board of supervisors at their January session; said compensation shall be for the succeeding year, and shall not exceed the sum of two and one-half dollars for each day of eight hours which said board determines may necessarily be required in the discharge of all official duties."

I think the true interpretation of this statute requires the board of supervisors to fix the maximum number of days that may be required for the completion of the work of the assessor and the

price per day which should not exceed two and one half dollars for each of such days of eight hours and that in any given case the assessor would be entitled to the price fixed per day for each of the days of eight hours each actually employed in said work, not exceeding, however, the maximum number of days fixed by the board. I do not think that it contemplates that the board should fix a lump sum as the compensation of the assessor for any particular taxing district.

You call attention to the opinion given by the writer and found on page 519 of the 1911-12 Report, which opinion, as you will observe, was rendered in January, 1912. You also call attention to the opinion of N. J. Lee, formerly special counsel in this department shown at page 292 of the same Report, which opinion was rendered May 29, 1911, in answer to the inquiry: "Are township assessors entitled to additional compensation for their services in connection with the new act?" This, undoubtedly, had reference to chapter 63 of the acts of the thirty-fourth general assembly relating to the taxation of moneys and credits, banking stock and banking capital and section 6 of the act made the same applicable to the assessments made in the year 1911. This act was approved April 6th and went into effect April 8, 1911, after many of the assessors had completed their work, or substantially so, and it seems to have been the thought of the writer of that opinion that because of the fact that the assessors were required to do additional work not contemplated by the board of supervisors at the time they fixed the number of days required at their January meeting previous to the enactment of this law, the board might allow additional compensation, that is, allow a greater number of days as the maximum time required to complete the assessment for that year.

As that situation does not arise at this time and cannot arise hereafter I see no necessity in attempting to harmonize the opinions, even if they may be said to be in conflict.

I am authorized to say that the views above expressed are concurred in by the attorney general.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

PEDDLERS' LICENSE—BICYCLE.—Peddler using bicycle must pay license.

June 17, 1915.

A. E. BROWN, *County Attorney*, Osage, Iowa.

DEAR SIR: Your letter of the 15th inst. addressed to the attorney general has been referred to me for reply. You state that a young man is engaged in selling certain articles throughout the county, using a bicycle as a means of locomotion, and ask if, in my opinion, he is required to obtain a peddler's license under the provisions of section 1347-a of the supplement to the code, 1913.

I take it from your letter that it is not that you do not desire an opinion as to whether he must obtain a license because of the character of the articles sold, but rather because of the mode of conveyance employed by him, since the statute does not specifically cover those persons traveling by means of a bicycle.

While the first part of the section referred to seems to divide peddlers into three classes, namely, those traveling on foot, those driving one horse conveyances and those driving two horse conveyances, further along in the section in defining the word peddlers, the following language is used:

> "The word 'peddlers' under the provisions of this act and wherever found in the act, shall be held to include and apply to all transient merchants and itinerant venders selling by samples or by taking orders for immediate or future delivery."

The language quoted indicates to me that the legislature intended that every person following the trade of a peddler should be included in the provisions of the section regardless of the mode of travel or kind of conveyance used. To hold that the section would apply to those traveling on foot, or any horse drawn vehicles, and not apply to those using bicycles, motorcycles, automobiles, aircraft or other form of locomotion, would make the statute discriminatory and therefore unconstitutional. The courts will so interpret a statute as to preserve its validity, if possible, without doing violence to its provisions, and I think that in construing this section, the courts would say that all peddlers who come within the definition of the word as given in the section must pay a license and where their mode of conveyance does not come within one of the specific classifications made by the statute they should pay such amount as could be said to place them on

an equal basis with the others who are specifically classified. That is to say, if a peddler uses a bicycle or a motorcycle, he should pay the same license as one who travels on foot. If he uses a small auto with a receptacle for goods equivalent to that ordinarily employed by a person traveling with a one horse vehicle, he should pay the same rate, and if he uses a large auto he should pay the same as a person who drives a team.

Such a construction seems to me to be a reasonable one, and would result in saving the statute in the event its validity was assailed.

JOHN FLETCHER, *Ass't Att'y Gen'l.*

MAYOR'S BOND—ACTS WHEN NONE GIVEN.—Fact that mayor had not given bond would not render his acts or those of council while he was a member, invalid.

June 18, 1915.

FRANK G. PIERCE, Marshalltown, Iowa.

DEAR SIR: Your letter of the 17th instant addressed to the attorney general has been referred to me for reply. Your inquiry is as follows:

> "A question has been raised as to whether certain ordinances are legal passed several years ago and signed by mayor when mayor did not give a bond. The whole question is as to legality of acts when mayor had not given bond. What is your opinion?"

In my opinion, the fact that the mayor had not given bond would not render his acts, or any action taken by the council while he was a member, invalid. One of the early rules of the common law was to the effect that the acts of a person who held an office under some color of title, although not holding it in a strictly legal manner, could not be assailed and this for the reason that third persons dealing with one who assumes to hold an office and holds himself out to the public as an officer have a right to rely upon his acts as being legal and should not be required to ascertain to a certainty his status as an official. Such officers are called de facto officers and the mayor referred to by you was a de facto officer. For Iowa cases on acts of de facto officers, see:

Bank vs. Bank, 104 Ia., 682;

State vs. Powell, 101 Ia., 382;

Stickney vs. Stickney, 77 Ia., 699.

I could cite you many decisions from the courts of other states in support of my opinion but presume these will be sufficient.

With kind personal regards, I am,

JOHN FLETCHER, *Ass't Att'y Gen'l.*

PUBLIC LIBRARY BOARD.—Five, seven or nine members on same.

June 21, 1915.

J. M. ALBERTSEN, *Auditor,* Logan, Iowa.

DEAR SIR: Replying to yours of the 18th instant addressed to the attorney general will say that the new law relating to the number of trustees on the public library board becomes effective July 4, 1915. I am quoting you herewith the provision of the new law relative to the number of trustees and the length of their respective terms.

> "Five, seven or nine members to be appointed by the mayor by and with the approval of the city council which shall also establish by ordinance the number to be appointed. Of said trustees so appointed on boards to consist of nine members, three shall hold office for two years, three for four years, and three for six years; on boards to consist of seven members, two shall hold office for two years, two for four years and three for six years each; and on boards to consist of five members, one shall hold office for two years, two for four years and two for six years each, from the first day of July following their appointment in each case, and at their first meeting they shall cast lots for their respective terms, reporting the result of such lot to the council."

C. A. ROBBINS, *Ass't Att'y Gen'l.*

SALOONS—CITY ELECTION.—Special city election is an election within the meaning of sub-division 9, section 2448, supplement to the code. Saloons close.

June 23, 1915.

UTT & GILLOON, Dyersville, Iowa.

GENTLEMEN: Replying to yours of the 21st inst. addressed to the attorney general will say that in my judgment our supreme court will hold a special city election to be an election within the meaning of sub-division 9, section 2448, supplement to the code. A primary election has been held to be such an election and a school election has been held to be such. See *Hammond vs. King,* 137 Iowa, 548.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

INDEPENDENT SCHOOL BOARD—BIDS FOR TEXT BOOKS.—Advertising for bids only necessary for books loaned pupils for use in school. Must advertise each time such books bought. Board not superintendent adopts books.

June 23, 1915.

A. E. VELINE, *Supt. of Schools,* Eldora, Iowa.

DEAR SIR: Yours of the 17th instant addressed to the attorney general has been referred to me for reply. You call attention to section 2824 of the code and section 2828, supplement to the code, 1913, relating to the purchase and loan of text books by school districts to the pupils thereof and you inquire, first:

> "Must the independent school district advertise for bids on all books bought whether they be text books, library books, reference books, etc.?"

In my judgment, this provision only applies to such books as are bought for the purpose of being loaned to the pupils for use in the schools and not to library or reference books which would more nearly be deemed equipment of the school. However, I do not think this provision requires that any board should purchase and loan to the pupils all of the books required to be used. In other words, it may purchase any one or all of the various books used. Your second question is:

> "Must the board advertise if they wish to place a certain text in the schools?"

The board must advertise if it is proposed to purchase the books and loan them to the pupils of the school. Your third question is:

> "If a book has been adopted by the board must the board advertise every time they buy a new supply of those books?"

This question should be answered in the affirmative.

Your fourth question is:

> "Is it necessary for a board to adopt certain text books to be used in each subject—say History for example, or may they direct their superintendent to purchase such books as he sees fit, the same to be sold to the students at cost as per section 2824?"

This question should be answered in the affirmative. However, as stated in answer to question No. 2 they would not need to purchase for the purpose of being reloaned to the pupils text for each subject taught but might purchase any one or all for that purpose. In my judgment, they might be guided by the superintendent in the selection of books but they should not delegate to him the power to purchase and sell or loan the same to the pupils.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

AUTO OWNED BY CITY—LICENSE.—City not required to have licenses on fire wagon, police patrols or ambulances.

June 23, 1915.

MR. L. A. WALCH, Dubuque, Iowa.

DEAR SIR: Replying to yours of the 21st inst. will say that by section 2 of the automobile law motor vehicles are defined to be vehicles propelled by any power other than muscular power, except motor trucks, motor drays, motor delivery wagons, traction engines, road rollers, *fire wagons and engines, police patrol wagons,* ambulances and such vehicles as are run only upon tracks or rails, hence I am of the opinion that the city would not be required to have licenses on fire wagons, police patrols or ambulances.

It is a somewhat close and difficult question whether our automobile law is a license measure or a taxing measure, and in fact I am of the opinion that it combines both features. If it were a taxing measure purely, then the city would not be liable for taxation upon cars owned by it for the reason that section 1304, supplement to the code, 1913, provides;

"The following classes of property are not to be taxed: the property of the United States and this state, including university, agricultural college, and school lands; the property of a county, township, *city,* town or school district, or militia company, when devoted entirely to public use."

It may be that the court would hold this class of property to be exempt even though the law combines with the taxing feature a license feature also.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

AUTO—CITY OWNERSHIP—TAXATION.—Auto law partakes of both a license and a tax. City car might be exempt from tax.

June 24, 1915.

ESKIL C. CARLSON, *City Solicitor,* Des Moines, Iowa.

DEAR SIR: Replying to yours of the 10th instant addressed to the attorney general will say it is a somewhat close and difficult question whether our automobile law is a license measure or a taxing measure, and in fact I am of the opinion that it combines both features. If it were a taxing measure purely, then the city would not be liable for taxation upon cars owned by it for the reason that section 1304, supplement to the code, 1913 provides:

"The following classes of property are not to be taxed; the property of the United States and this state, including university, agricultural college, and school lands; the property of a county, township, *city,* town or school district, or militia company, when devoted entirely to public use."

It may be that the court would hold this class of property to be exempt even though the law combines with the taxing feature a license feature also.

With the statute in this condition, this department prefers to give no definite opinion on the matter at this time.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

HOTEL INSPECTOR—DEPUTY.—Board of Health to approve of the deputies but not appoint them.

July 3, 1915.

LAFAYETTE HIGGINS, *Hotel Inspector.*

DEAR SIR: Replying to your request for a construction of section 2514-p, supplement to the code, 1913, as amended, and particularly that portion thereof which reads as follows,—

> "Such inspector may, with the consent of a majority of the members of the state board of health, appoint, and at his pleasure remove, one or more deputies who shall assist under his direction in performing the duties imposed by this act;"

will say that in my judgment the members of the state board of health have no voice in the selection of such deputies further than to determine whether or not one or more deputies are required and to fix the number of such deputies, and that the personnel of the deputies is to be determined by the hotel inspector and not by the board of health.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

BOARD OF SUPERVISORS.—May equip building for segregation and maintenance of tuberculosis patients or send them to some other county and pay expense—Can build hospital without submission to people.

July 9, 1915.

C. E. SMITH, *Chairman Board of Supervisors,* Pleasantville, Ia.

DEAR SIR: In compliance with the request of your board when all members were at the office yesterday I am enclosing copy of House File No. 352, an act passed by the thirty-fifth general assembly, relating to the care and support of indigent persons who are afflicted with tuberculosis.

After reading the bill it is my conclusion that your board will not have any difficulty in interpreting its provisions. Under the provision of section 2, the board may equip suitable buildings for the segregation and maintenance of persons afflicted with tuberculosis, or they may place such persons in institutions either in your own county or in some other county where suitable care and treatment may be given at the expense of the county.

You will notice under the provisions of section 3 the board may spend a certain amount for the erection of buildings for the care of indigent persons afflicted with tuberculosis without submitting the matter to a vote of the people.

The manner of caring for and treating all persons under the bill must have the approval of the state board of control.

JOHN FLETCHER, *Ass't Att'y Gen'l.*

INTOXICATING LIQUORS—DELIVERY OF.—Drayman not required to keep record of delivery—cannot deliver at all unless agent of carrier.

July 16, 1915.

C. W. REED, *County Attorney,* Cresco, Iowa.

DEAR SIR: Yours of the 7th instant, addressed to the attorney general, has been referred to me for reply.

Your question briefly stated is whether or not sub-division 2 of section 2421-a, supplement to the code, 1913, as amended, requires a drayman to keep the record of the delivery of packages of intoxicating liquor therein referred to.

The material part of the section to be considered reads as follows:

> "It shall be the duty of any railroad company, express company, or other common carrier, or corporation, steamboat or steamboat line, or person, who shall for hire carry any intoxicating liquor into the state, or from one point to another within the state, for the purpose of delivery, and who shall deliver such intoxicating liquor to any person, company, or corporation, to keep, at each station or office where it employs an agent or other person to make delivery of freight and keep records relative thereto, a record book, wherein such carrier shall promptly upon receipt, and prior to delivery, enter in ink, in legible writing, in full, the name of the consignor of each shipment of intoxicating liquor to be delivered from or through such station, from where shipped, the date of arrival, the quantity and kind of liquor, so far as disclosed by lettering on the package or by the carrier's records, and to whom and where consigned, and the date delivered."

In my judgment no such records are required to be kept by any carrier except each of such of its stations or offices as employ an agent or other person to make delivery of freight and keep records relative thereto, in other words, where an office or station is maintained for the purpose of making delivery and there is employed in such office or station a person whose duty it is to make delivery of the packages and keep records relative thereto, then the record required in this act is to be kept also.

You understand that no drayman or other carrier would have the lawful right to transport for hire intoxicating liquors between two points within this state as this would be a violation of section 2419. See also, *State vs. Wignall,* 150 Iowa, 650. However, if such drayman or carrier is employed by the railroad or express company or other carrier to complete an interstate shipment by making delivery to the consignee such transportation would be lawful and in such cases the record referred to should be kept by the carrier or its agents at the last station at which persons are employed to make delivery and keep records relative thereto, whether that be the railway station or express office or a station maintained by the drayman making final delivery.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

PENSION, FIREMEN'S.—Must serve 22 years in paid fire department, not volunteer department.

July 16, 1915.

SAM PAGE, *City Solicitor,* Sioux City, Iowa.

DEAR SIR: Replying to yours of the 14th instant, will say that in my judgment chapter 9, acts of the thirty-fifth general assembly, contemplates that a fireman to be entitled to the pension therein provided shall have served twenty-two years or more in a paid fire department. It is possible that the letter of the law would be complied with if it be shown that the previous volunteer fire department is the same organization and in fact the same company as the paid fire department. However, I doubt if this is within the spirit of the law.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

SCHOOL FUNDS—LOANS.—School funds loaned on city property as well as other real estate.

July 16, 1915.

D. A. CROWLEY, *County Attorney,* Greenfield, Iowa.

DEAR SIR: Your letter of the 13th instant, addressed to the attorney general, has been referred to me for reply.

You state that your county auditor has objected to making loans on town property from the school fund on the ground that such loans are not contemplated by the statute. I do not know upon what authority the county auditor would claim that such a loan would not be countenanced under the statute because section 2849 of the supplement provides that the promissory notes given for a school loan shall be secured by a mortgage on unincumbered real estate situate in the county in which the loan is made.

Lots and parcels of land lying within the corporate limits of a town are as much real estate as are farms situate without the limits of a city or town, and in the rules laid down for the construction of statutes in section 48 of the code the word "land" and the phrases "real estate" and "real property" must be construed to include lands, tenements, hereditaments and all rights thereto and interests therein.

I simply cite this section to show that no special interpretation has been placed upon the word "lands" by the legislature and therefore the word "lands" must be construed to mean real estate of any kind or character and wherever situate. I presume, of course, it is discretionary with the county as to what class of property they shall consider sufficient security for a loan, but so far as the statute itself is concerned it will not bear the interpretation placed upon it by the auditor if I have correctly interpreted the question propounded in your letter.

JOHN FLETCHER, *Ass't Att'y Gen'l.*

SHERIFF.—Not allowed expenses in attending international convention of sheriffs.

SPECIAL CITY ELECTION.—County Bridge—If to aid in building county bridges cost of election paid by county.

CULVERTS.—Temporary—Cost of paid by county or township according to circumstances.

July 19, 1915.

GEORGE E. HILL, *County Attorney*, Burlington, Iowa.

DEAR SIR: Your letters of the 7th and 15th instant, addressed to the attorney general, have been referred to me for reply.

Your first question is whether the township or the county should pay for temporary culverts constructed by the county on the township road system after the new law went into effect authorizing the construction of such culverts by the township but before the county or township officers learned of the change in the law.

In my judgment the township should bear the expense of these culverts up to the amount that it would have cost them to construct the same. If, however, the cost of such construction to the county was in excess of what the same culvert would have cost the township to construct, then the excess should be borne by the county.

Your second question is whether the city of Burlington or Des Moines county should pay the fees and expenses of the registration board for services rendered in registering names preparatory to the holding of a special city election held for the purpose of determining whether or not the city should aid the county in the construction of a county bridge under the provisions of sections 759 to 762 of the code.

It will be observed that the whole proposition is to aid in the construction of a county bridge. (See, section 759.) The last sentence of section 762 reads as follows:

> "The expense of giving of the notice and holding of election shall be audited and paid out of the county treasury as other claims against the county."

Section 1076, supplements to the code, 1913 and 1915, provides for registration on the sixth Monday preceding each general election and on the third Monday prior to *any city election.* The same section further provides in regard to registrars,—

"They shall hold their office for two years, but registers appointed for city elections during the year 1906 shall hold office until such election is completed, and receive compensation at the rate of $3.00 for each day of eight hours engaged in the discharge of their duties to be paid by the county, except in case of city elections when they shall be paid by the city."

In my judgment the election referred to is not such a city election as is referred to in the last quoted provision, and that the same refers to the general city election or possibly to special city elections where the city alone is interested in the question to be voted upon. At any rate, the two provisions should be construed together and section 762, above quoted from, especially provides that the expense is to be paid by the county which is a reasonable provision in view of the fact that the proposition is to aid a county project.

Your third question is whether or not the board of supervisors might lawfully allow to the sheriff his expenses incurred while attending the international convention of sheriffs.

According to the previous holdings of this department this inquiry should be answered in the negative.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

ABSENT VOTERS ACT—VACATION.—If one is away on a vacation he is entitled to the benefits of the law.

July 21, 1915.

J. B. HOCKERSMITH, *Attorney,* Prairie City, Iowa.

DEAR SIR: Replying to yours of recent date will say that the absent voters law was designed primarily for the benefit of "voters who, through the nature of their business, are absent, or expect in the course of said business to be absent, from the county on the day of holding the election."

However, it is now looked upon by business concerns as being a good thing for employees to take a vacation. In fact, the state law requires all state employees to take such a vacation. Hence, I am of the opinion that where one in the regular course of his business is away on such vacation at the time of election he would be entitled to the benefit of the law.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

ENUMERATORS—COMPENSATION.—Census enumerators' compensation fixed by board of supervisors.

July 21, 1915.

JOHN M. DAWSON, *Attorney,* Keokuk.

DEAR SIR: Your letters of the 7th and 20th instant, addressed to the attorney general, have been referred to me for reply.

Your question briefly stated is what compensation should be paid census enumerators in cities of the first class.

The matter is governed by section 172, supplemental supplement, 1915, the material portion of which reads as follows:

> "They shall receive pay at not to exceed $3.50 per day for each full day of eight hours actually employed in such work."

It will be observed from an examination of this section that there is no provision authorizing the assessor who appoints such enumerators to fix their compensation. The amount of such compensation should, in my judgment, be determined by the board of supervisors and it should allow a fair compensation for the work done not exceeding the maximum above specified which would be 43¾c per hour instead of 35c as indicated in your letter. Doubtless different boards might make a slightly different allowance. However, I will say for your information that the board here has allowed $3.25 per day of eight hours which would be a slight fraction over 40c per hour.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

CENSUS—CITIES AND TOWNS.—Of 1910 used as standard until the new is certified.

July 22, 1915.

P. E. MCGINN, *County Auditor,* New Hampton, Iowa.

DEAR SIR: Replying to yours of the 20th instant addressed to the attorney general will say that by section 177-c, supplement to the code, 1913, it is provided:

> "Wherever in the code or any supplement to the code or any copy of the session laws prior to this date, the population of any county, city or town is referred to, it shall be determined by the last *certified* or certified and published official census, whether the same be state or national."

You mention the fact that your county has a certain population as shown by the late census. However, the census now being taken will not, as I am advised by the secretary of state, be completed in such a way that the same can be properly certified before about the first of the year 1916, and until such census is so certified, the census of 1910 should be used as a standard from which to determine salaries based upon population.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

CENSUS.—Does not affect salary of county officers until certified.

July 22, 1915.

E. J. REIGEL, *County Auditor,* Rock Rapids, Iowa.

DEAR SIR: Replying to yours of the 20th instant will say that I am enclosing copy of opinion this day given showing that the new census may not be taken into account in determining the salary of county officers until the same has been completed and certified.

By sections 479 and 490, supplemental supplement, 1915, the salary of county auditor and county treasurer in counties having less than 15,000 population is $1,500.00 each, and by section 510-a of the supplemental supplement, the salary of the sheriff is fixed at $1,400.00. In each case the salary becomes effective on July 4th of this year.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

BLIND PERSONS, PENSION.—May receive pension under conditions specified.

July 24, 1915.

T. F. ARMSTRONG, *Mayor,* Lenox, Iowa.

DEAR SIR: Your letter of the 21st instant, addressed to the attorney general, has been referred to me for reply.

You state that you have a blind person living in Lenox and you have been informed that the last general assembly pensioned such blind persons. You ask me to advise you with reference thereto and how to proceed to obtain a pension for him if such a law was enacted.

Under the provisions of House File No. 175 of the thirty-sixth general assembly, which will be known as chapter 10-a of Title XIII, supplemental supplement to the code of Iowa, 1915, any blind person who is over the age of twenty-one years if a male and over the age of eighteen years if a female, and who is not a charge of any charitable institution of the state or any county or city, and who does not have an income of more than $300.00 per annum, who has resided within the state continuously for a period of five years and in the county one year, shall be entitled to receive from the county $150.00 per annum, payable quarterly. Application must be made to the "county clerk" under affidavit and he shall bring the same to the attention of the board of supervisors and the board shall refer the matter to the examiner of the blind who shall examine the applicant and report to the board.

The supplemental supplement is ready for distribution to the various county officers and I would advise you to examine the statute of any of the county offices before attempting to proceed under its provisions.

JOHN FLETCHER, *Ass't Att'y Gen'l.*

WIDOW'S PENSION.—May have some property and yet draw pension.

July 24, 1915.

HON. F. D. LETTS, Davenport, Iowa.

DEAR JUDGE: Your letter of the 16th instant, addressed to the attorney general, has been referred to me for reply.

You request such information as can be given you by the department relative to the history of chapter 31, acts of the thirty-fifth general assembly, commonly known as the "widow's pension law," and what interpretation has been placed upon the language of the act by the various district courts of the state.

But very little has come to the attention of this department as to the rules followed by the district courts in dealing with persons who make application for assistance under the provisions of the act in question. I have personal knowledge of one instance in Polk county where a mother possesses a small home valued at perhaps $300 or $400 with no other means who has been allowed a pension on account of children under the age of fourteen years.

I think perhaps it would be safe to follow the definition of "poor person" as defined in section 2252 of the code; and one of the more recent cases in this state where the supreme court has interpreted the words "poor" and "poor persons" is the case of *Hamilton Co. vs. Hollis,* 141 Iowa, 477. You will also find quite a good brief on the subject in the notes given in connection with the case of *Coffeen vs. Town of Preble,* a Wisconsin case reported in 27 L. R. A. (N. S.), at page 1079. You will also find some assistance under the title "Poor Person" in Words & Phrases. I trust that these references may be of assistance to you.

As to the specific cases referred to in your letter will say that I do not think the widow should be required to entirely exhaust her property in support of her children before she is granted relief. Especially is this true if we follow the definition of "poor person" as given by the legislature in section 2252. It would seem to me to be poor policy to require a woman in such a case to exhaust all her property and thus completely pauperize herself and her family when she can partly support them from such property and preserve the estate for some time to come. From a business standpoint it would be short-sighted policy on the part of the court.

If I can render you any further assistance in the matter kindly advise me.

JOHN FLETCHER, *Ass't Att'y Gen'l.*

FISH AND GAME—SEINE—NETS—SEIZURES.—Not all seines, nets, traps, etc., are subject to destruction and seizure under Sec. 2539 and Sec. 2540.

July 30, 1915.

E .C. HINSHAW, *State Fish and Game Warden,* Spirit Lake, Iowa.

DEAR SIR: Yours of the 28th instant addressed to the attorney general has been referred to me for reply and I am enclosing copy of the letter to which you refer which, as you will observe, is not as it was reported to you. However, I will say that in my judgment it is not every net or seine found that is subject to destruction. Section 2539 of the supplemental supplement now reads:

> "Any net, seine, trap, contrivance, material and substance whatever, *while in use or had and maintained for the purpose of catching, taking, killing, trapping or deceiving any fish,*

birds or animals contrary to any of the provisions of this chapter is hereby declared to be, and is, a public nuisance, and it shall be the duty of the fish and game warden, sheriffs, constables, and police officers of the state, without warrant or process, to take or seize any and all of the same, and abate and sell or destroy any and all of the same without warrant or process and no liability shall be incurred to the owner or any of the persons for such seizure and destruction."

It is further provided in section 2540 as follows:

"The possession of a spear, trap, net or seine, or the taking or killing or attempting to take or kill any fish by any means other than by rod, line, hook and bait within three hundred feet of a fishway or dam shall be unlawful. * * * And it shall be lawful for the state fish and game warden, or any of his deputies or assistants to seize without warrant and sell or destroy any such trap, net or seine wherever found."

From these and other provisions of the law it will readily appear that there is a lawful use that may be made of nets and seines; hence, it would be incumbent to show that they were either in use or kept for unlawful use or were found and seized within three hundred feet of a fishway or dam before they would be subject to destruction under the law.

I am authorized to say that the attorney general concurs in this view.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

INSURANCE POLICY—FARM IMPLEMENT.—An ensilage cutter held to be a farm implement under "farm implements" in policy.

July 30, 1915.

C. REMATHE, Slater, Iowa.

DEAR SIR: Replying to your recent inquiry will say that I am of the opinion that an ensilage cutter would be held, by the court, to be a farm implement. I call your attention to a decision of the supreme court of California *In re Baldwin*, 71 Cal., 74; and 12 Pac., 44, to the effect that the term "farm utensils or implements of husbandry" does not include a threshing machine where the same is employed by the farmer during the larger portion of the time in threshing grain for others for hire; also to *Muse*

vs. Darrah, 2 Ohio Dec., 604, to the effect that a clover huller is such an implement even though used for threshing for others during a part of the time; also to a decision of the supreme court of California which is a later decision than the one first quoted to the effect that a threshing machine is an implement of husbandry. *Spence vs. Smith*, 121 Cal. 536; 53 Pac., 653.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

CITIES AND TOWNS—LIGHTS—CONTRACT—POWERS.—No law as to how long a council may contract for lighting. Best rule not to contract beyond term of another council.

July 31, 1915.

FRANK G. PIERCE, Marshalltown, Iowa.

DEAR SIR: Replying to yours of the 26th instant addressed to the attorney general, will say that while I find no statute limiting the length of time for which a city or town council might contract for lighting of streets, yet I am of the opinion that a council might contract for a period beyond their term of office providing the length of time was reasonable under all circumstances. A council might be called upon to contract a few weeks or months before the expiration of their term of office, and, if they were limited to that short period of time, they might not be able to obtain an advantageous contract. I think a safe rule to follow would be not to contract beyond the term of office of the council next to follow the one making the contract. In other words, that each new council at some time during its term of office ought to have the opportunity to pass upon the reasonableness of the contract, and, until the law is made more specific, I think this would be the better practice.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

APPRAISERS.—Allowed $3.00 per day for collateral inheritance tax when not otherwise provided.

JUDGMENTS—INTEREST ON SAME.—Judgments bear simple interest, not compound, even if based upon a note which provides for compound interest.

July 31, 1915.

V. A. BURLEY, *Ass't Examiner,* Anamosa, Iowa.

DEAR SIR: Replying to yours of the 28th instant will say that section 1290 of the code fixes the fee to be paid appraisers or com-

missioners when their compensation is not otherwise provided, whether in probate matters or in the district court, while section 1290-a of the supplemental supplement, only attempts to fix the compensation of appraisers appointed to appraise property belonging to an estate as a basis for collateral inheritance tax and the rate is $3.00 per day instead of $2.00 as stated by you. The latter part of the last mentioned section provides $2.00 per day for appraisers in other cases where the compensation "is not now fixed by statute." I know of no such cases for the reason, as we have heretofore seen, section 1290 of the code already covers the compensation of appraisers where such compensation is not otherwise fixed.

With reference to your next question will say that all judgments bear simple interest rather than compound interest even though the obligation on which the judgment was rendered may have provided for compound interest as this provision only lasts during the lifetime of the note and is not carried into the judgment.

Replying to your last question will say that in my judgment no fee is provided for the filing of a certificate of a notary appointed for an adjoining county. The purpose of this filing is to enable the clerk to certify that the person filing is an acting notary, and section 296 of the supplement to the code, 1913, fails to provide any fee for such filing.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

BANKS—PRIVATE.—A private bank cannot use the word "state" in connection with the name of the bank.

August 2, 1915.

A. O. WOLEVER, *Chief Bank Examiner.*

DEAR SIR: You request, under date of today, an opinion upon the following facts:

The Bank of Scranton, a private bank, prints upon its draft forms the following heading:

"State of Iowa,

"Bank of Scranton,

Scranton, Iowa, ..."

(date)

You ask if it is proper to permit the use by a private bank of the words "State of Iowa" as they are used above.

Section 1862 of the code reads as follows:

> "No partnership, individual or unincorporated association engaged in buying or selling exchange, receiving deposits, discounting notes and bills, or other banking business, shall incorporate or embrace the word 'state' in its name, but this section shall not apply to associations organized under the laws of the United States."

It is my opinion that there is a violation of the section quoted in the case you refer to because the words "State of Iowa" are so used as to convey to the public the impression that they are a part of the name of the bank and that it is a state bank.

JOHN FLETCHER, *Ass't Att'y Gen'l.*

STATE BOARD OF EDUCATION—BLANKS FOR JUDGES.—The blanks furnished clerks of courts under Senate File 16, thirty-sixth general assembly may be printed by state to insure uniformity.

August 3, 1915.

W. H. GEMMILL, *Secretary State Board of Education.*

DEAR SIR: Replying to your oral inquiry of recent date as to the number of blanks which by the requirements of Senate File 16 of the acts of the thirty-sixth general assembly should be printed and furnished by the state to the clerks of the several superior and district courts of the state will say that section one of the act provides:

> "Such report shall be made within such time as may be fixed by the court, and upon blanks to be furnished as hereinafter provided."

Section nine of the same act provides:

> "The medical faculty of the University Hospital shall immediately upon taking effect of this act prepare a blank or blanks containing such questions and requiring such information as may in its judgment be necessary and proper to be obtained by the physician who examines the patient under order of court; and such blanks shall be printed by the state printer and a supply thereof shall be sent to the clerk of each superior and district court of the state of Iowa; and the physician making such examination shall make his report to the

court in duplicate on said blanks, answering the questions contained therein, and setting forth the information required thereby, and one of said duplicate reports shall be sent to the University Hospital with the patient, together with a certified copy of the order of the court. The executive council of the state of Iowa shall determine the number of such blanks to be printed and distributed to the clerks of the superior and district courts of the state of Iowa, and shall audit, allow and pay the bills of the state printer therefor, as other bills are allowed and paid for public printing."

Hence, I am of the opinion that the only blanks required to be so printed and furnished of those submitted with your inquiry are the ones entitled "Physician's Blank" and "Report of Physician," which together with the other copies submitted are herewith returned.

However, if, in the judgment of the council, it will be wise to provide for the printing and furnishing of all these blanks by the state in order to secure uniformity and prevent vexatious delays and frequent errors, it would have the power to do so.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

STATE BOARD OF EDUCATION.—Board has no legal right to set aside college funds known as Students' Repair Fund other than in the exceptions stated in letter to board. Funds thus collected and not used, may be returned to student body for their disposal.

August 3, 1915.

W. H. GEMMILL, *Secretary State Board of Education.*

DEAR SIR: In yours of the 26th ultimo addressed to the attorney general you set forth a resolution of the State Board of Education adopted September 15, 1914, which reads as follows:

"*Students' Incidental Fees.*

"Resolved: That the president of the college be authorized this year, the same as last year, to set aside $2,000.00 from students' incidental fees, to be known as the Student Repair Fund, for use in paying for damage or loss to property on the campus not due to ordinary wear; the balance not so used to be returned to the student body at the end

of the year for such expenditure as that body deems for the best interests of the college or student life, subject to the supervision of the president of the college."

You then state that:

"The regular incidental and janitor fee for the semester is $12.00, but all students who classify during the classification period, Friday and Saturday, before college work begins, will be charged only $9.00 per semester. This fee is used as follows:

"1. Incidental and janitor service.....$6.00
"2. Hospital 2.00
"3. Students' Repair Fund ..... 1.00"

You then propound the following inquiries:

"1. Has the Iowa State Board of Education the legal right to set aside college funds for the purpose stated in the resolution?"

In reply to this question will say that in my judgment it should be answered in the negative in so far as moneys appropriated by the legislature are concerned and in so far as it authorizes any portion of such moneys to be expended by direction of the student body. However, as shall be hereafter seen, I am of the opinion that funds mentioned in the resolution and derived from resident pupils as incidental fees are not college funds within the meaning of those words as used in this interrogatory for it is provided by section 2649 of the code as follows:

"Tuition in the college herein established shall be forever free to pupils from the state over sixteen years of age, who have been residents of this state six months previous to their admission. Each county in this state shall have a prior right to tuition for three scholars from such county; the remainder equal to the capacity of the college, shall be by the trustees distributed among the counties in proportion to the population, subject to the above rule. Transient scholars otherwise qualified, may at all times receive tuition."

Section 2682-f, supplement to the code, 1913, provides:

"The state board of education shall have power * * * to direct the expenditure of all appropriations the general assembly shall, from time to time, make to said institutions, and the expenditure of any other moneys."

Hence, the board of education is without power to exact from the students such incidental fees. In support of this position I call your attention to the case of *State vs. Board of Regents of the University of Kansas,* reported in 29 L. R. A., 378, where the language of the statute is very similar to our own and reads as follows:

> "Admission into the university shall be free to all inhabitants of the state, but a sufficient fee shall be required from non-resident applicants, to be fixed by the Board of Regents, and no person shall be debarred on account of age, race or sex."

And in holding that the board was without power to exact a fee for the use of the library by resident students, the court said:

> "Notwithstanding the apparently plain provisions of this section, it is contended that the board of regents may yet collect a reasonable fee for the wear and tear of the books; that the word 'free' must be taken with qualifications; that in the nature of things there must be rules and regulations; that each and every student cannot be permitted to occupy the chancellor's seat at his desk, or any other place in the university he may choose, at his own sweet will, but that the regents and the chancellor have a right to make proper regulations; and that the fee imposed is no more than is reasonable to preserve and protect the library. We fully agree with so much of the claim of the learned counsel as asserts the right of the regents and the chancellor to make all necessary and proper rules and regulations for the orderly management of the school, the preservation of discipline therein, and the protection of its property, but that it may require the payment of money as a condition precedent to the use of the property of the state is another and a different claim, with which we do not agree. If the regents may collect five dollars for the use of the library, why may they not collect also for the use of the rooms of the building and of its furniture? Why may they not impose fees for walking in the campus, or for the payment of instructors? All these things have cost money. There are expenses incurred by the state on behalf of the students in connection with every department of the school. If they may collect for one thing, it is not apparent why they may not collect for another.

It is suggested that supplies are furnished in the laboratories for the use of students, which are destroyed, that vessels and implements may be broken, and that the students should certainly be required to pay for these things. No question of that kind, however, is now presented, and express provision therefor is made by chapter 226, Laws 1895. The library is provided for permanent use. Each volume with proper care may be used by a great number of students, and for a long term of years. The library as a whole is subjected to wear and tear, but only in the same manner as furniture and other properties furnished by the state. The buildings, furniture, library and apparatus, as well as the services of the faculty, are furnished and paid for by the state. These, we hold, under the provisions of the statute quoted, are free to all residents of the state, who are entitled to admission into the university. The regents have no power to raise a fund to be managed and disposed of at their discretion by charging fees for the use of the library, or under any other claim for any other purpose, unless expressly authorized to do so by law."

While there is one case holding a contrary view under a statute somewhat similar, namely *State vs. Regents University of Wisconsin,* 11 N. W., 472, yet I am inclined to the view that the opinion of the Kansas court is sound and would be followed by our supreme court should a test be made.

Your second question is:

"If Students' Incidental Fees are set aside for the purpose designated in the first part of the resolution, has the Iowa State Board of Education the legal right to permit the balance not so used to be returned to the student body at the end of the year for such expenditure as that body deems for the best interest of the college or student life, subject to the supervision of the president of the college?"

This question should be answered in the affirmative for the reasons heretofore given, namely that the funds are not college funds, and having been exacted from the student without right, there would be nothing illegal in permitting them to control the expenditure of a part of their own funds.

Your third question is:

> "When funds are set aside as provided in the resolution, has the student body the legal right to spend 'the balance not so used' * * * for such expenditure as that body deems for the best interest of the college or student life, subject to the supervision of the president of the college?"

This question should be answered in the affirmative. Your fourth question is:

> "If the student body has the legal right to expend such funds as that body deems for the best interest of the college or student life, subject to the supervision of the president of the college, may such funds be expended in any manner that may be agreed upon by the students and the president of the college?"

This question should be answered in the affirmative.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

RAILROADS—FENCES.—When railroads will not fence hog tight it is an indictable misdemeanor under section 2058, code.

August 5, 1915.

FRED BOIE, *Township Clerk,* Hawkeye, Iowa.

DEAR SIR: Your letter of the 2d instant, addressed to the attorney general, has been referred to me for reply.

You make inquiry as to what can be done to compel a railway company to fence its right-of-way hog tight where abutting property owners have erected such fence.

I agree with you that sections 2358 and 2367 are not applicable to right-of-way fences because section 2055 of the code specifically provides that no law of the state or any local or police regulations of any county, township, city or town relating to restraining of domestic animals and relating to the fences of farmers or landowners shall be applicable to right-of-way unless specifically so stated in such law and regulation. There is no provision bringing the railway companies under such regulations.

The only recourse you have is under section 2058 of the code which makes the failure to fence as provided by law an indictable misdemeanor punishable by a fine of not exceeding $500.00 and providing that every thirty days' continuance of the neglect

to construct the fence a separate and distinct offense. It seems to me that this penalty, in addition to the penalty that gives the owner of stock injured double damages, would be sufficient to cause the railway company to fence its right-of-way in the manner provided by law.

JOHN FLETCHER, *Ass't Att'y Gen'l.*

COUNTY AUDITOR—ADDITIONAL SALARY.—The three hundred dollars allowed auditor by section 479, supplemental supplement, paid when work is done even if all done in 1915—not paid monthly.

August 9, 1915.

H. C. SCHOEMAKER, *County Auditor,* Muscatine, Iowa.

DEAR SIR: Replying to yours of the 7th instant, addressed to the attorney general will say that we concur with you in the view that the three hundred dollars additional allowed county auditors by section 479 of the supplemental supplement in counties containing a special charter city for which the county auditor must keep the city tax books should be paid to him as soon as that work is complete and not apportioned monthly throughout the year. I am also of the opinion that if the auditor makes up such books in the year 1915 he would be entitled to the three hundred dollars additional in said year, even though the law did not take effect until July 4th.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

BLIND—PENSION.—Applications filed any time. Examination not compelled until Jan. 1, 1916. Clerk certifies Jan. 15, 1916. Supervisors then order warrants drawn.

August 11, 1915.

HAROLD R. CLEMENTS, *Clerk,* Knoxville, Iowa.

DEAR SIR: Replying to yours of the 4th instant addressed to the attorney general, will say that in my judgment applications for relief of the blind may be filed at any time and examinations made by the examiner at any time, although he is not required to keep his office open as provided for in section 2722-1 until during the first week of January, 1916. However, the clerk of

the court is not required to certify the names of those found entitled to relief to the board of supervisors until on or before the 15th day of January, 1916; (see section 2722-o, supplemental supplement); and it is the duty of the board of supervisors at its first session thereafter to cause warrants on the county treasurer to be drawn payable to each of said persons in the county each quarter in each year thereafter, but they are not required or authorized to cause any such warrant to be issued until during January, 1916.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

INTOXICATING LIQUOR—DELIVERY.—Consignee must sign in person, not by another. When shipment is interstate consignee cannot have drayman deliver from express office or depot.

August 12, 1915.

N. D. SHINN, *County Attorney*, Knoxville, Iowa.

DEAR SIR: Replying to yours of the 11th instant will say that in my judgment a person ordering intoxicating liquors for his own use must order and have the same consigned in his own name and that it would be unlawful for him to sign the name of another person as consignee. See page 14 of the leaflet or section 2421-b of the supplemental supplement.

With reference to your other question will say that this department has frequently heretofore held that if the drayman is employed by the consignor and the consignment is made from without the state and the contract of shipment requires the delivery to be made to the residence of the consignee he may deliver the shipment to the consignee at his residence after the same has been properly signed for, but that the consignee may not, where he receives the consignment at the depot or express office, employ a drayman or other person to deliver the same to his residence and that any drayman so employed by such consignee would be guilty of a violation of section 2419.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

INTERNAL IMPROVEMENT.—A telephone company is a work of internal improvement.

August 13, 1915.

HON. W. S. ALLEN, *Secretary of State.*

DEAR SIR: Yours of the 19th ultimo addressed to the attorney general relative to the status of the Standard Telephone Company of Waukon, Iowa, and especially with reference to the period of its corporate existence has been referred to me for reply.

The question presented hinges largely on the meaning of the words, "works of internal improvement." In other words, "Is a telephone company a work of internal improvement?"

I note your suggestions in the matter, also the fact that your department has for fourteen years last past construed the term as excluding and not including telephone companies and that this view is sustained, to some extent, by the opinion of former Attorney General Mullan, to the effect that waterworks, lighting plants and the like are not works of internal improvement, which opinion was rendered January 31, 1903 and is shown at pages 149-153, inclusive, of the Attorney General's Report for 1904.

I have also examined the authorities presented by J. L. Parrish in his letter of the 15th ultimo addressed to the attorney general, copy of which has been furnished you.

If the question were one to be determined in the first instance, the writer would not be inclined to agree with the opinion of former Attorney General Mullan even on the question of waterworks or electric lighting plants, for in my judgment, the weight of authority is to the effect that such plants are works of internal improvement. See

Yesler vs. Seattle, 1 Wash., 308; 25 Pac., 1014;
Leavenworth vs. Miller, 7 Kansas, 493.

For other cases defining works of internal improvement, I call your attention to the brief in the case of *Cooke vs. Iverson,* 108 Minn., 388; 122 N. W. 251 and 52 L. R. A. (N. S.), 415 and authorities referred to in the note in the last mentioned volume. *Erskine vs. Nelson County,* 27 L. R. A., 696 and note at page 701. See also *Rippe vs. Becker,* 57 N. W. (Minn.), 331, wherein it was held that a grain elevator was a work of internal improvement in the erection or conduct of which the state might not lawfully engage.

In the case of *Northwestern Telegraph Exchange vs. C. M. & St. P. Ry. Co.*, 79 N. W., 315, the supreme court of Minnesota held that a telephone line was a work of internal improvement, basing its opinion upon the fact that the federal government by section 5263 of the revised statutes had provided:

> "Any telegraph company now organized, or which may hereafter be organized under the laws of the state, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States, which then or may hereafter be declared such by law, and over, under or across navigable streams or water of the United States."

and on the further proposition that a telephone was a speaking telegraph that there was no distinction between the two so far as their rights under the statute were concerned. In the course of the opinion the court, at page 317, says:

> "No valid distinction can be made between federal and state legislation in the state so that the Act of Congress with reference to telegraph lines over and along post roads before referred to must, in our opinion, include telephone lines, where applicable at all. *Unquestionably, a line constructed as is proposed by plaintiff, for public use, for the transmission of intelligence by wire whether it be, technically speaking, a telegraph or a telephone line, is a work of internal improvement.*"

In my judgment our court would probably follow the last cited case and hold that a telephone line or system is a work of internal improvement.

I am authorized to say that the attorney general concurs in this view.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

HOTEL INSPECTION.—Authorized to personally collect inspection fee under law of thirty-sixth general assembly.

August 13, 1915.

NORVAL ENGER, *Inspector of Hotels.*

DEAR SIR: You call attention to the provisions of sections 2514-q and 2514-s of the hotel inspection law and inquire whether

or not these sections should be construed together in such a way as to require the inspector or his deputies making the inspection to collect the hotel inspection fees provided for in the last named section. In the first mentioned section there is found the following language:

> "If upon inspection of any hotel it shall be found that this law has been fully complied with *and the inspection fee has been paid to the inspector,* he shall issue a certificate to that effect to the person operating the same."

I am of the opinion that this language is sufficient and authorizes the hotel inspector or his deputies making the inspection to collect the inspection fee notwithstanding the fact that the words were stricken from the last mentioned section which required it to be paid to the person making the inspection.

In view of the foregoing answer, it is unnecessary to answer your second, third and fourth inquiries.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

CITIES AND TOWNS—MANAGER.—Cities governed by the manager plan do not, by that method, eliminate the park commissioner, but it may be abolished by the council.

August 21, 1915.

W. R. RYAN, *Sec'y Park Commission,* Webster City, Iowa.

DEAR SIR: Replying to yours of the 20th instant addressed to the attorney general will say that in my judgment chapter 14-D, title V of the suplemental supplement, known as the city manager plan of government does not necessarily abolish the park commission, but the same may be abolished by the council. I call your attention to the following language found in section 1056-b3:

> "The terms of office of the mayor and councilmen or aldermen of any city or incorporated town, adopting the form of government contemplated by this act, in office at the beginning of the terms of office of the councilmen first elected, under the provisions hereof, shall then cease and determine, and except the members of the library board, whose terms of office shall continue as now provided by law, *the terms of office of all other officers including park commissioners,* members of the board of public works, and water works trustees, whether

elected or appointed, and of all employees of such city or incorporated town, shall be subject to the action of the council or manager, as herein provided. Except the members of the library board, the council shall have power *to determine the tenure of office of any officer or the term of employment of any employee that it is authorized to appoint or employ, and to declare any such office vacant,* or to discharge any such employee with or without cause, as it may deem advisable."

See also section 1056-b22 which reads as follows:

"All departments of cities and towns which shall adopt the form of government herein contemplated, shall continue to exist as departments of the government of such city or town until abolished, changed or modified under the provisions of this act."

C. A. ROBBINS, *Ass't Att'y Gen'l.*

COUNTY AUDITOR.—Is to enter all drainage assessments on the regular tax books same as other taxes and such tax should be divided into two installments same as other taxes.

August 28, 1915.

H. J. MCCHESNEY, *County Treasurer,* Algona, Iowa.

DEAR SIR: Yours of the 25th instant, addressed to the attorney general, has been referred to me for reply.

You call attention to section 1983 of the drainage law and inquire whether or not it is the duty of the county auditor to extend all drainage assessments, principal and interest, on to the regular tax list in order that they may be collected by the treasurer at the same time and in the same manner as other taxes.

In my judgment the section to which you refer has no reference or application to such drainage districts as exist in your county, but has reference alone to the collection of the costs of what are termed United States levees. If you will examine sections 1975 to 1989 inclusive you will see that all these sections relate to this subject. In my opinion the law which governs the question which you have in mind is found in chapter 2-A of title X and will be found commencing with section 1989-a1, and the section covering the matter about which you inquire is section 1989-a13, supplement to the code, 1913, which reads in part as follows:

"Said tax shall be levied upon the lands of the owners so benefited in the ratio aforesaid and collected in the same manner as other taxes for county purposes."

Hence I am of the opinion that it is the duty of the auditor to enter all drainage assessments on the regular tax books in the same manner as other taxes; also that the tax should be divided into two installments the same as the general taxes, and the same rule should also govern the entering of paving, curbing, gutter and sewer assessments in cities and towns.

With reference to your other question will say that this department has heretofore held that where a town has certified to the treasurer ten days prior to August 1st of this year the number of miles of unpaved streets within such city or town as required by section 1571-m32, supplemental supplement, that such cities and towns would be entitled to participate in the apportionment made in August of this year of the motor vehicle fund, otherwise not.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

CORPORATIONS.—A corporation does not have to comply with the law regulating foreign corporations in order to commence an action in Iowa.

August 30, 1915.

BLAKE & WILSON, *Attorneys,* Burlington, Iowa.

GENTLEMEN: Replying to yours of the 26th instant addressed to the attorney general will say that I am of the opinion that the bringing of the action in the courts of this state by a foreign corporation is not such a doing of business within this state as would require it to comply with our laws regulating foreign corporations. I call your attention to the following cases so holding:

St. Louis, A. & T. Ry. Co. vs. Fire Assn. of Phila., 18 S. W. 43, 46, 55 Ark. 163;

Charter Oak Life Ins. Co. vs. Sawyer, 44 Wis., 387;

Christian vs. American Freehold Land & Mortgage Co., 7 South., 427, 89 Ala., 198;

Cook vs. Rome Brick Co., 12 South., 918, 919 98 Ala., 409.

George A. Barse Live Stock Co. vs. Range Valley Cattle Co., 50 Pac., 630, 632, 16 Utah, 59;

Utley vs. Clark-Gardner Lode Min. Co., 4 Colo., 369, 373;

Mandel vs. Swan Land & Cattle Co., 40 N. E., 462, 465, 151 Ill., 177, 27 L. R. A., 313, 45 Am. St. Rep., 124;
Powder River Cattle Co. vs. Custer Co., Com'rs, 22 Pac., 383, 385, 9 Mont., 145.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

FISH AND GAME LICENSE.—May be obtained by filling out the application blank and swearing to same before a notary or justice or by appearing in person before the auditor.

September 3, 1915.

H. C. BINGHAM, *Sec'y Iowa Gas Co.*, Iowa Falls, Iowa.

DEAR SIR: Replying to yours of the 26th ultimo will say that it is provided by section 2563-a4, supplemental supplement, 1915:

> "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 a justice of the peace."

Hence, it follows that unless you appear personally before the auditor you would have to swear to the application before either a justice of the peace or a notary and it would be up to the applicant to pay the regular notarial or justice fees, as the case may be. This went into effect by the provisions of senate file 623 of the last general assembly and this is doubtless the reason why you have had no difficulty in former years in procuring a license without making personal application.

I am inclined to the view that the payment of a personal tax in the taxing district would be some evidence of residence in that district but it would not be conclusive, as a person might have personal property in a taxing district other than that in which he really resides.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

COUNTY TREASURER.—When city taxes are collected by county treasurer, treasurer is entitled to the $300 for the year of 1915. Supervisors alone provide clerk help other than deputy.

September 9, 1915.

R. E. JOHNSON, *County Treasurer*, Muscatine, Iowa.

DEAR SIR: Replying to yours of the 4th instant will say that this department has heretofore held that for the year 1915, in coun-

ties having a special charter city, where the taxes are collected by the county treasurer, the treasurer is entitled to the whole of said three hundred dollars even though the law was enforced only after July 4th, 1915.

With reference to your second question will say that by an examination of the last sentence of section 491 of the supplemental supplement you will find that it is optional with the board of supervisors whether they will allow anything for additional clerk hire, the language being:

> "And in case additional deputies or clerks are needed the board of supervisors may make such allowance therefor as they may deem reasonable, not exceeding the salary of the first deputy,"

and unless you can convince the board that such additional help is needed, I know of no way by which you might obtain the desired relief.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

COUNTY AUDITOR.—Deputy receives one-half received by auditor. This to include one-half the entire amount received as salary.

September 9, 1915.

H. C. SHOEMAKER, *County Auditor,* Muscatine, Iowa.

DEAR SIR: Replying to yours of the 7th instant will say that this department has heretofore held that in those counties where the salary of the deputy county auditor is fixed at one-half the salary of the auditor any additional allowance to the auditor should be added to and considered a part of his salary as fixed by statute for the purpose of determining the amount of the salary of the deputy. We were led to this conclusion by reason of the fact that in fixing the salary of the deputy clerk in section 298-a the language is "an amount equal to one-half the amount *received by the clerk,*" and while the language is not the same as to the deputies in other offices, yet there is no apparent reason for making a distinction, and that as to the deputy auditor and deputy treasurer the law should be construed the same as in the case of the deputy clerk.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

CITIES AND TOWNS, SCALES.—Cities and towns cannot install scales and require weighing of articles on same. Owner who complies with sections 3009-i to 3029-d1 may make use of same.

September 11, 1915.

UNITED LUMBER CO., Clinton, Iowa.

GENTLEMEN: Replying to yours of the 4th instant addressed to the attorney general will say that prior to the enactment of sections 3009-i to 3029-d1, this department had held that cities and towns had power to install city scales and require the weighing of articles sold by weight over such scales.

However, I am of the opinion that by the acts of the thirty-sixth general assembly, found in said sections, the power of cities in this respect was withdrawn and this would have the effect to annul any ordinance theretofore enacted providing for such city scales. Hence, it follows that the owner of a scale who has complied with the sections above referred to would have the right to make use of the same.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

CITIES AND TOWNS—POLICEMAN'S PENSION.—A policeman who is incapacitated by disease during his term of service is entitled to policeman's pension under section 932-n, supplement to the code, 1913.

September 13, 1915.

JAMES G. BRITTON, *Acting Chief of Police,* Sioux City, Iowa.

DEAR SIR: Yours of the 7th instant addressed to the attorney general has been referred to me for reply. Your question briefly stated is whether or not a member of the police force who, while serving as such member, becomes disabled through disease contracted subsequent to the commencement of his service, is entitled to the policeman's pension, whether such disease be the direct result of his employment or not. The language of the law material to be considered is found in section 932-n, supplement to the code, 1913, and reads as follows:

> "Any member of a police department within the provisions of this act who shall, while a member of such department and while engaged in the performance of his duties as such policeman, be injured or disabled and, upon an examination by a physician appointed by the board of trustees, be found to be

> physically or mentally permanently disabled so as to render him unfit for the performance of duties of a policeman, shall be entitled to be retired and the board of trustees shall thereupon order his retirement and upon being retired, he shall be paid out of the policemen's pension fund of such city, monthly, a sum equal to one-half of the amount of the monthly compensation allowed such member as salary at the date of his injury or disability."

The disease complained of and which has resulted in the claim "disability" is not traceable alone to the performance of official duties and doubtless the disease was present during the time the policeman was off duty as well as during the time he was on duty, but under the proofs submitted it has reached the stage which resulted in disability during the time of his employment and, in my judgment, this is all that is required in order to entitle him to be retired and to receive the benefits of the act provided for those thus retired.

"Disability" has been held to mean any bodily infirmity by which a person is incapacitated from pursuing his usual vocation.

Miller vs. American Mutual Accident Ins. Co., 92 Tenn. 167; 21 S. W. 39; 20 L. R. A. 765.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

SELLING SCHOOL SUPPLIES AT PROFIT.—A school corporation cannot sell school supplies to scholars except at cost.

September 17, 1915.

EDW. LUCKIESH, Maquoketa, Iowa.

DEAR SIR: Your favor of the 10th instant has been referred to me for reply. You present the following question:

> "Is there a state law in Iowa prohibiting public schools from selling school supplies to students *at a profit*—these supplies being tablets, pencils, paper, etc.?"

Generally speaking, there is no law which, in so many words, prohibits a school from selling supplies at a profit. Nevertheless, it is plain that it was not intended that public schools should sell such supplies at a profit because section 2824 provides as follows:

"The board of directors of each and every school corporation in the state of Iowa is hereby authorized and empowered to adopt text books for the teaching of all branches that are now or may hereafter be authorized to be taught in the public schools of the state, and to contract for and buy said books and *any and all* other necessary school supplies at said contract prices, and to sell the same to the pupils of their respective districts *at cost*, and said money so received shall be returned to the contingent fund."

Therefore, it is plainly intended that no profit shall be made and that a public school corporation cannot sell school supplies to students at a profit.

WILEY S. RANKIN, *Special Counsel.*

CITIES AND TOWNS—BRIDGE TAX.—Cities are entitled to all bridge tax collected within their limits after July 4th, 1915.

September 24, 1915.

E. J. WENNER, *County Attorney,* Waterloo, Iowa.

DEAR SIR: Yours of the 21st instant addressed to the attorney general has been referred to me for reply together with a copy of the letter of J. B. Newman, mayor of Cedar Falls, in which he, on behalf of said city, asserts the right to control the bridge fund collected upon the property in such city after July 4, 1915. I am inclined to the view that his contention is well founded. While there is no statute directly specifying when the officials are to start this special city bridge fund, yet under the express terms of the law the county is relieved from liability, and such liability is imposed upon the city on and after the taking effect of this law, to wit: July 4, 1915, and it would seem unjust to impose the duty of caring for bridges within its limits upon the city without furnishing it the means with which to perform such duty.

Hence, I am of the opinion that Cedar Falls and other like cities are entitled to all bridge tax collected from property within their limits from and after July 4, 1915.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

BOARD OF CONTROL—TRANSFER OF PRISONERS.—The board of control may transfer prisoners from one prison to another.

September 30, 1915.

HONORABLE BOARD OF CONTROL OF STATE INSTITUTIONS.

GENTLEMEN: You have requested this department to rule on the following question:

> "Can the board of control, under the law, order the transfer of a prisoner at Fort Madison to the Reformatory at Anamosa for the purpose of furnishing employment to the prisoner thus transferred; also vice versa?"

You state that Warden McClaughry wants a man to do certain work in a cooperage plant and does not happen to have a man to do the work required and that there is such a man at Fort Madison. While there is no specific statute covering this particular matter, there seems to be no good reason why you cannot make such a transfer. It certainly will be conceded at once that a transfer from Fort Madison to Anamosa may be made. The code does provide that where an institution is overcrowded a transfer is authorized. It has also been decided that for the care of the insane a transfer may be made. As the law now stands, it is provided:

> "The inmates of the penitentiary and of the reformatory shall be employed only on state account and for state use and on any public works; provided, however, that none of said employment for state account or state use shall be exercised or performed within the corporate limits of the city of Fort Madison or the city of Anamosa, unless performed on state premises, and excepting such employment as pertains to existing contracts or exclusively for the benefit of the state."

Section 5718-a11, from which I quote, also gives your board power to establish industries which may seem advisable, and the thirty-sixth general assembly gives your board additional power to furnish employment by teaching useful trades and callings so far as practicable and in looking after the intellectual and moral development, and uses these words:

> "The board of control is hereby authorized and empowered to establish such industries as it may deem advisable at said penitentiary, and at said reformatory, and at or in connection with any of the penal, reformatory or other institutions under

its jurisdiction, and the inmates may render services as herein limited and defined, at or away from any of the said institutions with the consent of said board of control, * * *."

It would seem that the whole general meaning of the law as it now stands is to give the board of control considerable latitude in exchange of prisoners, and your questions should be answered in the affirmative.

WILEY S. RANKIN, *Special Counsel.*

SOLDIERS' EXEMPTION.—Old soldiers are entitled to an exemption of $1,200 for the year 1915; $1,500 for 1916 and thereafter.

October 1, 1915.

MRS. J. J. NINEMIRES, Ottumwa, Iowa.

DEAR MADAM: I have your letter of the 29th ultimo in which you state that you noticed an article in a newspaper to the effect that soldiers and soldiers' widows would not receive the benefit of an exemption from taxation for this year because of a change in the provisions of the law with reference to such exemptions. You ask me to advise you with reference thereto.

The question has arisen in many localities in the state as to whether an honorably discharged Union soldier or sailor of the Mexican War or War of the Rebellion, or the widows remaining unmarried of such soldier or sailor, who did not file with the assessor, or who failed to file with the board of supervisors before September 1st, a verified statement that he or she is the owner of the property on which exemption from taxation is claimed, will be entitled to an exemption for the year 1915.

The provision requiring the filing of a statement that the person claiming the exemption under what is known as the Soldier's Exemption Law is the owner of the property was enacted by the thirty-sixth general assembly and did not become a law until July 4, 1915, long after the assessment of property for this year was completed and does not, in my opinion, affect exemptions for the year 1915, but each person entitled to an exemption under the law as it existed at the time the assessment was made should receive the benefit of such exemption for this year without regard to any restrictions or requirements contained in the enactment of the thirty-sixth general assembly affecting the taxation of property of the persons referred to above. The additional requirements

will only be operative as to exemptions on property assessed during the year 1916 and subsequent years. You will be entitled to an exemption for this year without filing of statement as to ownership as required in section 1304-1a of the supplemental supplement to the code, 1915.

JOHN FLETCHER, *Ass't Att'y Gen'l.*

PERSISTENT VIOLATORS.—Under section 2461-m, supplemental supplement, 1915, convictions prior to the statute cannot be considered to prove one a persistent violator.

October 2, 1915.

CHAS. E. MILLER, *County Attorney,* Albia, Iowa.

DEAR SIR: Your letter of the 29th ultimo, addressed to the attorney general, has been referred to me for reply, and I note that you are desirous of having an answer by Monday of next week.

You will note that the provision of the statute reads as follows:

> "And who shall *hereafter* be indicted, tried and convicted for a subsequent offense * * * shall be considered a persistent violator," etc.

In view of this language I am inclined to believe that the supreme court would hold as it did in the case of Sawyer vs. Gallagher, 151 Iowa 64, that for the first conviction subsequent to the enactment of the statute the court could sentence the defendant to the penitentiary or reformatory. Personally I would be inclined to agree with your construction of the statute, but call your attention to this decision of the supreme court for the reason that they and not myself would be the ones to finally pass upon the construction of the statute.

JOHN FLETCHER, *Ass't Att'y Gen'l.*

PENSION FOR THE BLIND.—A person need not be absolutely blind in order to entitle him to the benefit of a pension.

October 4, 1915.

E. F. FEELY, *Attorney,* Waterloo, Iowa.

DEAR SIR: Your letter of the 16th ultimo, addressed to the attorney general, has been referred to me for reply.

You cite an instance in your county where a person is totally blind in one eye and so near blind in the other that he cannot recognize his friends standing within a few feet of him, that he is wholly unfit for any kind of service on account of his defective eyesight, and you ask whether in the opinion of the department he would be entitled to pension under chapter 10-A, supplemental supplement to the code, 1915.

It is my opinion that a person need not be totally blind in order to entitle him to the benefits of the law referred to. If he is so blind as to render him incapable of doing work that necessitates the faculty of sight to perform he would be blind in the sense that the word is used in the act. I do not mean by this that merely defective eyesight would entitle one to the benefits of the law, but there must be such a lack of sight as that the person has no practical use of the sense of sight. This is a question largely for the examining physician to determine and no hard and fast rule can be laid down on the subject.

JOHN FLETCHER, *Ass't Att'y Gen'l.*

SCHOOL BOARDS—EMPLOYMENT OF MEMBERS.—A school board cannot employ one of its members to haul children to and from school.

October 4, 1915.

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

DEAR SIR: In yours of the 29th ultimo, addressed to the attorney general, you propound the following question:

> "Under Section 2794-a, Paragraph c, Supplement to the Code, Could a school board legally employ one of its members to haul children to and from school?"

In my judgment this question should be answered in the negative. Our supreme court has held that such contracts are against public policy.

See Bay vs. Davidson, 133 Iowa 688.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

INTOXICATING LIQUORS—DELIVERY.—Drayman signing name of consignee on records as receiving liquor might be punished for aiding and abetting carrier in violating law.

October 15, 1915.

J. E. RISDEN, Oskaloosa, Iowa.

DEAR SIR: Yours of the 14th instant addressed to the attorney general has been referred to me for reply.

The mere fact of the drayman's entering the name of the consignee on the records would not, in my judgment, constitute any offense. However, the last sentence of section 2421-b, supplemental supplement, provides:

> "No shipment billed in whole or in part as intoxicating liquor shall be delivered to the consignee until such consignee upon such record enters in ink, in legible writing, his full name and the residence or place of business, giving the name of the town or city and the street name and number, where there is such, and certifies that such liquor is for his own lawful purposes or private consumption."

Section 2421-c provides:

> "It shall be a misdemeanor for any railroad company, express company, corporation or common carrier, person, steamboat or steamboat line, or any agent or employe of such railroad company, express company, corporation or common carrier, person, steamboat or steamboat line, to deliver any intoxicating liquor to any person other than the consignee, or without same having been receipted for as herein required, or where there is reasonable ground to believe that such liquor is intended for unlawful use, or to refuse examination of such record to any officer entitled to same as herein provided. And in no case shall any railroad company, express company, corporation or other common carrier, person, steamboat or steamboat line, be liable for damages for complying with this act."

Hence the carrier delivering to such a drayman would be guilty of a misdemeanor.

Section 5299 of the code provides:

> "The distinction between an accessory before the fact and a principal is abrogated, and all persons concerned in the commission of a public offense, whether they directly commit the

act constituting the offense, or aid and abet its commission, though not present, must hereafter be indicted, tried and punished as principals."

Combining these sections, I am of the opinion that the drayman in such a case might be punished for aiding and abetting the carrier in violating the law.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

AGRICULTURAL SOCIETY—DISTRICT—COUNTY.—Any association or incorporated society having in view any or all of section 1661-a, supplemental supplement, 1915, would be entitled to benefit of state aid.

October 25, 1915.

A. R. COREY, *Secretary,* Department of Agriculture.

DEAR SIR: Yours of the 15th instant, addressed to the attorney general, has been referred to me for reply.

Your question, briefly stated, is, What constitutes a county or district agricultural society within the meaning of section 1661-a, supplemental supplement, 1915?

The language material to be considered reads as follows:

> "Any county or district agricultural society, upon the filing with the auditor of state affidavits of its president, secretary and treasurer showing what sum has actually been paid out during the current year for premiums, not including races, or money paid to secure games or other amusements, and that no gambling device or other violations of law were permitted, together with the certificate from the secretary of the state society showing that it has reported according to law, shall be entitled to receive from the state treasurer a sum equal to 60% of the amount so paid in premiums."

An agricultural society has been defined to be

> "one seeking to bring together people engaged in agricultural pursuits, and in the manufacture of articles adapted to the use and cultivation of the soil, and to exhibit to those in attendance the crops resulting from the various methods of farming, and give to the people of the state engaged in agricultural pursuits an opportunity of discussing various methods of farming, farm implements used, different breeds of stock

raised, and to educate the people in this way in the pursuits of agriculture, that the condition of the agriculturist may be improved by knowledge of the best methods of farming, best machinery, and best breeds of stock."

Downing vs. Indiana State Board of Agriculture, 28 N. E. 123, 126; 129 Ind. 443; 12 L. R. A. 604.

Hence, I am of the opinion that any association or incorporated society having in view any or all of these purposes and embracing within its territory a county or district, and which has complied with the provisions of section 1661-a, above quoted, would be entitled to the benefits of state aid under said section whether it be denominated "district agricultural society" or "county agricultural society" or not, and even though all classes of farm products may not be exhibited at the particular fair during the year for which the state aid is claimed. See, also, Agricultural Society vs. Shaffer, 86 Iowa 377, holding that two or more societies in the same county may be entitled to state aid.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

PEACE OFFICERS—USE OF FORCE IN MAKING ARREST.—Peace officers may only use force to overcome a person in making an arrest. Cannot inflict great bodily injury or death.

October 29, 1915.

J. BINGENHEIMER, Odebolt, Iowa.

DEAR SIR: Your letter of the 15th instant, addressed to the attorney general, has been referred to me for reply.

You desire to be informed as to how far you may go in using force in accomplishing an arrest.

You are only permitted to use so much force as may be necessary to accomplish the arrest of a person but never to the extremity of inflicting great bodily injury or death. Officers are too frequently imbued with the idea that they have authority to even take life to accomplish the arrest of a person who may be charged with some minor offense. Just recently a marshal in a little town in Iowa killed a person for resisting arrest for intoxication. The marshal is to-day serving time in the penitentiary.

JOHN FLETCHER, *Ass't Att'y Gen'l.*

DEER—AUTHORITY OF GAME WARDEN TO KILL.—State game warden may capture or kill deer if necessary to protect property or persons.

October 29, 1915.

HON. E. C. HINSHAW, *State Fish and Game Warden*, Spirit Lake, Iowa.

MY DEAR SIR: Your letter of the 25th instant, addressed to the attorney general, has been referred to me for reply.

You unfold plans for the capture of a number of deer for the purpose of furnishing specimens to the state historical department.

In my opinion you have ample authority under chapter 206, acts of the thirty-fifth general assembly, to kill or capture any deer, provided the killing or capturing is, in your judgment, necessary either to the protection of the remainder of the deer or the protection of persons or property. The mere fact in itself that the state desires a specimen for its historical department would not be sufficient reason for the killing of deer. If the necessity for the destruction of deer exists then of course there would be nothing wrong in furnishing the hides to the historical department and disposing of the venison in the manner provided by law. So, if you make sure in your own mind that it is necessary for the protection of persons or property or the remainder of the herd to kill a few there would be nothing wrong with your turning over the hides to the historical department.

JOHN FLETCHER, *Ass't Att'y Gen'l.*

DAIRY AND FOOD—MILK INSPECTION BY CITIES AND TOWNS.—Cities and towns are without power in Iowa to enact an ordinance for milk inspection.

November 8, 1915.

HON. BENJ. L. PURCELL, *Commissioner Dairy and Food Dept.*, Richmond, Virginia.

DEAR SIR: Your letter of the 29th ultimo, addressed to our dairy and food commissioner, has been referred to this department and to me for reply.

You inquire whether or not we have any laws in this state governing the following matters:

"Prohibiting municipalities from passing ordinances which fix requirements more stringent than those already established by state statute on the same subject; particularly laws prohibiting municipalities from passing more stringent requirements for dairy products than those provided by state statute."

Our code, section 680, provides:

"Municipal corporations shall have power to make and publish, from time to time, ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties conferred by this title, and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort and convenience of such corporations and the inhabitants thereof, and to enforce obedience to such ordinances by fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days."

Under this statute our supreme court has held that where the legislature had provided a system of milk inspection that cities and towns were without power to enact an ordinance for the same purpose. See

Bear vs. City of Cedar Rapids, 147 Iowa 341.

We have no special law covering the matter referred to in your second inquiry which reads as follows:

"Laws requiring transportation companies to provide proper sanitary facilities for forwarding foods, particularly milk and dairy products."

C. A. ROBBINS, *Ass't Att'y Gen'l.*

AUTO REGISTRATION—HALF YEAR.—36th G. A. authorized registration of last half of year.

November 10, 1915.

CLARENCE R. OFF, *Attorney,* North English, Iowa.

DEAR SIR: Replying to yours of the 3rd instant addressed to the attorney general, will say whatever the rate is for 1916 there is no provision for registering for a half year at a time except for the last half of the year. If the car has been used four years, or has paid four registration fees in this state, then it would be en-

titled to one-half rate next year even though one or more of the previous registrations was for a half year only.

However, I am unable to conceive of a case of the kind which you mention as existing at this time for there was no provision until the acts of the thirty-fifth general assembly which authorizes registration for a half year and any car that has been used four years in this state must of necessity have paid the full registration fee for at least its first and second years and there would be no occasion where such a car could be registered for one-half year in 1913 or 1914 as it is only new cars, purchased after August 1st, which are entitled to registration at one-half rate.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

CITY TAX FOR DISPOSAL PLANT.—Under Section 696-b, Supplemental Supplement, it is meant that council may levy the tax for establishment of disposal plant. Council may not issue bonds for same if indebtedness beyond statutory limit without vote. Must have majority vote.

November 18, 1915.

LAFAYETTE HIGGINS, *Civil and Sanitary Engineer,* State Board of Health.

DEAR SIR: Yours of the 16th ultimo addressed to the attorney general has been referred to me for reply and you call attention to section 696-b, supplemental supplement, which reads as follows:

> "The council of any incorporated city or town, including cities operating under special charter and commission governed cities, may, by ordinance, provide for the establishment of sanitary districts for the collection and disposal of garbage and such other waste material as may become dangerous to the public health or detrimental to the best interests of the community, and for the oiling and sprinkling, flushing and cleaning of streets, and may adopt such rules and regulations as are necessary for the proper administration of the provisions of this act. It shall have authority to levy an annual tax within each district not exceeding two mills for a fund for the purposes of this act, and, by vote of a majority of the voters voting on such proposition, may issue bonds for the purchase or erection of disposal plants."

And you inquire:

> "I understand the statute to mean that the council of any incorporated city or town may levy the tax for the purposes mentioned in this act, and may use such income in any proper manner, even to the building of a disposal plant where necessary. Am I correct in this interpretation?"

In my judgment, this question should be answered in the affirmative. Your second question is:

> "However, I do not understand the full meaning and effect of the statements regarding the issuance of bonds. May not a city council issue bonds for the purposes indicated, provided such bonds would not carry the indebtedness beyond the statutory limit, without a vote, as is now frequently done by city councils?"

In my judgment, this inquiry should be answered in the negative. Your third question briefly stated is:

> "Does the provision of this statute cut out the necessity of the majority vote of the preceding election."

In my judgment, this question should be answered in the affirmative.

In other words, this provision designed to establish a rule for the purposes mentioned in this section requires a vote of the people in all bond issues for such purposes, but such vote need only be a majority of the voters voting on the proposition and need not be a vote equal to the vote of the majority of the voters voting at the last preceding election as is required in some matters.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

CITY MANAGER IN CITIES OF SPECIAL CHARTER.—City manager plan is not available to special charter cities.

December 9, 1915.

H. D. HORST, *Attorney,* Muscatine, Iowa.

DEAR SIR: Yours of the 4th instant addressed to the attorney general has been referred to me for reply. Your question briefly stated is whether or not the law providing a government of cities by a city manager plan is applicable to cities under special charter. Section 933 of the code reads as follows:

"The provisions of this chapter shall apply only to cities acting under special charter and no provisions of this code nor laws hereafter enacted relating to the powers and duties, liabilities or obligations of cities or towns shall in any manner affect or be construed to affect cities while acting under special charter unless the same have special reference or are made applicable to such cities."

It will be noted that section 1056-b, the first section of the act providing for the city manager plan provides that any city, or incorporated town, and cities organized under Chapter 14-C (Title V), supplement to the code, 1913, which last provision covers cities organized under the commission form of government, may adopt the plan.

It will be noted that cities organized under Chapter 14 of said Title or special charter cities are not mentioned and the fact that the legislature skipped over Chapter 14 of said Title and included Chapter 14-C of said title would seem to indicate that it was not the intention to make the city manager plan available to special charter cities. It is true that in the last section reference is made to special charter cities when it comes to an abandonment of the plan, but this only confers power to abandon the manager plan and not power to take it up so that we would be left to read into the law by inference that it was the intention of the legislature to have the whole law apply to the manager plan and this would be contrary to the express provision of section 933 above quoted.

Hence, I am of the opinion that the city manager plan is not available to special charter cities.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

INTOXICATING LIQUORS.—Use of in compounding medicine. Permit holder may have alcohol in his possession for compounding purposes. Alcohol used in making medicines must be so compounded with other substance as to lose its distinctive character as an intoxicating liquor. The sale of malted milk in the form in which it is sold at soda fountains is not a violation of the prohibitory statute.

December 9, 1915.

AL. FALKENHAINER, *Secretary, Iowa Pharmaceutical Association*, Algona, Iowa.

DEAR SIR: I am in receipt of yours of the 7th instant enclosing a letter from Mr. W. W. Richards of Cedar Rapids, in which he

specifies several articles sold by druggists and requests your opinion as to whether such articles may be sold without violating the prohibitory statutes of the state. You request this department to make answer to these inquiries.

The first inquiry is whether after January 1st, 1916, a druggist may sell patent medicines which contain a small per cent of alcohol. In reply to this inquiry I will say that no change was made in the prohibitory laws by the thirty-sixth general assembly which in any way affect the sale of patent medicines containing alcohol. The law on this question, therefore, is the same as it has been for years past; that is, that when alcohol or other liquor is used in connection with substances of a medicinal character and so compounded with such substances as to lose its character as an intoxicating liquor and is not desirable for use as a stimulating beverage but becomes in fact a medicine, the sale thereof is not prohibited in this state no matter what the per cent of alcohol may be.

This general statement of the law will also apply to the inquiry of Mr. Richards with reference to compounding tinctures, spirits of camphor, etc., and I would say that it would apply to alcohol sold for bathing, rubbing and other medicinal purposes where it is so mixed with other drugs as to render its use as a beverage impossible or at least impracticable. That is to say alcohol sold for such purposes should be so mixed with drugs that the contents could not be separated by some easy and simple process known to the ordinary layman and thus separate the alcohol from the other ingredients and so render easy an evasion of the prohibitory statutes.

Another inquiry made by Mr. Richards is whether a druggist will be in danger of prosecution if he has intoxicating liquor in his store for chemical and pharmaceutical purposes. Section 2385 of the code expressly authorizes registered pharmacists to purchase from permit holders intoxicating liquors for the purpose of compounding medicines, tinctures and extracts that cannot be used as beverages. It is my opinion that a registered pharmacist would be safe in having in his possession sufficient liquor for the purposes specified in the section referred to if such liquor is used strictly for those purposes. As a safeguard against the violation of the privilege given by the statute the law provides that the commissioners of pharmacy may make rules with reference to the amount of liquor a pharmacist may have on hand for chemical or pharmaceutical purposes but in no case, in my opinion, should the amount on hand exceed the quantity that would actually

be necessary for compounding purposes. This amount, of course, must necessarily depend on the volume of business that a particular pharmacist would transact in the way of compounding tinctures and medicines.

The question of the value of a permit by way of the protection it would afford one who does not handle liquors except for the purposes for which a registered pharmacist is authorized to handle them is entirely problematical and one of policy rather than of law. Therefore, on that question I express no opinion nor would I express one on the question of whether a druggist who does not keep intoxicating liquor on his premises should have a government license except that I cannot see the necessity of having a government license unless sales are being made of some liquor which requires payment of the government tax.

The last question of your correspondent relates to the sale of malted milk and he inquires if the sale of this article as it is usually made up into a drink and sold at soda fountains constitutes a violation of our prohibitory statutes. Malted milk in the condition in which it is prepared by the manufacturers is a powdered preparation which does not and cannot by reason of its character contain alcohol in its content and the addition of ordinary milk, ice cream, charged water, etc., usually added to it at the soda fountain would not in any way generate alcohol. It is true of this, however, as it is of many sweetened drinks or foods that if permitted to stand a sufficient time after being made a fermentation will take place which would cause the formation of more or less acid and therefore alcohol. But when made up and drunk while fresh no fermentation is possible and therefore there is no alcohol present or any other ingredient that would produce an intoxicating effect. Hence, there would be no violation of the prohibitory laws in selling a drink which does not contain an intoxicating ingredient in any quantity when sold.

JOHN FLETCHER, *Ass't Att'y Gen'l.*

CORPORATION NOT A CITIZEN.—Corporation is not a citizen within the meaning of the federal constitution.

December 30, 1915.

Q. A. WILLIS, *Deputy State Treasurer.*

DEAR SIR: I am returning herewith the inquiry of D. W. Bates enclosed in your letter of the 23d ultimo, together with

your brief in connection with the matter. After an examination of the authorities submitted I am inclined to the view that, while a corporation is for some purposes to be deemed a citizen of the state or country where it is incorporated, yet in my judgment the term "citizen" or "subject" as made use of in the treaties in question refers to only natural persons.

> "In government, the term 'subject' refers to one who owes obedience to the laws, and is entitled to partake of the elections into the public office."
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> 37 Cyc, 341;
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> *Respublica vs. Chapman* (Pa.) 1 Dall., 60;
>
> *The Pizarro,* 15 U. S. (2 Wheat) 227, 245;
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> *U. S. vs. Chong. Sam,* 47 Fed., 878, 885;
>
> *U. S. vs. Wong Kim,* (Ark.) 169 U. S., 649;
>
> *Com. vs. Hutchinson* (Pa.), 5 Clark, 321, 322.
>
> "As used in a treaty with a nation having a monarchial form of government, the term as applied to persons owing allegiance to such government, must be construed in the same sense as 'citizens' or 'inhabitants,' when applied to persons owing allegiance to the United States."
>
> 37 Cyc. 341.

As suggested by you, the supreme court of the United States has held that corporations are not citizens within the meaning of the federal constitution.

> *Paul vs. Virginia,* 8 Wall. 168, 178, 179;
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> *Ducat vs. Chicago,* 10 Wall., 410, 415;
>
> *Liverpool Ins. Co. vs. Mass.,* 10 Wall., 566, 573;
>
> *Mining Co. vs. Penn.,* 125 U. S., 181;
>
> *Blake vs. McClurg,* 172 U. S., 239, 259.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

TRANSMISSION LINES—ASSESSMENT OF REAL ESTATE OF.—All real estate actually used by a transmission line in connection with the business should be included as a part of the property on which council bases assessment.

December 30, 1915.

HONORABLE EXECUTIVE COUNCIL.

GENTLEMEN: I have your letter of the 28th instant requesting an opinion as to whether the real estate comprising the right-of-

way of an electric transmission line should be assessed by the executive council as a part of the property of such line, or whether it should be assessed by the local taxing district in which it is located.

There is nothing in the provisions of the law dealing with the subject of taxation of the class of property referred to which indicates that it was the intention of the legislature that real estate over which a line is constructed is to be taxed separately from the other property comprising the line, and although the real estate is not particularly mentioned, neither is there any language in the law from which it can be fairly inferred that it is not to be considered by the council in fixing the assessed valuation of a transmission line. The right of way is as essential to the operation of the business of a concern of this character as are its poles, wires and other equipment, and there is no other provision for assessing any of the property used in the business except that part which is located within the corporate limits of cities or towns.

Section 1346-q of the supplemental supplement to the code, 1915, contains the express provision that "all *lands,* building, machinery, poles, towers, wires," etc., of any transmission line, located within the limits of a city or town shall be assessed by the municipality in which they are located, and this same section contains a provision which exempts from assessment, by any method or by an assessing board, any transmission line or part thereof located outside of cities and towns except as it is assessed by the council. The provisions of this particular section, which give exclusively to cities and towns the right to assess all of the property of a transmission line, or lines, that is located within their limits and denies to any other taxing board the right to tax such property, leads to the conclusion that it was the intention of the legislature that the executive council should exercise the assessing power over all classes of property of such lines used in the business that are located outside of cities and towns, and it is my opinion that the reasonable and logical construction to be placed upon the law is that all real estate actually used by a transmission line in connection with the business of transmitting light or power should be included as a part of the property upon which the executive council bases the valuation of such property for assessment purposes, and that no other assessing board has authority to assess the real estate separate and distinct from the other property of a transmission line.

JOHN FLETCHER, *Ass't Att'y Gen'l.*

DEPARTMENT CORRESPONDENCE.

Letters by the Department to County Officers and others during the year 1916.

COUNCIL PROCEEDINGS PUBLISHED OR POSTED.—Mandatory that council proceedings be published or posted. Sec. 687-a, supplemental supplement, 1915.

January 4, 1916.

NEIL R. ASHBY, Wellsburg, Iowa.

DEAR SIR: Replying to yours of the 1st instant relative to the publication of council proceedings will say that the law was amended by the thirty-sixth general assembly and section 687-a now reads as follows:

> "Immediately following a regular or special meeting of the city or town council, the clerk shall prepare a condensed statement of the proceedings of said council, including the list of claims allowed, and from what funds appropriated and cause the same to be published in one or more newspapers of general circulation, published in said city or town, or by posting in one or more public places, *as directed by said council.*"

You will note that it is mandatory for the matter to be either published in a newspaper or posted but that the council may determine which method it will follow. I think there have been no decisions of the supreme court since this change in the law.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

STREETS AND HIGHWAYS—ABANDONMENT OF.—City of Clinton cannot vacate its streets for private purposes.

January 6, 1916.

GEORGE C. CAMPBELL, *Secretary, Tri-City Labor Congress,* Clinton, Iowa.

DEAR SIR: Yours of the 4th instant addressed to the attorney general has been referred to me for reply. Your question briefly stated is whether or not it is within the power of the city of Clinton to vacate its streets and to donate them for private purposes.

"A municipality has no inherent power to grant privileges in its streets but any power which it exercises must be derived from the legislature, either expressly or by fair or necessary implication." 28 Cyc. 866.

"A grant by a municipality without legislative authority is void." 28 Cyc, 866.

"Except where the use is temporary, or the power has been delegated by the legislature, a municipality has no power to authorize the use of streets *for a private purpose,* that is, one from which neither the municipality nor its citizens derive any consideration or benefit."

28 Cyc, 870;
Bennett vs. Mt. Vernon, 124 Ia., 537;
Heath vs. Des Moines, 61 Iowa, 11;
Young vs. Rothrock, 121 Iowa, 588.

From these authorities it would appear that your question should be answered in the negative.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

CITIES AND TOWNS, POPULATION, REGISTRATION, LAST CERTIFIED CENSUS.—Registration in municipal election required in cities of 3,500 population decided by 1910 census unless 1915 census certified before third Monday prior to city election.

January 20, 1916.

FRANK G. PIERCE, Marshalltown, Iowa.

DEAR SIR: Replying to yours of the 18th instant inquiring whether or not cities the population of which has been increased by the last census to more than 3,500 population are required to provide for the registration of voters at the March municipal election in 1916 will say that by reference to the last sentence of section 177-c, supplement to the code, 1913, you will find the following provision:

"Whenever in the code or any supplement to the code or any copy of the session laws prior to this date the population of any county, city or town is referred to, it shall be determined by the last *certified* or *certified and published official census,* whether the same be state or national."

It goes without saying that the last certified and published census was the national census of 1910. Upon inquiry at the office of the secretary of state I find that the state census taken during the year 1915 is not yet complete and has not been certified and in all probability will not be completed in time for certification before the time for holding municipal elections in Iowa this year. However, if such census should be completed and certified prior to the third Monday prior to the city election so that registration could be provided as required in section 1076, supplement to the code, then I am inclined to think the population would be governed by the state census of 1915 and provision should be made for the registration; otherwise, it would be governed by the national census of 1910 and no registration would be required where the same has not been heretofore required.

I am enclosing duplicate of this letter in order that you may forward same to Mr. Taggart, of Spencer, who propounded the inquiry.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

PAVING.—Where narrow park is reserved lengthwise in center of street, entire cost of pavement is still taxed to the property owners.

January 20, 1916.

MISS ELSIE B. DANN, Eagle Grove, Iowa.

DEAR MADAM: Replying to yours of the 11th instant, as I understand your letter you have reference to a pavement where a narrow park is reserved lengthwise in the center of the street, and, in such case, I am of the opinion the entire cost of the pavement might properly be taxed to the property owner even though the city claims title to the park, for if they paved the entire street rather than paving a part and parking the center, the additional paving required to cover the space occupied by the parking might still be taxed to the property owner under section 792-g, supplement to the code, 1913, and in such case would exceed the cost of paving simply the unparked portion.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

PERMANENT ROAD IMPROVEMENT DISTRICTS.—Sections 1527-f to 1527-r present a question on which a test case should be brought.

January 21, 1916.

GEORGE E. HILL, *County Attorney,* Burlington, Iowa.

DEAR SIR: In relation to the question propounded by you when recently in the office concerning the formation of permanent road improvement districts under sections 1527-f to 1527-r, supplement to the code, 1913, will say that the question is one of such extreme doubt that I do not feel like giving a definite opinion on the matter one way or the other.

In the first mentioned section it is provided in the last clause thereof as follows:

> "And to assess *not less than 50%* of the cost thereof on abutting or adjacent property *as provided in this act";*

while in section 1527-l, it is stated:

> "Provided, however, that *not to exceed 50%* of the entire cost of the improvement shall be paid by the said assessment on the property within said improvement district, the balance of the cost of said improvement to be paid by the county out of the funds hereinafter provided in this said act."

Construing these sections together and giving both their literal meaning it would be equivalent to saying that 50% of the cost, no more and no less, must be assessed against the abutting and adjacent property in the improvement district. While this is true, yet I have grave doubts as to whether this was the legislative intent.

I would suggest that a test case be arranged on the matter and let the court pass upon it.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

SECRETARY OF STATE.—Fixes salary of extra help under Senate File 585, thirty-sixth G. A.

January 31, 1916.

HON. W. S. ALLEN, *Secretary of State.*

DEAR SIR: In yours of the 31st instant addressed to the attorney general you call attention to Senate File 585 passed by the thir-

ty-sixth general assembly appropriating $2,400.00 for the payment of extra clerical help and assistants in the office of secretary of state for the period beginning April 1st, 1915, and ending June 30, 1915, and you inquire by whom the salary or compensation to the various clerks shall be fixed.

In the latter part of section 1 of said act is found the following language:

> "Or so much thereof as may be necessary to be expended under the direction of the secretary of state."

In my judgment this is sufficient to authorize the secretary of state to fix the compensation. Of course, the compensation thus fixed should be reasonable as compared with the service rendered in order that it might receive the sanction of the executive council or the board of audit, as the case may be.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

CHILD LABOR LAWS.—A child under fourteen years of age cannot be employed in a theater even without compensation unless theater is owned or operated by parents.

February 2, 1916.

C. C. HAMILTON, Sioux City, Iowa.

DEAR SIR: Your letter of the 22d ultimo, addressed to the attorney general, has been referred to me for reply.

You call attention to the appearance of Leone O'Leary, a girl seven years of age, upon the stage of the Princess theater on different occasions in exhibitions of singing and dancing. You also state that these exhibitions have been in the presence of her father and mother and that her father is stage manager of the theater in which she appears and no compensation is paid her for the services. Your inquiry is whether this constitutes a violation of what is known as the child labor statutes.

Section 2477-a of the supplemental supplement prohibits the employment of persons under fourteen years of age in certain lines of employment and among the places enumerated where the employment of such persons is prohibited is designated "place of amusement". There is only one exception to the provisions of the statute and that permits the employment of a child under fourteen years of age in an establishment owned or operated by its parents.

I am of the opinion that the appearance upon the stage of the little girl referred to, under the circumstances described in your letter is a violation of the section and the fact that her father is stage manager and that she performs in the presence of her father and mother does not make her employment one in an establishment owned or operated by her parents in such sense as to bring the employment within the exception of the statute.

I might also add that the provisions of section 2477-a-1 which give to superintendents of schools or their truant officers power to issue permits to children under eleven years of age to engage in employment only relate to street employment and have no reference to the classes of employment enumerated in section under consideration.

JOHN FLETCHER, *Ass't Att'y Gen'l.*

ICE—REMOVAL—RIPARIAN OWNER.—Ice may be taken from meandered streams if the taking does not interfere with rights of riparian owner.

February 2, 1916.

ROBERT E. BARR, Wapello, Iowa.

DEAR SIR: Replying to yours of the 24th ultimo will say that there is no statute in Iowa covering the right to take ice from the streams of the state. However, the general rule is, as to meandered streams whether navigable or non-navigable, that any person may cut and remove the ice if he can obtain access thereto without trespassing upon the lands of the riparian owners. See *Brown vs. Cunningham,* 12 L. R. A., 583; 82 Iowa, 512, where our supreme court held that the same right exists to take the ice that exists to take the water in the stream; see also *Park Commissioners of Des Moines vs. Des Moines Ice Company,* 105 N. W. 203; 3 L. R. A. (N. S.), 1103.

As the Iowa river is a meandered stream, it follows that any person would have the right to take ice therefrom who can gain access to the same without crossing the land of the adjacent owner above highwater mark.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

SHERIFF'S FEES.—Sheriff must account for fees on matters sent him from other states and counties except mileage which belongs to him even if he is out of office.

February 2, 1916.

MR. J. J. RATHBUN, Sigourney, Iowa.

DEAR SIR: Replying to yours of the 22d ultimo, will say that under the present law (section 510-a of the supplemental supplement) the sheriff is required to pay to the clerk of the district court, for the use of the county, all fees earned by him, except mileage. This requirement would, in my judgment, compel him to account for and pay to such clerk the fees earned by him in the service of legal notice or other papers sent him from other states and counties, except the mileage earned in the service of such papers, which mileage he would have the right to retain and the same would belong to him when collected, even though he has retired from office.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

SCHOOL TREASURER.—Elected by vote of people under section 2754, Code Sup., 1913, at the regular annual meeting.

February 12, 1916.

L. T. SHANGLE, *Attorney,* Oskaloosa, Iowa.

DEAR SIR: Replying to yours of the 10th instant addressed to the attorney general will say that your school treasurer should be elected by a vote of the people under the provisions of section 2754 of the supplement to the code, 1913. You will notice that this section provides for the election of a treasurer in all districts composed in whole or in part of cities or towns and, while it is true that section 2757 of the supplemental supplement provides for the election by the board in independent city, town and village corporations of a *secretary and treasurer,* except as provided in section 2754, heretofore referred to, the result is, under the provisions of this last section, the secretary only is to be elected by the board for the reason that by the provisions of section 2754 the treasurer is to be elected by the people at the regular annual meeting.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

INDEPENDENT SCHOOL DISTRICT.—President, secretary and one director act as judges at election under code section 2746. Registration not necessary.

February 16, 1916.

J. O. BOYD, *Attorney,* Keokuk, Iowa.

DEAR SIR: Replying to yours of the 15th instant will say that in my judgment the president, secretary and one of the directors should act as judges of election in your independent school district as provided by section 2746 of the code. The other provision quoted by you from section 2756, supplement to the code, 1913, has no application except where the district has availed itself of the provisions of section 2755, supplement to the code, 1913, by dividing a district into several precincts.

I am also of the opinion that the provision for registration does not apply until such division into precincts has been made.

With reference to the notice, I think the notice provided in section 2746 should be given. See section 2763-b, supplement to the code, 1913, which substantially so provides and which would apply in your case. A careful reading of section 2763-a of the 1913 supplement to which you call attention will show that it does not apply to a district of your kind but only to those not included in section 2763-b.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

ABSENT VOTERS LAW.—Students properly come within its provisions—registration by mail.

February 21, 1916.

PROF. FRANK E. HORACK, *State University of Iowa,* Iowa City, Iowa.

DEAR SIR: I am in receipt of your communication of the 16th inst., requesting to be advised as to whether or not the absent voters law, entitled chapter 3-B of Title VI, supplemental supplement, 1915, would authorize students of the university to avail themselves of the privileges of the law without returning to their several residences in this state to vote.

Section 1137-b provides:

> "Any qualified elector of the state of Iowa, having duly registered where such registration is required, who through the nature of his business, is absent or expects in the course

> of said business, to be absent from the county in which he is a qualified elector on the day of holding any general, special, primary, county, city or town election may vote at any such election as hereinafter provided."

I am of the opinion that a student properly comes within the provisions of said section, that is to say, his work at the university makes him absent from home on "business" as it is his business to be attending school. If, however, he lives in a city where registration is required you will note by said section that he must then have been duly registered. The law, in my opinion, should receive no narrow interpretation, but should apply to any person who is necessarily or properly away from home on the day of any general, special, primary, county, city or town election. I am, therefore, of the opinion that the law properly applies to the student and that he may avail himself of the provisions of said act by following the terms and conditions therein stated.

GEORGE COSSON, *Attorney General.*

SCHOOL LOCATION.—Not to be on property occupied as a home if there is an orchard or garden connected therewith.

February 23, 1916.

R. J. JACKSON, Early, Iowa.

DEAR SIR: Replying to yours of the 21st instant inquiring whether or not property occupied as a home located in a city or town may be condemned for school purposes will say that the question is not entirely free from doubt. Section 2814, supplement to the code, 1913, provides:

> "Any school corporation may take and hold so much real estate as may be required for school house sites * * * which site must be upon some public road already established or procured by the board of directors and shall, except in cities, towns or villages, be at least thirty rods from the residence of any owner who objects to its being placed nearer, *and not in any orchard, garden or public park.*"

The language which renders the question doubtful is that in italics above; that is to say, if this provision is to apply in cities and towns as well as in the country then the proposed site could not be laid upon any orchard, garden or public park. The fact

that public parks are usually in cities and towns rather than elsewhere and the provision exempting public parks being so closely connected with the words "orchard" and "garden" would indicate that the legislature intended this provision to apply to inside cities and towns as well as elsewhere, and on the whole, my judgment is that if the parties occupying the homes referred to have in connection with them an orchard or garden, then the property may not be condemned, but if the house is without orchard or garden, then it may be.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

COUNTY ATTORNEY.—County attorney entitled to fee on forfeiture of bond, same as on fines collected.

February 24, 1916.

R. P. SCOTT, *County Attorney,* Marshalltown, Iowa.

DEAR SIR: Replying to yours of the 12th instant will say that in my judgment under section 308 of the supplemental supplement, 1915, the county attorney is entitled to the same percentage on the forfeiture bond where the amount of the bond is collected by suit as he would be for fines collected. In other words, the same rule would apply to a forfeiture that would apply to a fine collected where the county attorney appears for the state in the action in which the forfeiture is adjudged to be due and such forfeiture is thereafter collected.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

CITIES AND TOWNS—ORDINANCES.—Four councilmen must vote to dispense with the reading of ordinances three times.

February 25, 1916.

S. C. KERBERG, *Attorney,* Audubon, Iowa.

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

You request to be advised as to the number of votes which are required to be registered in favor of suspending the rules to pass an ordinance on its third reading at one time under section 682 of the code.

It is my opinion that it is necessary to have the vote of four councilmen to dispense with the rule requiring the ordinance to be read on three different days, and that the mayor is not a member of the council in the sense that he should be considered in the determination of what constitutes three-fourths of the membership of the council.

JOHN FLETCHER, *Ass't Att'y Gen'l.*

FRATERNITIES—HIGH SCHOOL.—Section 2782-a, 1913, supplement regarding secret fraternities does not apply to certain fraternities and clubs.

March 1, 1916.

A. I. TISS, *Superintendent Cresco Public Schools,* Cresco, Iowa.

DEAR SIR: Yours of the 25th ultimo addressed to the attorney general has been referred to me for reply. Your question briefly stated is whether section 2782-a, supplement to the code, 1913, which reads as follows:

> "That from and after the passage of this act it shall be unlawful for any pupil, registered as such, and attending any public high school, district, primary or graded school, which is partially or wholly maintained by public funds, to join, become a member of, or to solicit any other pupil of any such school to join, or become a member of any *secret* fraternity or society wholly or partially formed from the membership of pupils attending any such schools or to take part in the organization or formation of any *such* fraternity or society, except such societies or associations as are sanctioned by the directors of such schools."

would apply to fraternities or clubs, as well as to secret societies. In my judgment, this question should be answered in the negative and that the section should be construed the same as though the last phrase thereof read as follows:

> "Except such (secret) societies or associations as are sanctioned by the directors of such schools."

This view is strengthened when reference is made to section 2782-d, from which it will be seen that it is contemplated that students may belong to fraternities or societies contemplated by that section and the regulation there sought to be imposed is for

the purpose of preventing their being rushed or solicited to join such societies, for, if they were prohibited from joining such societies, there would be no occasion to prohibit rushing or soliciting.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

GRAIN ALCOHOL—BUYING IN IOWA.—By a wholesale grocery company and using for chemical purposes in the manufacture of extracts probably legal.

March 1, 1916.

CHAS. HEWITT & SONS CO., Des Moines, Iowa.

GENTLEMEN: Replying to yours of the 29th ultimo addressed to the attorney general will say that the question is not entirely free from doubt, but my judgment is that this would be a chemical purpose and that one holding a permit to sell for lawful purposes in Iowa might sell to you for this use. However, you could not import the same without engaging in the wholesale drug business and complying with section 2401-a, supplement to the code, 1913, a copy of which I enclose, and also with section 2419 of the code, copy of which will be found on page 12 of the enclosed leaflet.

You will understand that this question is one concerning which this department could not advise you officially, but is simply the best judgment of the undersigned.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

LEGISLATION.—Effect of showing "Absent or Not Voting" whether member is present or otherwise.

March 2, 1916.

HON. WM. SCHMEDIKA, Radcliffe, Iowa.

DEAR MR. SCHMEDIKA: I am in receipt of your communication of the 1st instant in which you state that in the roll call on the final passage of a bill, a record is made in the house and senate journals showing those voting "Aye" and those voting "No" and those "Absent or not voting," and you request an opinion as to the effect of those marked "Absent or not voting."

On the final passage of a bill, barring certain exceptions, the bill must receive a majority vote in each house; in other words, it must receive 26 affirmative votes in the senate and 55 affirmative votes

in the house. Therefore, so far as the final passage of the bill is concerned, there is just one way in which you can support a bill and that way is to vote "Aye." A person who sits in his seat and fails to vote has the same effect upon the final passage of a bill as the man who votes "No," barring, of course, the possible influence his vote might have on some other member. This necessarily follows because, as before stated, each bill upon final passage must receive an affirmative vote of 26 votes in the senate and 55 affirmative votes in the house.

In preliminary motions, the effect of failing to vote would not necessarily have the same effect as voting "No" because many preliminary matters are determined by an actual majority of those who happen to vote; but as before stated, in the final passage of a bill it is only the affirmative votes that count, and if a person either declines to vote, or is necessarily absent, it has the same ultimate effect as voting "No."

GEORGE COSSON, *Attorney General.*

WOMEN.—May vote at all school elections or at an election on the question of increasing the tax levy or the levying of bonds, or at the election of trustees if owner of land in drainage district and over twenty-one years of age.

March 10, 1916.

WM. H. WOLLE, Belmond, Iowa.

DEAR SIR: Replying to yours of the 7th instant, addressed to the attorney general, will say that *women may not vote at all elections in Iowa.*

Constitution of Iowa, Art. II, Sec. 1.

At the primary election in June of this year the question of amending the constitution so as to give equal suffrage will be voted upon by the people.

However, *women may vote—*

At any and all elections held in school corporations for the *purpose of issuing bonds for school purposes,* or for *increasing the tax levy,* or for the *purpose of borrowing money.*

Code Sections 1131 and 2747, 154 N. W. 437;
Kinney vs. Howard, 133 Iowa 94, 154 N. W. 581.

At any city or town election on the question of issuing bonds for *municipal purposes* and for *borrowing money,* or on the question of *increasing the tax levy.*

Code Section 1131;
Coggeshall vs. Des Moines, 138 Iowa 730;
Younkers vs. Susong, 156 N. W. 24.

And if over twenty-one years of age and the owner of land in a drainage district, at the election of trustees in drainage districts and in other elections held in connection with such drainage district.

Sections 1989-a63 to 1989-a73, Supplemental Supplement, 1915.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

BRIBE.—If made by bank and not candidate not bribe.

March 11, 1916.

MR. B. F. GAYLORD, Strawberry Point, Iowa.

DEAR SIR: Replying to yours of the 10th instant addressed to the attorney general, will say that if the proposition to pay more interest than the law provided for had been made by the candidate instead of by the president of his bank, it would then clearly have been a bribe. See *Carothers vs. Russell,* 53 Iowa 346. However, where the proposition is made by some person other than the candidate it would not, in my judgment, affect the right of such candidate, if elected, to hold the office.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

HOG CHOLERA SERUM.—Permit to sell or offer for sale might be issued to company not licensed to do business in Iowa, but it is not compulsory.

March 11, 1916.

C. H. STANGE, *Director,* State Biological Laboratory, Ames, Iowa.

DEAR SIR: Replying to yours of the 29th ultimo, will say that in my judgment you might issue a permit to a person, firm, company, or corporation, to sell or offer for sale within this state serum or virus manufactured by a company not holding a permit to do business in this state, but that you would not be required to issue such permit to such company.

As to whether or not a distributing agency not manufacturing serum should hold a United States government license in order to carry on an interstate business is a question not entirely free from doubt, and as to this phase of the matter I would suggest that it would concern the United States government perhaps more than the state or your department and that you take the matter up with the United States district attorney for the district in which the distributing agency proposes to operate; if in the northern district, the Hon. Frank O'Connor, of Hampton; if in the southern district, the Hon. Claude R. Porter, of Centerville.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

SCHOOL BOARD—BLOODHOUNDS.—Board cannot recover expense for use of bloodhounds.

March 11, 1916.

GEO. M. KOEHLER, Unionville, Iowa.

DEAR SIR: Replying to yours of recent date addressed to the attorney general inquiring whether or not a school board, which had employed the services of bloodhounds accompanied by their owner in an effort to fix the responsibility for an incendiary fire which destroyed school property, might recover the amount paid for such services from the county, will say that in my judgment this question should be answered in the negative. Our supreme court looks with disfavor upon the testimony of bloodhounds in view of the fact that they may be neither sworn nor cross-examined. See *McClurg vs. Brenton,* 123 Iowa 368.

In the absence of a direct provision authorizing the county to reimburse school boards or others who may see fit to employ this class of service, the same could not be lawfully allowed.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

SANATORIUM AT OAKDALE—ADMISSION.—If applicant has lived in state one year but in several counties, he can be admitted from the last county in which he lived.

March 14, 1916.

H. V. SCARBOROUGH, M. D., Oakdale, Iowa.

DEAR SIR: In yours of the 13th instant addressed to the attorney general you propound the following questions:

"1st. If an applicant has lived within the state of Iowa continuously for more than one year previous to the time the application is made, yet has not lived in any one county for a term of one year previous to the time of application, is this patient a legal resident in the matter of admission to the state sanatorium, and if so to what county should he be credited?"

In my judgment such patient should be deemed a legal resident of the last county in which he in good faith resided for any appreciable length of time.

"2nd. What would seem to be a proper method of certification of information as to applicant's residence upon which the superintendent may determine as to eligibility to become a patient at the state sanatorium?"

No form of showing is required to be made further than the mere statement by the applicant as to his place of residence and the length thereof. However, it would be entirely proper to require some corroboration in the way of a written statement from reputable acquaintances of the patient at his place of residence or at each of the several places, if he resided in more than one place during the last year prior to his admission.

"3rd. In case of an erroneous showing it transpires that the patient is not eligible, would the superintendent or any other officer certifying to the residence of an applicant be responsible for the amount incurred for his support while a patient at the sanatorium provided the statements were certified to the superintendent in good faith as being correct?"

In my judgment this question should be answered in the negative.

"4th. In case the usual method of certification required is by certificate of the local board of health that the patient has been a resident of a certain county for a certain length of time and the local board of health refuses to certify that the applicant has been a resident of the said county for any length of time, and the said applicant should be indigent so that certification is required, what action may be taken by the superintendent to secure said certification or the proper data upon which admission may be secured?"

If the proper officers have the information required and arbitrarily refuse to make the certificate, they might by a court order obtained in the mandamus proceeding be compelled to do so.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

PRIMARY—PRESIDENTIAL PREFERENCE.—Party national committeemen—should be elected at such primary.

March 14, 1916.

HAL H. MCNEIL, *County Attorney,* Indianola, Iowa.

DEAR SIR: Replying to your inquiry over the telephone as to whether or not party national committeemen are to be elected at the presidential preference primary to be held April 10th, will say that this matter is covered by section 1087-a36, supplement to the code, 1913, which reads as follows:

> "That from and after the passage of this act in the years in which a president and vice-president of the United States are to be elected, there shall be held a primary election for the election of delegates and alternate delegates to the national conventions of all political parties at which candidates for president and vice-president are to be nominated, for the election of a party national committeeman for each party, and for the election of delegates to county conventions, which shall choose delegates to the state convention."

An analysis of this section shows that there are three things to be done: First, the election of delegates and alternates to the national convention; second, the election of party national committeemen, and third, the election of delegates to county conventions, which convention shall choose delegates to the state convention.

It is entirely clear that the first and last are to be elected at the primary election provided for by this section, and as to the second there are two possible interpretations: First, that the party national committeemen should be elected at the same primary, or that they should be selected at the national convention. On account of the fact that the first and last propositions are to be fully determined at the primary election and on account of the further fact that the national committeemen would have work to do before the holding of the national convention, I am of the opinion that the election of party national committeemen for each party should also be made at the presidential preference primary.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

INSURANCE—PROVING UP LIFE OR ACCIDENT POLICIES.—Must be done as per conditions specified in policy unless party incapacitated by insanity.

March 14, 1916.

DR. F. E. FOUCK, Des Moines, Iowa.

DEAR SIR: Replying to yours of recent date addressed to the attorney general, in which you inquire as to the length of time which will operate to bar the holder of a life and accident policy from recovering on account of any claim against the company by reason of failure to give notice or submit proofs of injury or illness, under the Iowa law, will say that where there is a provision in the policy requiring notice to be given within sixty days then the notice must be so given except in those cases where the policy provides that a failure to give such notice within the time fixed shall not prevent a recovery upon the claim if it were not reasonably possible to give such notice within the time fixed and where under the facts in the particular case it was not reasonably possible to give such notice; for instance, if the injury rendered the party insane or physically incapable of giving notice within the time, then this sixty-day provision would not apply; otherwise the combined provisions of the policy as authorized by code section 1744, as amended, would govern.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

ELECTIONS—CITY NOMINATIONS.—Nominations cannot be filed on Monday, March 13th, when 15th day falls on Sunday. See *Conklin vs. Marshalltown,* 66 Iowa 122.

March 15, 1916.

J. E. LARSON, West Branch, Iowa.

DEAR SIR: Replying to yours of the 14th instant addressed to the attorney general, will say that the petition which you enclose and which I herewith return, and which was, as you say, prepared and filed on the 13th instant, was not filed in time, the last day for such filing being the 11th instant.

The law requires fifteen days before the election and, while the 12th, the fifteenth day before the election, was Sunday, yet the rule allowing any act which is required to be done on a day which falls on Sunday to be done on the following day does not apply where the act might have been done on a day previous to Sunday, and as the law does not require the petition to be filed on the

fifteenth day prior to the election, but only requires that it be filed not less than fifteen days prior to such election, the same might have been filed at any time prior to the 12th. For a decision of our supreme court on this question see sub-division 23, section 48, and the case of *Conklin vs. Marshalltown,* 66 Iowa 122.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

NOMINATIONS—CITIES AND TOWNS.—Must be filed fifteen days prior to date of election. March 13th too late when election is held on the 27th.

March 16, 1916.

C. C. WILLIAMS, *City Clerk,* Valley Junction, Iowa.

DEAR SIR: You state the following situation with reference to the coming election of city officers in Valley Junction:

The only certificates of nomination or petitions, placing candidates in nomination for any of the city offices, were filed on Monday, March 13th, or later, and you ask what method to pursue in the printing of ballots for the city election.

A filing on Monday, March 13th, would be one day too late for filing under the provisions of the statute, and as the fifteenth day fell on Sunday a filing on Monday was in fact two days too late to print the names of the persons nominated upon the official ballot. In my opinion the only way that you can take care of this matter is by printing a blank ballot leaving blank the spaces for candidates for all offices.

JOHN FLETCHER, *Ass't Att'y Gen'l.*

ELECTION—CITY NOMINATIONS.—When filed too late not such vacancy as would permit its being filled by committee under section 1102.

March 16, 1916.

LESTER THOMPSON, *Attorney,* Des Moines, Iowa.

DEAR SIR: Replying to your inquiry over the telephone, will say that this department has heretofore held that where no nominations for city offices were filed within the time required by law it would be the duty of the election officials to prepare a blank ballot, leaving thereon blank lines upon which the voter may write

the name of the person of his choice for each office to be filled at such election and that there is in such case no such vacancy occurring in the nomination as would permit the same being filled by any committee as contemplated by section 1102 of the code.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

ELECTIONS—CITY NOMINATION—WITHDRAWAL.—Person may not refile after 15-day limit, if proper withdrawal has been mad as provided by section 1101, Supplemental Supplement, be fore said fifteen days.

March 17, 1916.

CARL P. MILLER, Jewell, Iowa.

DEAR SIR: Replying to yours of the 16th instant addressed to the attorney general, will say that if the candidate referred to, whose paper was filed before the fifteen-day limit expired, withdrew his nomination by written request signed and acknowledged by him before any officer empowered to take the acknowledgment of deeds and filed the same with the city clerk fifteen days before the day of the election, then his name should not be printed upon the ballot merely because he refiled his petition after said fifteen-day limit had expired and if his withdrawal was not so filed as provided by section 1101, supplemental supplement, 1915, then his name should appear upon the ballot. If his name does not appear upon the ballot, then persons desiring to vote for him might write in his name on a blank line which must appear upon the ballot for each office to be filled whether candidates are nominated for that office or not.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

CONSOLIDATED SCHOOL—BALLOT BOX.—Separate box for those within incorporated city, also for those in platted village and also for those outside either of these.

March 17, 1916.

GEO. H. BARTELS, *Cashier,* Benton, Iowa.

DEAR SIR: Replying to yours of the 15th instant will say that on a proposition to form a consolidated independent school district a separate ballot box should be provided for those residing inside the corporate limits of an incorporated city or town located within the proposed district, and if there is a platted village not

incorporated, then a separate ballot box should be provided for those residing within the platted portion of such village and those residing outside the incorporate limits of cities and towns and outside the platted limits of unincorporated villages should also vote in a separate box.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

ELECTIONS — CITY NOMINATIONS — BLANK BALLOTS — PASTERS.— Nominations must be made the full fifteen days before or ballot must be blank. "Insert in writing" used in section 1119 means in writing or by paster bearing written, typewritten, printed or stamped name of candidate.

March 20, 1916.

J. T. STANGL, *Councilman,* Dedham, Iowa.

DEAR SIR: Replying to yours of the 18th instant, will say that this department has heretofore held that it was the duty of the election officials to disregard all nomination papers filed less than fifteen days prior to the election and that blank ballots should be printed having thereon blank lines upon which to write the name of some person for each office to be filled, together with square opposite such name in which to make proper mark for the name thus to be inserted.

You now inquire whether or not it will be lawful to make use of printed pasters for the purpose of inserting the names of the persons to be voted for. This question is not entirely free from doubt. The general rule is that where the statute so provides the voter may use printed pasters for the insertion of names not on the ballot instead of writing them in the space reserved for their reception, but otherwise not. 15 Cyc. 356.

The section of our statute material for consideration reads as follows:

Code Section 1119:

> "Upon retiring to the voting booth, the voter shall prepare his ballot by placing a cross in the square opposite the name of each candidate for whom he desires to vote. The voter may also *insert in writing* in the proper place the name of any person for whom he desires to vote, making a cross opposite thereof."

It is manifest that the insertion of the name may be made by writing in the name, by stamping it in or by inserting a paster bearing such name written, printed or stamped thereon, but whether each of these methods would comply with the law, and if not which would fail to be a compliance, are the real questions.

Under a statute of Illinois which provided that the voter "may prepare his ballot *by writing in* the name of the candidate of his choice in the blank space on said ticket," it was held that it did not follow that he might also indicate his choice by pasting a printed name on the ticket. The supreme court says: "Such pasting of the name does not come within the meaning of the words 'writing in the name of the candidate of his choice in the blank space on said ticket.'" However, it will be observed that this statute contemplated that the voter himself should write in the name. *McSorley vs. Schroeder,* 196 Illinois, 99.

Under a statute of Pennsylvania which provided that the voter should "prepare his ballot by marking in the appropriate margin or place * * * opposite the name of the candidate of his choice, for each office to be filled or by *inserting* in the blank space provided therefor any name not already on the ballot" it was held that stickers might be used for inserting such names, the supreme court saying: "It would be a strange construction to hold that the word 'inserting' as used in the act means *'inserting by writing.'* It certainly does not say so and we see no reason why we should place this construction upon it." *DeWalt vs. Bartley,* 15 L. R .A., 771; also *Ray vs. Hogan,* 108 N. E., 105.

However, it will be observed that our statute makes use of the words "insert in writing" instead of merely the word "insert" and, while on the authority of the case last cited it would seem that the insertion might be made by use of the paster, we have yet to determine whether or not the name appearing on the paster must be in writing, or may it also be stamped or printed upon the paster.

It has been held in many cases that the word "writing" embraces printed words. See 8 Words & Phrases, page 7539.

Under the constitution of Massachusetts which provided that every member of the House of Representatives should be chosen by written votes it was held that a printed ballot should have been received and counted. *Henshaw vs. Foster,* 26 Mass., 319, and under a statute requiring deeds, bonds, tickets and the like to be in writing the term "writing" was held to include printing as well as script. *Benson vs. McMahon,* 127 U. S., 457.

Under a statute of Minnesota which provided, "When the voter so desires, he may write other names in the blank spaces under the printed names of candidates and the names so written shall be counted" it was held that pasters might be used, the supreme court saying: "The blank spaces are left on the official ballot to enable every voter, who so desires, to vote for any eligible elector he pleases. This is his constitutional right. The statute then must be liberally construed and with reference to well understood methods of expressing any matter in writing in vogue at the time the statute was enacted. So construing it, the words 'write' and 'written' as used therein, include any mode of representing words or letters as provided by statute. Therefore, our construction of the statute here in question is that it gives to a voter who desires to vote for a person other than those whose names are on the official ballot the right to express the name of the person for whom he intends to vote by writing or putting his name in the blank space, and, further, that if he intends to avail himself of the latter method, he may, before going into the booth, provide himself with and use the printed or typewritten name of his choice on adhesive paper: that is, with the so-called paster or sticker." *Snortum vs. Homme,* 119 N. W., 59.

In view of these decisions and the language of our statute I am of the opinion that the name may be inserted by the voter in writing or by a paster, bearing the written, typewritten, printed or stamped name of a candidate for whom he desires to vote.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

COUNCILMEN.—In commission plan cities should devote all of their time to that office.

March 20, 1916.

WM. KING, Cedar Rapids, Iowa.

DEAR SIR: Replying to yours of the 18th instant will say that while there is no direct provision requiring members of the city council to bestow all of the time upon the duties of the office, yet the spirit of the law contemplates that such an officer be free to give his services to the city at all times.

Whether or not in your case your duties as an officer of the King's Crown Plaster Company or your duties as vice president of the People's Savings Bank, or both combined might interfere with

your duties as councilman of your city would be a question of fact rather than law and would depend, among other things, upon the size of the city and the amount of work required of the officers of such city.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

ELECTIONS—CITY NOMINATIONS—USE OF STICKERS, BLANK BALLOT

Stickers may be used separately for each office without square thereon, and marked by voter after going into booth, where no nominations made.

March 21, 1916.

HENRY H. JEBENS, *County Attorney,* Davenport, Iowa.

DEAR SIR: Replying to yours of the 20th instant will say that the questions which you propound briefly stated are as follows:

1st. What form of ballot should be provided by the election officials where no nominations have been made?

2nd. May stickers be made use of by the voters in the marking of their ballots?

3rd. Must the stickers be used separately for each person voted for, or may the names of candidates for different offices be included upon the same paster?

4th. May the squares be printed upon the paster or only upon the ballot?

5th. If printed upon the paster may the same be marked by the voter before going into the booth?

Replying to your first question will say a blank ballot should be provided.

Replying to your second question will say that section 1119, supplement to the code, 1913, provides among other things, "The voter may also insert *in writing* in the proper place the name of any person for whom he desires to vote, making a cross opposite thereto." Sub-division 18 of section 48 of our code provides: "The words 'written' and 'in writing' may include any mode of representing words and letters in general use, except that signatures * * * must be made by the writing or mark of the person." Under a statute in Minnesota which provides that the voter may write other names in the blank spaces and under a similar statute defining the scope of the words "write" and "written" it was held that the voter "may provide himself before going into the booth with, and use, the printed or typewritten name of his choice

on adhesive paper; that is with the so-called paster or sticker." *Snortum vs. Homme,* 119 N. W., 59. See also *DeWalt vs. Bartley,* 15 L. R. A., 771; *Ray vs. Hogan,* 108 N. E., 105.

Replying to your third question: The stickers, if used, should bear the name of but one person and be used separately.

Answering your fourth question will say the squares should be printed upon the ballot and not upon the paster, and should only be marked by the voter in the booth.

Even if one ticket has been nominated, blank lines should also be added for the reception of the paster or the written name of the person for whom the voter desires to vote for each office to be filled.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

ELECTION—CITY NOMINATION.—Blank line for each office must be provided even though one ticket is properly nominated.

March 21, 1916.

MR. E. E. COAKLEY, Ryan, Iowa.

DEAR SIR: Replying to yours of the 20th instant will say that even though one ticket has been properly nominated a blank line and square for each office to be filled should also appear upon the same ticket and in the same column immediately following the names printed on the ballot in order that the voter may write in or paste in by means of a sticker the name of the person for whom he desires to vote for each office to be filled.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

NOMINATION PAPERS.—Where all councilmen are interested the clerk and mayor should determine objections to nomination papers.

March 21, 1916.

JAMES ROBERTSON, *Mayor,* Washta, Iowa.

DEAR SIR: Replying to yours of the 20th instant will say that I am enclosing copy of an opinion heretofore given which is in accord with the written opinion which you have that nomination papers filed on Sunday, the 12th, are on time and that filing on such day is not illegal.

With reference to your other question where all the councilmen are interested then in my judgment the clerk and mayor should determine the objections made to nomination papers.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

POOL AND BILLIARD HALL—CLUB—MINORS.—A pool or billiard hall run for a membership only cannot admit minors.

March 21, 1916.

JOHN CUNNINGHAM, *County Attorney,* Humboldt, Iowa.

DEAR SIR: Replying to yours of the 17th instant addressed to the attorney general will say that in my judgment a pool or billiard hall operated in the manner which you suggest, namely where no charge is made except through the sale of membership tickets, would be such a pool hall as that minors should not be permitted to attend or hold memberships in the club, for such would be a violation of section 5002 of the code.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

POLL TAX (HEAD)—EXEMPTION.—Members of fire companies not exempt from 50c head tax.

March 22, 1916.

E. M. NEELY, *Grinnell Fire Dept.,* Grinnell, Iowa.

DEAR SIR: Replying to yours of the 21st instant will say that by section 2462 of the code persons while active members of the fire engine, hook and ladder, hose, or any other company for the extinguishment of fire are exempt from military duty and labor on the roads on account of poll tax and from jury service, yet they are not exempt from the fifty cents head tax imposed on each male resident over twenty-one years of age by sub-division 2 of section 1303, supplemental supplement, 1915.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

GOVERNOR—PROCLAMATION.—Proclamation required to be given in connection with the equal suffrage amendment.

March 23, 1916.

HON. GEORGE W. CLARKE, *Governor.*

SIR: Replying to your oral request for the opinion of this department as to whether or not a proclamation is required to be given by you in connection with the submission of the proposition to amend the constitution of the state by granting equal suffrage, which proposition is, pursuant to the joint resolution of the general assembly, required to be submitted to the people at the time of the coming June primary election, will say that, in my judgment, the inquiry should be answered in the affirmative.

Section 1061 of the code provides for a proclamation to be given thirty days before any general election. Section 1062 of the code provides for publication of the same by the sheriff in each of the several counties. Section 1063 of the code provides:

> "A similar proclamation shall be issued before any special election *ordered by the governor,* designating the time at which such special election shall be held; and the sheriff of each county in which such election is to be held shall give notice thereof, as provided in the last section."

While it is true that this election is not one ordered by the governor within the meaning of this section, yet it is a special election and, in this connection, I call your attention to the provisions of sections 57, 58 and 59 of our code which reads as follows, respectively:

> "Whenever a proposition to amend the constitution is submitted to a vote of the electors, the governor shall include such proposed amendment in his election proclamation."

> "The general assembly may provide for the submission of constitutional amendments to the people *at a special election for that purpose,* at such time as it may prescribe, proclamation for which election shall be made by the governor, and the same shall in all respects be governed and conducted as prescribed by law for the submission of constitutional amendments at a general election."

"Expenses incurred under the provisions of this chapter shall be audited and allowed by the executive council, and paid out of any money in the state treasury not otherwise appropriated."

C. A. ROBBINS, *Ass't Att'y Gen'l.*

TOWNSHIP TRUSTEES.—Cannot erect building for road machinery.
BOARD OF SUPERVISORS.—Can employ outside attorney in a case appealed to supreme court.

March 24, 1916.

F. B. SHAFFER, *County Attorney,* New Hampton, Iowa.

DEAR MR. SHAFFER: I have your letter of the 20th instant in which you propound two inquiries.

The first inquiry is whether township trustees would have the authority to erect a building costing $200.00 for the purpose of housing road machinery and for use as a place for holding elections and meetings of the trustees. I do not find anything in the statutes which would authorize an expenditure of this kind by the trustees, and believe that the only safe course to pursue is under the provisions of sections 567 and subsequent sections of the code relating to the erection of township halls.

Upon your second question as to whether the county attorney is required to represent the board of supervisors in a case appealed to the supreme court will say that I do not know of any statute which expressly makes it the duty of the county attorney to appear in cases of that character, and the board no doubt would have authority to pay the services of an outside attorney in such matters.

JOHN FLETCHER, *Ass't Att'y Gen'l.*

PRIMARIES—APRIL PRESIDENTIAL.—Term of office of delegates to presidential primaries ceases when the convention adjourns.

March 25, 1916.

LUTHER I. AASGAARD, Forest City, Iowa.

DEAR SIR: Your letter of the 24th instant with reference to the duties of delegates selected at the April primaries, addressed to the attorney general, has been referred to me for reply.

There is no provision in the law fixing the term of service of delegates elected at the presidential primaries in April. Neither is there any provision as to the length of time delegates selected to the first state convention or the presidential convention shall serve, but after the precinct delegates, selected at the April primaries, meet in county convention and select delegates to the state convention and adjourn there is no further duty for them to perform and for all practical purposes their offices cease to exist. The delegates to the state convention after they meet and adjourn have no further duties to perform. The regular party delegates will be selected at the June primaries and these delegates will attend county conventions and nominate candidates for offices not filled in the primary, and select delegates to the state convention. These delegates that are selected in June serve for two years and the delegates that they select to the state convention will be the only ones entitled to sit in the state convention that will meet after the June primaries.

JOHN FLETCHER, *Ass't Att'y Gen'l.*

LIBRARY.—Township cannot unite with town in the expense of erecting a library building.

March 25, 1916.

MISS JULIA A. ROBINSON, *Secretary Library Commission.*

DEAR MISS ROBINSON: I have your letter of the 21st instant in which you request to be advised as to whether a township can unite with a town in the erection of a library building and pay a share of the expense of its construction from the township funds.

I do not find any provision of our statute which would authorize a township to expend funds to aid in the construction of a library building. A township may contract for the use of a library and levy a tax of not exceeding one mill on the dollar for the purpose of bearing the expense of such contract, but there is no law authorizing it to join with some other corporation in the erection of a building.

JOHN FLETCHER, *Ass't Att'y Gen'l.*

SCHOOL TAX SUBMITTED.—Two may be submitted at one time.

March 28, 1916.

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

DEAR SIR: Replying to your inquiry as to whether or not, under the provisions of sections 2820-d1 to 2820-d5 inclusive, two or more separate propositions to vote a tax for the building of two or more separate school buildings may be submitted at the same election and whether or not, when separate petitions are filed asking for two or more such school buildings, it is incumbent upon the board to submit each question to a vote of the people and whether or not either would take precedence over the other and as to whether the petitioners signing petitions for such purposes must sign in ink, will say that, in my judgment, it is incumbent upon the board to submit each of the propositions properly petitioned for even though they may be, to some extent, conflicting, and, in such case, neither petition nor propositions would take precedence over the other.

In my judgment, however, the board would not be required to submit both questions at the same election, but they might do so. In the event that two such propositions would carry and the aggregate amount of bonds voted exceeded the limit of indebtedness which the district might incur, then, of course, it would be impossible for the district to sell the full amount of bonds voted and in such case they might even have difficulty in selling an amount equal to the amount of indebtedness which the statute permits the district to incur.

If the propositions are submitted separately then, in my judgment, the one last submitted should not be submitted for an amount which would make the aggregate indebtedness of the district greater than the statutory limit permits.

Such petitioners need not sign in ink.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

BOARD OF PAROLE.—James Davidson decision. Defendant being over 16 years, his sentence should be treated as life sentence under indeterminate law even though judge imposed only 20 years.

March 28, 1916.

HONORABLE BOARD OF PAROLE.

GENTLEMEN: Replying to yours of the 27th instant addressed to the attorney general relative to the sentence imposed upon one James Davidson will say from the portion of the judgment entry quoted in your letter nothing appears showing the age of the defendant, nor does anything appear showing that the crime was in fact committed subsequent to July 4, 1907, so as to bring the case within the indeterminate sentence law.

If the defendant was in fact over sixteen years of age and if the crime was in fact committed subsequent to July 4, 1907, then the judgment of the court imposing the twenty year sentence only instead of the life sentence would be erroneous. See *Adams vs. Barr,* 154 Ia., 83. However, as the defendant might have been under sixteen years of age and as the felony might have been committed prior to July 4, 1907, (although not probable in view of the fact that his plea of guilty was entered June 8, 1915, nearly eight years subsequent to the date fixed for the taking effect of the indeterminate sentence law) every presumption is in favor of the correctness of the judgment of the trial court. In the case above cited our supreme court in making this same point said:

> "So far as appears, the appellant's crime may have been committed prior to July 4, 1907, and that fact may have been clearly shown on the trial. The indictment is not before us, and whether it contained any allegation or averment as to the date of the offense we have no means of knowing. Indeed, it does not appear whether the indictment was found or returned before or after July 4, 1907. On this showing the presumption of regularity which attaches to the proceedings of a court of record must be given effect, and we cannot hold that its judgment imposing a determinate sentence is void. To do so we would have to indulge in the mere conjecture that plaintiff's offense was committed after July 4, 1907, and upon that conjecture alone hold that the trial court exceeded its powers. Such a holding would be a most

> radical departure from rules which have had the sanction of the courts from the beginning of our judicial history. The court had the power to impose a determinate sentence in certain cases of burglary. It did impose such a sentence. There is nothing shown to indicate that this particular burglary was not of the class or kind which could properly be so punished. We must, therefore, presume the court did its duty, and that the sentence for two years was properly entered."

Hence, under the holding in that case, unless the facts above referred to as being not shown are, in fact, shown by the record, your first question which reads as follows:

> "In view of the foregoing facts and of the penalty for rape as fixed by Section 4756, is this man in on a twenty year sentence or a life sentence?"

should be answered by saying that the defendant is in on a twenty year sentence. Your second question reads as follows:

> "In case a district judge through error or otherwise fixes the length of sentence at a less time than the statute provides, what is the proper course for the board of parole to pursue?"

In such case the board should ignore the sentence and follow the indeterminate sentence law where all facts appear of record showing that the indeterminate sentence law applies. Where they do not so appear of record, then the presumption is in favor of the correctness of the judgment of the trial court and it should be followed.

If the record shows that the crime was in fact committed subsequent to July 4th, 1907, and also that defendant was over sixteen years of age, then his sentence should be treated as a life sentence under the indeterminate law, even though the trial judge imposed a twenty year sentence only.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

ELECTION—SCRATCHING BALLOT.—Ballots should be printed with blank lines for writing in names. Would not vitiate the ballot if omitted. The scratching of a name on the ballot does not spoil the entire ballot.

March 29, 1916.

M. C. BARRY, Belmond, Iowa.

DEAR SIR: Yours of the 28th instant, addressed to the attorney general, has been referred to me for reply.

Your first question, briefly stated, is whether or not upon the ballot used at your recent election there should have been provided blank lines preceded by a square for use in writing in or pasting in the names of candidates whose names did not appear upon the printed ballot.

This question should be answered in the affirmative. However, the failure to provide such blank line and square would not, in my judgment, vitiate the election. See section 1122. Those interested in having the ballot in proper form should have compelled the election officers to have provided such ballot in proper form in time for use at the election by a mandamus proceeding in court, if necessary.

Your second question is:

> "Can a ballot be counted at all if a man's name has been scratched thus, John Smith. Does this spoil the whole ballot?"

If the party voting marked a cross in the square preceding the name "John Smith" and then drew a line through such name indicating an intention not to vote for such person, in my judgment, the ballot should not be counted for John Smith. However, this would not spoil the whole ballot unless there is some further evidence tending to show that this means was used as a mark of identification. See *Voorhees vs. Arnold,* 108 Iowa, 77; and *Kelso vs. Wright,* 110 Iowa, 560.

Your third question is: "What is a spoiled ballot?" The statute does not define a spoiled ballot, but in my judgment any ballot which the voter intentionally, or through mistake, marks in such a way as that he can no longer make use of such ballot in properly expressing his choice of candidates should be deemed a spoiled ballot.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

ELECTION—NOMINATIONS FOR STATE OFFICE.—Nomination papers for state offices must be filed at least forty days prior to date of the primary.

March 29, 1916.

HON. B. J. HORCHEM, Dubuque, Iowa.

DEAR MR. HORCHEM: I have your letter of the 27th instant with reference to the filing of nomination papers and note what you say with reference to the date for filing.

Section 1087-a10 of the supplement to the code, 1913, contains the provision with reference to the date for filing nomination papers for the various offices. For a state office the nomination paper must be filed at least forty days prior to the date of the primary, and there is no provision that prohibits a filing more than sixty days prior to such primary. Under the law a filing might be made three months before the primary or even earlier than that.

With reference to the filing of the affidavit I would call your attention to the same section and you will note that near the close of that section there is a provision that the candidate shall make and file affidavit stating that he is eligible to the office he seeks and "shall file such affidavit with the nomination paper or papers, when such paper or papers are required." It would seem from this that it would be necessary to file the affidavit at the same time as the papers are filed and not later.

JOHN FLETCHER, *Ass't Att'y Gen'l.*

ELECTIONS—FILING NOMINATION PAPER.—Nomination paper can be filed on Sunday when that day is the 15th before election; act of clerk purely ministerial.

March 30, 1916.

ROBERT O. BATES, Washta, Iowa.

DEAR SIR: Replying to yours of the 17th instant, addressed to the attorney general, will say that in my judgment a nomination paper filed on Sunday, the 12th of March should be printed upon the ballot with the same force and effect as though filed on the previous day. The 12th instant would be the fifteenth day prior to the holding of the election and if a filing may lawfully be made on that day then it would be sufficient. The act of the clerk in filing a nomination paper is purely a ministerial act and

our supreme court has held that a ministerial act may be performed on Sunday.

It has been held that a four days' notice of introduction of additional witnesses against a defendant under indictment may be served on Sunday.

State vs. Lyon, 113 Iowa, 536.

And where the publication of notice is required for a given number of weeks that one or more of such publications may be made on Sunday.

Nixon vs. Burlington, 141 Iowa, 316.

And even that a judgment of the court may be entered upon the record on Sunday.

Puckett vs. Guenther, 142 Iowa, 35.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

INTOXICATING LIQUORS.—Record of kept by drayman. Drayman must keep record if he has office where he employs an agent.

March 30, 1916.

CLARENCE MCCONNELL, Creston, Iowa.

DEAR SIR: Replying to yours of the 28th instant will say that in my judgment section 2421-b, supplemental supplement, only requires the drayman to keep a record of the delivery of liquors where he keeps an "office where he employs an agent or other person to make delivery of freight and keep records relative thereto." That is to say if such drayman has an office more or less remote from the railway station where he picks up the shipment, to which office the same is taken for delivery the same as other merchandise, and if he keeps a record there to show the delivery of other merchandise, then he must keep the record required with reference to intoxicating liquors; otherwise not.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

SECRETARY OF STATE.—Auto Law. No penalty on auto fee paid on April 1st.

April 1, 1916.

HON. W. S. ALLEN, *Secretary of State.*

SIR: Replying to yours of this date for construction of the provision of the automobile law requiring the imposition of a penalty of ten per cent on registration fees not paid by April 1st will say that the language of section 1571-m7, material to be considered, reads as follows:

> "On April 1st of each year a penalty of ten per cent shall be added to all fees not paid *by that date.*"

The question is whether or not this language permits the payment of such fees on April 1st, without penalty, or whether, if the fees are paid on that day, a penalty must be imposed. The question is not entirely free from doubt as respectable authorities on either side of the proposition may be found.

There is a line of cases holding that the word "by" means "before."

Express Co. vs. Aldine Press, 126 Pa. St., 347;
Miller vs. Phillips, 31 Pa. St., 218;
Rankin vs. Woodworth, 3d Penn. & W., 48;
Wilson vs. Rodeman, 8 S. E., 855.

However, in my judgment, the weight of authority holds the word to be the equivalent of "not later than" or "as soon as" or "as early as" or "on or before."

Coonley vs. Anderson, 1st Hill, 519;
Wachsmith vs. Routledge, 51 Pac., 443;
Elizabeth Cottonmills vs. Dunston, 121 N. C., 12;
Higley vs. Gilner, 3 Mont., 433;
Babcock vs. Clark, 133 N. C., 306;
Ferguson vs. Coleman, 3d Rich. 99.

In view of this state of the authorities, and, in view of the fundamental rule that statutes imposing a penalty are to be construed strictly so as not to impose the penalty unless it is clearly provided, I am of the opinion that no penalty should be exacted upon applications for registration made on April 1st, and that the first date on which the penalty might be imposed would be on the next registration day thereafter.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

PRIMARY.—Delegates selected at presidential primary do not displace delegates selected at June primary and have no duty to perform in connection with selection of county, district or state officers.

April 5, 1916.

BURT J. THOMPSON, *Attorney,* Forest City, Iowa.

DEAR SIR: Replying to yours of the 1st instant addressed to the attorney general will say that this department has heretofore held that the delegates to the county convention to be selected under sections 1087-a36, 1087-a37, 1087-a38 and 1087-a39 and the county and state conventions of such delegates are entirely separate and distinct from the delegates and conventions provided for by sections 1087-a25, 1087-a26 and 1087-a27, and that the first mentioned delegates and conventions do not even in presidential years displace the delegates or conventions last mentioned, and that neither the delegates elected at the April presidential primary nor the conventions held by them would have any duty to perform in connection with the selection of county, district or state officers but that such officers, when not nominated by the vote at the primary, would be nominated by the delegates and at the conventions provided for in sections 1087-a25, 1087-a26 and 1087-a27.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

SUFFRAGE.—Election on suffrage a special election. Registrars should comply fully with provisions covering board of registrars.

April 5, 1916.

REALFF OTTOSEN, *Ass't County Attorney,* Davenport, Iowa.

DEAR SIR: Replying to your request of April 3rd for copy of opinion relative to the necessity for registration on and prior to the June primary will say that by section 58 of our code, it is provided:

> "The general assembly may provide for the submission of constitutional amendments to the people *at a special election for that purpose,* at such time as it may prescribe, proclamation for which election shall be made by the governor, and the same shall in all respects be governed and conducted as prescribed by law for the submission of constitutional amendments at a general election."

The joint resolution of the thirty-sixth general assembly relating to suffrage, together with the act in connection therewith, provided for the submission of the question to the people at the June primary. In my opinion this would render the election on the suffrage question a special election even though it is to be held on the day of the regular June primary election; hence, it follows that such election would be a special election within the meaning of section 1077 which requires:

> "The registers shall meet on the second Thursday prior to any general, city or special election, at the usual voting place in the precinct in which they have been appointed, and shall hold continuous sessions for two consecutive days, from eight o'clock in the forenoon until nine o'clock in the afternoon."

Such registrars should also meet on the Saturday before the primary election during the same hours as required by section 1080. They should also be in session on primary election day during the time the polls are open as provided by section 1082. In other words, they should comply fully with the provisions covering boards of registrars found in sections 1076 to 1083, inclusive, the only difference between special and general elections being that no notice of the times and places of making registration is required to be published at such special election as is required by section 1085 in case of general elections.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

ELECTION.—Refusal of ballot not justified because of less than 10 days' residence in precinct.

April 6, 1916.

HUGH P. STUART, *County Attorney,* Dubuque, Iowa.

DEAR SIR: I am enclosing herewith letter of E. T. Baer of your city relative to the position taken by the judges of election in refusing his ballot at the recent election. This department has held that the statute requiring ten days' residence in the precinct being in conflict with the constitution of the state which requires alone six months' residence in the state and sixty days in the county in addition to citizenship in the United States, is inoperative and should not be enforced.

I trust that you will see that the election officials are properly advised and that there may be no further occasion for complaint.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

LODGE PROPERTIES—EXEMPTION, TAXATION.—Not exempt when leased or otherwise used for pecuniary profit.

April 6, 1916.

C. H. HUNT, Clarksville, Iowa.

DEAR SIR: Replying to yours of the 28th ultimo will say with reference to the taxation of lodge properties that this department has heretofore fully considered the matter and notwithstanding the cases to which you refer, *Lacy vs. Davis*, 112 Iowa, 106, and *Morrow vs. Smith*, 145 Iowa, 514, such property is not exempt from taxation under the provisions of sub-division 2 of section 1304, supplemental supplement where the same is "*leased* or otherwise used with a view to pecuniary profit."

In the first case to which you refer the exemption was denied on the ground that the property was not used exclusively for lodge purposes, except for about four days in the year. In the second case to which you refer the only question determined was that the lodge was a charitable institution within the meaning of the law exempting such institutions from collateral inheritance tax and conceding, for the purpose of the argument, that the lodge is a charitable institution, still under the terms of the section above referred to, the exemption is not available where the property is leased even though the rental received may be applied to the same purpose.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

TAXATION.—Real estate belonging to bank assessed same as though belonging to individuals. Value is fixed without reference to amount actually invested in said real estate, that is on its actual value.

April 6, 1916.

R. E. BARR, *Assessor*, Wapello, Iowa.

DEAR SIR: Replying to yours of the 5th instant addressed to the attorney general will say that the real estate belonging to the bank should be assessed in the same manner as other real estate

belonging to individuals without reference to the amount of the bank's capital invested in such real estate. The bank stock belonging to the stockholders of the bank should be assessed at its fair value, taking into account the capital surplus, undivided profits and deducting therefrom the amount of the bank's capital actually invested in real estate without reference to the value of the real estate in which the same is invested.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

COUNTY ATTORNEY.—Percentage of fines. Office rent, fuel, lights, etc., should be allowed him if not provided by board of supervisors. *Hill vs. City of Clarinda,* 103 Ia., 409.

April 7, 1916.

HENRY H. JEBENS, *County Attorney,* Davenport, Iowa.

DEAR SIR: Yours of the 31st ultimo duly received and with reference to the questions in dispute between your county and the ex-county attorney, Mr. Vollmer, will say that I am still of the opinion that Mr. Vollmer is not entitled to the ten per cent straight on all fines but only upon certain fines as heretofore suggested and upon the others he is entitled to ten per cent on the first two hundred dollars of each fine, five per cent on the next three hundred dollars, three per cent on the next five hundred dollars and one per cent on excess of one thousand dollars, the same as is provided for by the statute where suits are brought upon written instruments containing agreement for the payment of attorney's fees by the defendant.

With reference to the claim of Mr. Vollmer on which he seeks to recover from the county for office rent, fuel, lights, etc., will say that section 468 of the code provides:

> "The board of supervisors shall furnish the clerk of the district court, sheriff, recorder, treasurer, auditor, *county attorney* and county superintendent with offices at the county seat, together with fuel, lights, blanks, books and stationery necessary and proper to enable them to discharge the duties of their respective offices."

It has been held by our supreme court, construing a similar statute which required the city council to provide the mayor with an office at some convenient place in the city, that where the coun-

cil failed to provide or assign to the mayor such office rooms he might provide the same at his own expense and recover from the city the reasonable rental value thereof. See *Hill vs. City of Clarinda*, 103 Iowa, 409.

Other authorities having more or less bearing on the question have been submitted by yourself on the one hand and by Mr. Vollmer on the other, all of which have been duly considered, and, without attempting to review the several authorities cited, I am inclined to the opinion that the case already referred to and the terms of the statute are controlling and that if no suitable office room was assigned to Mr. Vollmer, the county attorney, by the board of supervisors he had the right to select suitable office rooms at the county seat and that he would have the right to recover from the county the reasonable rental value thereof, together with a reasonable cost for fuel, lights and other supplies required. The mere fact that at the time of collecting his salary he failed to make any claim for office rent would not bar him by estoppel or otherwise from collecting such rent.

The briefs which you forwarded me are herewith returned.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

FISH AND GAME WARDEN—AUTOMOBILE ORDINANCES.—Speed ordinances of cities and towns must be complied with by game warden as well as other persons.

April 7, 1916.

W. M. DEAN, *Mayor*, Lake View, Iowa.

DEAR SIR: Replying to yours of the 4th instant will say that neither the deputy state fish and game warden nor any other person is exempt from the operation of properly enacted speed regulations by reason of his official position. However, for any one to be guilty of violating the speed laws the act constituting such violation must be wilfully done for it is the unlawful intent that is the essence of all crime. For instance, if, while passing through a territory in which a speed regulation is in force, the equipment by which the speed of the car is regulated fails to operate so that the speed of the car exceeds the limit in spite of all the operator could do no one would contend that the operator should in such case be punished, although there has been a violation of the letter of the law. So in this case, if by reason of the employment of the officer his attention was distracted from the operation of the car by the

other official duties in hand to such an extent that he did not realize that he was exceeding the speed limit the court or jury should hesitate to convict, but if he knew and realized that he was exceeding the speed limit then he would not be exempt from the operation of the law even though in the performance of an urgent official duty.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

SHERIFF.—Entitled to charge for board furnished escaped patients of state institutions; also to 40c per hour for time employed in going to and from prisons, asylums, etc., sub-div. 16, section 511, supplement to the code, 1913. Paid by Board of Control under section 2310-a30, or 2310-a30-a, supplement to the code, 1913.

April 7, 1916.

M. C. MACKIN, *Superintendent Inebriate Hospital,* Knoxville, Iowa.

DEAR SIR: Replying to yours of the 5th instant will say that under sub-division 16 of section 511, supplement to the code, 1913, the sheriff would in my judgment be entitled to charge for meals furnished an escaped patient the same as for boarding a prisoner, and under sub-division 20 of the same section he would be entitled to necessary traveling expenses actually paid out by him including board and railroad fare incurred in the capture and delivery of such escaped patient. The same sub-division provides compensation of 40c per hour for the time necessarily employed in going to and from said prisons, asylums, etc. This provision for compensation would not in my judgment apply to a case where the sheriff does not go outside his own county in making the capture unless he would undertake to deliver the patient captured in his county either at the inebriate hospital or at some intermediate point, in which event he should be allowed the 40c per hour.

In my judgment the particular charges and expenses, whatever they may be, should be paid by the board of control under section 2310-a30, supplement to the code, 1913, which reads as follows:

> "The law as it appears in section twenty-three hundred ten-a thirty, supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"'In case of the escape of any patient from the hospital all necessary expenses incurred in the recapture and recommitment of such patient shall be paid out of any funds in the state treasury not otherwise appropriated on vouchers executed and approved as in other cases.'"

or from the contingent fund provided for in section 2310-a30-a, supplement to the code, 1913, which reads as follows:

"The board of control of state institutions is hereby authorized to permit the superintendent to pay any claims to which the three foregoing sections refer, from the contingent fund provided for by the law as it appears in section twenty-seven hundred twenty-seven-a forty-four, supplement to the code, 1907, and the institution support fund shall be credited at the beginning of each month with the amount, if any, paid during the preceding month from such contingent fund, as shown by the certificate of the superintendent approved by said board of control."

C. A. ROBBINS, *Ass't Att'y Gen'l.*

TAXATION—EXEMPTION.—Team, wagon and harness of teamster exempt if they are chief and principal means of support.

April 7, 1916.

A. W. RENSHAW, *Assessor,* Afton, Iowa.

DEAR SIR: Yours of the 6th instant addressed to the attorney general has been referred to me for reply. You ask for a construction of sub-division 5 of section 1304, supplemental supplement exempting from taxation the team, wagon and harness of the teamster or drayman who makes his living by their use in hauling for others, and your question is whether or not one who has moved in from a farm and has money in the bank and has a team which he works upon the street on a salary of four dollars per day would be regarded as such a teamster or drayman.

My judgment is that the rule of reason must be applied to this statute as to all others and that if the chief and principal means of support of the person is the money earned by the use of such team he would be entitled to the exemption; otherwise not. And the same rule would apply to the man who uses his horses to keep the cemetery in trim. If the work is such that it requires

the use of such horses during practically the entire summer season, then in my judgment he would be entitled to the exemption even though he made no other use of the horses.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

FRANCHISE.—Forfeiture of; may not be declared on account of non-user except for such length of time as would indicate abandonment unless so specified in franchise.

April 8, 1916.

FRANK G. PIERCE, Marshalltown, Iowa.

DEAR SIR: Replying to yours of the 7th instant and especially to the inquiry propounded by Mr. Barlow, town clerk of Dumont, relative to the forfeiture of an electric light and power franchise will say that as is frequently the case the parties are asking the advice after they have made their bargain instead of before. As suggested by you, clauses are usually inserted in such franchises requiring not merely acceptance by the concern to whom the grant is made but some active work done or service furnished under the franchise within a limited and specified time and, of course, where such a provision is contained in the contract and especially if forfeiture is directly provided for on account of said failure, the forfeiture may be had.

However, in the absence of such a provision a forfeiture may only be declared by court proceedings after due notice and proof which would show an intention on the part of the concern holding the franchise to abandon the same.

Just what length of time non-user alone would furnish sufficient evidence of the intention to abandon would depend upon the facts in each particular case. For instance, in one case forty years' omission to furnish the public with the service due was held to be an abandonment. *Smith vs. Harkins,* 38 N. C., 613.

In another case eighteen years was held to raise a legal presumption of abandonment. *Hartford Bridge Co. vs. E. Hartford,* 16 Conn., 149.

In another case twenty years was held to show an abandonment. *Brearly vs. Norris,* 23 Ark., 514.

In my judgment the character of the franchise should also be considered. That is to say, if the franchise were an exclusive

one, then a much shorter period of failure to operate under it should be regarded as an abandonment than where the franchise is not exclusive, and in the case in hand you will notice by section eight of the ordinance, "The town reserves the right to grant electric light and power franchises to other persons or corporations."

Hence, the town is in no way injured by the failure of this concern to operate under its franchise, for as soon as there is sufficient demand and some other company desires a franchise, the town would be at liberty to grant the same.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

SEWAGE.—Board of Health have right to fix standard of purification of sewage disposal plants and can by removal or by mandamus proceedings compel proper officers to see that such plants are properly cared for.

April 11, 1916.

LAFAYETTE HIGGINS, *Civil and Sanitary Engineer, State Board of Health.*

DEAR SIR: Replying to yours of the 10th instant will say that your first and second interrogatories which read as follows:

> "Does the State Board of Health have the right, and is it their duty, to fix the standards of purification for sewage disposal?"
>
> "If upon inspection of a sewage treatment plant it is found that such sewage treatment plant fails to produce satisfactory purification in accordance with the standards adopted by the State Board of Health, and it is found that such failure is due to the conditions which cannot be remedied by ordinary care, shall the State Board of Health condemn such disposal plant, wholly or in part, and issue an order to the local board of health in whose jurisdiction such sewage treatment plant is located to take the necessary legal steps to provide for the proper equipment and care of such sewage treatment plant?"

should be answered in the affirmative.

In reply to your third interrogatory, which reads as follows:

> "If questions one and two be answered affirmatively, what further duty rests upon the State Board of Health relative to a sewage treatment plant thus condemned to correct the conditions produced by such sewage treatment plant?"

will say that I know of nothing further which would be required unless it would be to give additional friendly advice as to details.

In reply to your fourth inquiry, which reads as follows:

> "If the duty of the State Board of Health ceases with their condemnation of a sewage treatment plant which fails to render sufficient sewage purification, what procedure should be instituted locally to correct the conditions or to require the parties responsible for such conditions to correct the same?"

will say that the remedies available would be, removal of the officials if their failure was gross and habitual, mandamus proceedings to compel them to perform their duty, and if they suffer the nuisance to become a pubic one they might be subject to indictment.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

ELECTION, PRESIDENTIAL PREFERENCE PRIMARY.—Official ballots for delegates to county convention should be blank.

April 14, 1916.

N. B. SHAFFER, *Clerk Clay Township,* Altoona, Iowa.

DEAR SIR: Replying to yours of the 11th instant addressed to the attorney general will say that section 1087-a25 contemplates that the official ballot shall be left blank so far as the names of delegates to the county convention are concerned, the provision being:

> "The requisite number of names of candidates of his choice for delegates to the county convention to which each precinct is entitled shall be written, or pasted with uniform white pasters, on the blank lines upon the ballot *by the voter while in the booth.*"

By section 1087-a47 it is provided that section 1087-a25 above referred to, among other sections of the primary law, is made applicable to the presidential preference primary election.

Hence, it follows that at such presidential preference primary election the official ballots for delegates to the county convention should also have been blank.

The form of ballot which you enclosed is herewith returned.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

ELECTION to be held on June 5th, 1916, to which equal suffrage amendment is to be submitted is special election—Primary election boards rather than the boards which served at the last preceding general election should act as election boards. Not unlawful to use separate ballot boxes. Ballots required for non-partisan judicial nominations shall be printed on each ballot for each political party.—Separate non-partisan judicial ballot should be provided for use of voters who do not belong to any political party.

April 14, 1916.

E. J. WENNER, *County Attorney,* Waterloo, Iowa.

DEAR SIR: Replying to yours of the 12th instant, will say that it is true, as stated by you, that this department has held that the election to be held on June 5, 1916, to which the proposed constitutional amendment is to be submitted is a special election within the meaning of sections 1077 and 1089 of the code.

While it is true that section 1093 of the code provides that the election board at any special election shall be the same as at the last preceding general election, yet I am of the opinion that this provision would not apply at this election, for it is evident that the purpose of the legislature in submitting the proposed constitutional amendment at the time of the June primary was to make use of the primary election boards, which boards are made up, selected and appointed in the same manner as for the general election under the requirements of section 1087-a5, and I am therefore of the opinion that the primary election boards rather than the board which served at the last preceding general election should act in connection with the constitutional amendment special election.

With reference to ballot boxes, will say that the law nowhere makes any provision for special or separate ballot boxes for the reception of ballots on the constitutional amendment proposition. However, I am of the opinion that it would not be unlawful and

might facilitate matters if a separate ballot box were provided for the reception of such ballots.

I am of the opinion, however, that separate poll books will be required in which to record the names of those voting upon the proposed constitutional amendment and in which to certify the result. Especially would this be so in view of the fact that registration is required for those voting upon the constitutional amendment and is not required for those voting at the primary, which would unavoidably result in two separate lists of voters, some of which would vote upon one question, some upon another, still others upon both.

With reference to your other question concerning the character of ballots required for the non-partisan judicial nominations will say that this department has not held that such ballot should be printed upon separate sheets and could not well do so under the provisions of section 1087-b2, which require:

> "There shall be provided *on each ballot for each political party* a ticket entitled non-partisan judiciary ticket."

However, we did hold that for the use of voters who did not belong to any political party, within the meaning of that term as defined in section 1087-a3, there should be provided a separate ballot containing only the names of such judicial candidates as had complied with the requirements of the law to entitle them to have their names printed upon the regular ballots and this ruling will doubtless be adhered to until some further legislation is had upon the subject.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

DRAINAGE WARRANTS.—Exempt from taxation if issued after July 4, 1909; otherwise not.

April 14, 1916.

SCHANKE & CO., Mason City, Iowa.

GENTLEMEN: Replying to yours of the 12th instant addressed to the attorney general, will say that by chapter 81 of the acts of the thirty-third general assembly approved April 16, 1909, and effective July 4, 1909, there was inserted in section 1304, supplement to the code, as additional classes of property entitled to exemption from taxation the following: Municipal, school and

drainage bonds or certificates *hereafter issued.* Hence, it follows that drainage warrants issued after July 4, 1909, are exempt from taxation and those issued prior to that time are not thus exempt.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

PEDDLERS.—As to when a junk dealer will be deemed a peddler discussed.

April 14, 1916.

TOM C. WHITMORE, *County Attorney,* Atlantic, Iowa.

DEAR SIR: Replying to yours of the 12th instant addressed to the attorney general relative to the construction of section 1347-a, supplement to the code, 1913, will say that the question as to whether or not one who buys junk from the farmers and sells the same at wholesale or retail would be a peddler within the meaning of the section referred to is a question of some doubt.

The term "huckster" signifies a petty dealer and retailer of small articles. *Mays vs. City of Cincinnati,* 1st Ohio State, 268.

"Huckstering" is a business carried on by persons who go from house to house buying from the farmers and afterwards selling to customers either at wholesale or retail. *Lebanon County vs. Kline,* 2 Pa. Co. Ct. R, 621.

Under the first authority ordinary junk dealers would not be included, for their purchases are not confined to small articles; however, under the second definition the dealer would not necessarily be confined to small articles in order to be a huckster.

As to whether or not the fact that the huckster pays for the junk with brooms instead of cash, or in some instances makes a direct sale of brooms instead of merely exchanging the same for junk would render him a peddler under this section, will say that I am inclined to think that where direct sales are made this would render him a peddler unless the brooms sold were articles of his own work of production, or were the work or production of his employer for whom he was selling the same, in neither of which latter events would he be a peddler.

The question is so close that you would be justified in making a test of the matter, if you feel so inclined.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

MERCHANTS.—Buying live stock for immediate shipment taxed on value of stock. Section 1318. Would not apply when bought for fattening purposes.

April 15, 1916.

H. F. GARRETT, *County Attorney,* Corydon, Iowa.

DEAR SIR: Replying to yours of the 14th instant will say that in my judgment persons engaged in buying live stock for the purpose of immediate shipment to the various markets and for sale at such points should be regarded as merchants and taxed on the average value of their stock as provided by section 1318 of the code. However, it has been held by our court that this provision would not apply to a person who buys stock for the purpose of fattening the same and for the purpose of resale thereafter. See Jewell vs. Board of Trustees, 113 Iowa 47. However, this decision would not apply to cases where the intention is not to feed but to sell and whatever feeding is to be done is merely incidental.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

PEDDLERS.—Use of automobile as vehicle. Peddlers using an automobile as a vehicle should pay same license fee as one using a two-horse conveyance.

April 18, 1916.

E. R. JACKSON, *Asst. County Attorney,* Council Bluffs, Iowa.

DEAR SIR: Replying to yours of the 17th instant will say that in my judgment one making use of an automobile in the business of peddling should be licensed in the same manner as one making use of a two-horse conveyance. The language of section 1347-a, supplement to the code, 1913, is "and $75.00 for each two-horse conveyance." While this language doubtless contemplated that the conveyance should be a horse-drawn conveyance of the size usually drawn by two horses, yet if a conveyance of that size should be drawn by dogs or oxen or other animals than horses it would hardly be claimed that such a peddler would be exempt; and applying the same rule it would seem that one making use of a vehicle which is operated by its own power, which is the equivalent of two or more horse power, should not escape the payment of the license fee required for a two-horse conveyance.

With reference to your other question will say that unless the chief and principal business should be the sale of medicines such a peddler would not be exempt as a transient vendor of drugs under this section.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

TAXATION—ASSESSMENTS—ABSENCE OF NOTICE OF.—Board of Supervisors or Assessor has no power to assess property without giving notice of such assessment. In absence of such notice assessment void and might be cancelled.

April 18, 1916.

REALFF OTTOSEN, *Asst. County Attorney,* Davenport, Iowa.

DEAR SIR: Replying to yours of the 15th instant, addressed to the attorney general, will say that in my judgment the opinion in the case of *In re Kaufmann's Estate,* 104 Iowa, 639, is not good law and that in the absence of notice of assessment is invalid. I call your attention to the language of the same court in the later case of *Ferry vs. Campbell,* 110 Iowa, at 207:

> "When the assessment is based upon value or benefits, whether it be a tax on property or succession tax, and that value is to be ascertained by appraisement, assessors, or other tribunal which involves inquiry, notice and an opportunity for hearing are essential to the validity of the proceedings. *Hagar vs. Reclamation Dist.,* 111 U. S., 701 (4 Sup. Ct. Rep. 663, 28 L. Ed 569); *Stuart vs. Palmer,* 74 N. Y. 183. The succession tax of the state of New York provides for notice to parties interested, and *In Re McPherson,* 104 N. Y. 321 (58 Am. Rep. 502, 10 N. E. Rep. 685), the supreme court of that state said: 'This tax is imposed according to the value of the legacy and collateral inheritance liable to be taxed, and hence there must be some method of ascertaining that value; and for that purpose judicial action is requisite at some stage of the proceedings before the liability of the taxpayer becomes finally fixed. He must have some kind of notice of the proceedings against him, and a hearing, or an opportunity to be heard, in reference to the value of his property and the amount of the tax which is thus to be imposed. Unless he has this, his constitutional right to due process of law has been invaded,'—citing cases heretofore referred to."

Hence, I am of the opinion that the assessment referred to is void and might be cancelled and the property assessed as omitted property on proper basis or, what would amount to the same thing, the board might make a settlement remitting the tax on the excess.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

COUNTY TREASURER—COMPENSATION.—Special charter cities of less than 2,000 regarded as special charter cities in determining additional compensation as provided by sections 490-a, supplemental supplement, 1915, and section 1010 of the code.

April 18, 1916.

HUGH P. STUART, *County Attorney,* Dubuque, Iowa.

DEAR SIR: At the request of your Mr. McGuire I am making further reply to your letter of February 8th relative to the salary of your county treasurer. Mr. McGuire has called specific attention to that portion of your letter which shows that your county treasurer does not collect all the municipal taxes for the city of Dubuque but only certain specified taxes, to-wit, health, road, park, mulct, moneys and credits, and bridge taxes. Upon further consideration of the question with this suggestion in mind I am of the opinion that the law does not contemplate that the treasurer should have his additional salary unless the special charter city and county, to-wit, Dubuque in your case, has followed the provisions of section 1010 of the code by "certifying all taxes and assessments to the county auditor as provided in section 902, chapter 11, Title V of the code as amended," which would in effect place special charter cities on the same basis as cities organized under the general law, in so far as the collection of the city's taxes through the county treasurer is concerned. So that if in your case this provision has been complied with and the treasurer has collected such of the taxes as he is able to collect then he would be entitled to the additional salary, otherwise not.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

TAX—DELINQUENT.—5 per cent penalty due and payable when claim is placed for collection.

April 20, 1916.

O. T. NAGLESTAD, *County Attorney,* Sioux City, Iowa.

DEAR SIR: Replying to yours of the 18th instant will say that this department concurs with you in the view that the 5 per cent penalty on delinquent taxes, provided by section 1407, supplement to the code, 1913, is due and payable from the delinquent tax payer whenever such delinquent tax claim has been placed in the hands of a delinquent tax collector, and should be collected from the delinquent whether the tax be collected by distress and sale or otherwise, and where demand has been made upon the delinquent by the delinquent tax collector then this penalty is due even though the collector fails to make the collection at the time of demand and the delinquent tax is thereafter paid direct to the treasurer.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

TUBERCULOSIS HOSPITAL.—City might be enjoined by township trustees from locating hospital outside city limits even though not a nuisance. *Warner vs. Stebbins,* 111 Iowa 86.

April 24, 1916.

DR. C. B. SPATES, Des Moines, Iowa.

DEAR SIR: With reference to the matter of establishing tuberculosis hospital in a rural district and as to whether or not such action might be enjoined by neighboring land owners, would say that the question is not entirely free from doubt, as there are authorities both ways on the question.

However, I think it may be laid down as a generally accepted rule of law that a hospital, whether for the treatment of ordinary diseases or for the treatment of contagious and infectious ones is not a nuisance per se, although it may become such *by reason of the place of its location,* or because of the manner in which it is conducted. See *Stotler vs. Rochelle* (cancer hospital), 109 Pac. 788, 29 L. R. A. (N. S.) 49, and many cases cited in note: *Evans vs. Foss* 9 L. R. A. (N. S.) 1028; *Barry vs. Smith,* 5 L. R. A. (N. S.) 1028; *Manhattan vs. Hessin,* 25 L. R. A. (N. S.) 228; *Summit Township vs. City of Jackson,* 18 L. R. A. (N. S.) 260; *Shepard vs. Seattle,* 40 L. R. A. (N. S.) 647.

However, there is one phase of our law which I think may give you some trouble and I call your attention to the case of *Warner vs. Stebbins*, 111 Iowa 86, wherein it was held by our supreme court, under section 2568 of our code that a city might be enjoined by the township trustees from locating a hospital outside the city limits and in the township even though it was not a nuisance, because, under the statute, they were given power to protect their territory from infection. A careful study of this case should be made and in my judgment you should secure the consent or co-operation of the township trustees.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

ELECTIONS—PROCLAMATION OF.—Sheriff not required to issue proclamation but must publish proclamation by governor.

April 24, 1916.

HON. GEORGE W. CLARKE, *Governor of Iowa.*

DEAR SIR: Replying to your inquiry of the 22d instant, which reads as follows:

> "Do the sheriffs of the various counties have to issue any proclamation in connection with any general or special election?"

will say that while the sheriffs of the various counties are not required to issue a proclamation in connection with the general and special elections, yet the sheriff in each county is required to publish the proclamation issued by the governor in connection with each of such elections. See sections 1061, 1062 and 1063 of the code.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

ELECTION.—Instructions as to procedure for special election June 5th for voting on suffrage amendment to constitution.

April 25, 1916.

B. MURPHY, Vinton, Iowa.

DEAR SIR: Replying to yours of the 22nd instant addressed to the attorney general, will say relative to the conducting of the regular primary election June 5th, together with the special election covering the proposed constitutional amendment to be held at the same time, this department has heretofore held:

1st. That the election as to such proposed amendment is a special election requiring the issuance by the governor of a proclamation under section 1061 of the code.

2nd. That the sheriff of each county should publish such proclamation in some newspaper printed in his county at least ten days prior to June 5th.

3rd. That the primary election judges and clerks should act in connection with this special election and that no separate set of officers will be required.

4th. That separate ballot boxes for the suffrage amendment ballots are permitted, but not required.

5th. That separate poll books are required. However, this is a practical question rather than a legal one, and, if proper provision is made, either in the same or in a different poll book for keeping a separate record of the person voting on the constitutional amendment, either on a separate page or column, in my judgment, the same would not be held illegal.

6th. That the election officers will not draw double pay because of the two elections, but will be paid by the hour for time consumed, as provided by law.

7th. That while the time for opening and closing the polls for general and special elections differs slightly from the hours during which the polls are to be open for the primary election, yet, as the legislature has especially provided that the constitutional amendment is to be submitted at the primary election, the hours governing the opening and closing of the polls for the primary election will govern for both elections to be held on June 5th.

And it has also been held that the following provisions with reference to registration should be complied with in cities having a population of thirty-five hundred or over:

The registrars should meet on the second Thursday, Friday and Saturday prior to June 5th at the usual voting place in the precinct and hold continuous sessions from 8 o'clock in the forenoon until 9 o'clock in the afternoon, as required by section 1077.

They should also meet at the same place between the same hours on the Saturday immediately prior to June 5th, as provided by section 1080.

They should also be in session on election day during the hours in which, by law, the polls are required to be kept open, as provided by section 1082.

Such registrars should prepare a new registry book for this election *by copying* from the poll book of the preceding general election all the names found therein, adding thereto those of all persons registered and voting at any subsequent election, as required by section 1084.

A voter already duly registered in the precinct wherein he resides and proposes to vote is not required to register prior to the June primary election, but must register anew before the general election, as required by sections 1076 and 1084.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

BOARD OF SUPERVISORS.—Member of, may not be elected when resident of same township as another member, although old member resided elsewhere when elected.

April 26, 1916.

P. T. GRIMES, Bloomfield, Iowa.

DEAR SIR: Replying to yours of the 24th instant will say that the language covering the matter inquired about is found in section 411, supplemental supplement, 1915, and reads as follows:

> "No member shall be elected who is a resident of the same township with either of the members holding over, but a member-elect may be a resident of the same township as the member who is elected to succeed."

My judgment is the prohibition is against the electing of a new member who is a resident of the same township where some of the members reside at the time of the election of a new member, for it would be immaterial that the old member may have resided elsewhere at the time of his election.

Where the place of residence of the old member is doubtful I am inclined to the view that the election of a new member could not be defeated by reason of the fact that the old member claimed a residence in the township in which the new member resided and, at any rate, the election would not be void, the provision of the statute being merely directory, and the acts of the officer would be valid as those of a *de facto* officer even though his election may have been irregular.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

FARMERS' INSTITUTE.—If no report made not entitled to state aid. If two make required report in same county probably the state aid should be divided between them.

April 28, 1916.

TOM C. WHITMORE, *County Attorney,* Atlantic, Iowa.

DEAR SIR: Replying to yours of the 27th instant addressed to the attorney general, will say that in my judgment a farmers' institute failing to make the report required by section 1675 would not be entitled to state aid for that year nor would it be entitled to share in such aid by reason of the fact that another institute in the same county had made the required report and received the state aid.

However, it may be that if both had filed the required report each would have been entitled to the aid. I simply suggest but do not undertake to determine this question, but call your attention to the decision of our supreme court with reference to allowing state aid to two or more agricultural societies in the same county in the case of *Agricultural Society vs. Shaffer,* 86 Iowa 377.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

SECRETARY OF STATE.—Withdrawal of candidate may be made if same is prepared and correctly acknowledged, Section 1101, and filed within time specified.

May 5, 1916.

HON. W. S. ALLEN, *Secretary of State.*

DEAR SIR: Replying to yours of the 5th instant in which you call attention to the provisions of section 1087-a10, supplement to the code, 1913, which provides:

> "A nomination paper when filed shall not be withdrawn, nor added to, nor any signature thereon revoked."

also to the provisions of section 1101 of the code, which provides:

> "Any candidate named by either of the methods authorized in this chapter may withdraw his nomination by a written request, signed and acknowledged by him before any officer empowered to take the acknowledgment of deeds, and filed in the office of the secretary of state thirty days, or the proper auditor or clerk fifteen days, before the day of election, and no name so withdrawn shall be printed upon the ballot."

and you inquire:

> "May a candidate who has so filed a nomination paper in this office withdraw his name as such candidate before the primary, and in this event, should the secretary of state withhold certification of his name for a place on the official ballot in the state or district, as the case may be?"

I call your attention to section 1087-a1, supplement to the code, 1913, which provides:

> "The provisions of Chapters 3 and 4, Title VI and Chapter 8, Title XXIV of the code shall apply, so far as applicable, to all such primary elections, the same as general elections, except as hereinafter provided.

Section 1101, from which you quote, is one of the sections of Chapter 3, Title VI, and would, therefore, apply unless the provision first quoted from section 1087-a10 should be regarded as a contrary provision. It will be noticed that the language has reference to the withdrawal of the *nomination paper* rather than to the withdrawal of the candidate as such.

Former Attorney General Byers has ruled that a candidate may withdraw by complying with the provisions of section 1101. (Attorney General's Report 1909, page 344.) This department concurs in that opinion.

Hence, it follows that your inquiry must be answered in the affirmative provided the withdrawal is prepared and acknowledged in the manner required by section 1101 and filed within the time therein specified, which for the present year, should be on or before May 6, 1916.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

PRIMARY ELECTION.—If previous registry lists are brought down to date, election at which such list is used would not be void. *Younker vs. Susong,* 156 N. W. 24, at 32.

May 6, 1916.

GEORGE A. WILSON, *County Attorney,* Des Moines, Iowa.

DEAR SIR: Complying with your request over the telephone, I am enclosing you copy of an opinion heretofore given relative to registration required for the coming June primary and special election.

As to whether or not the provision of section 1084 requiring the registrars to prepare a new registry book for such election is so far mandatory as that a failure to comply therewith would render the election void, will say that in discussing this proposition our supreme court in the case of *Younker vs. Susong,* 156 N. W. 24 at 32, makes use of the following language:

> "It must be admitted that from this record there was not a strict observance of the registration laws by the registration officers. But it is clear that such officers attempted to provide a means for ascertaining the citizens who shall be entitled to vote, and this is the purpose of the registration laws. It is not claimed that there was any fraud or corruption on the part of any of the election officers. A registration of some sort was had, and new names were added to the lists contained in prior pollbooks, and we think there was a substantial compliance with the statute in so far as to ascertain and furnish a list of voters entitled to vote. So that, even if the officers whose duty it was to prepare the pollbooks and the voting lists did not strictly follow the statute, the voters were in no manner to blame, and they should not be deprived of their right to vote because of some mistake of the registration officers. It ought not to be the law that each voter about to register or who is entitled to have his name brought forward on a new list, must, at the peril of losing his right to vote, take an attorney with him to see that the registration officers perform their duty. We fail to see how anyone was prejudiced by the error, if any, of the registration officers."

In view of this holding, I am of the opinion that if previous lists are amended and brought down to date in such a way as to make the same substantially complete this would be such a substantial compliance with the provisions of section 1084 as that the court would not hold an election, at which such list is used, void.

However, I would not want to assume the responsibility of advising registration officers to ignore the provisions of section 1084.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

NOMINATION PAPERS—Filing of. Section 1104 has reference only to sections 1098 and 1100 and has no reference to papers filed to entitle candidates to have name printed on primary election ballots.

May 6, 1916.

MR. N. E. WILEY, Osceola, Iowa.

DEAR SIR: Replying to yours of the 5th instant, will say that section 1104 to which you call attention has reference only to the filing of nomination papers for the general election where the nomination is made by petition or convention, as provided in sections 1098 and 1100 of the code, and has no reference whatever to nomination papers filed for the purpose of entitling candidates to have their names printed on the primary election ballot, this being governed by section 1087-a10, supplement to the code, 1913, which fixes a time after which nomination papers may not be filed but does not fix a time before which they may not be filed.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

CONSTITUTIONAL AMENDMENT.—Printed upon ballot on yellow colored paper.

May 6, 1916.

E. F. WISDOM, *Sup't.*, West Bend, Iowa.

DEAR SIR: Replying to yours of the 3rd instant will say that by section 1106, supplement to the code, 1913, it is provided that when a constitutional amendment or other public measure is to be voted upon it shall be printed in full upon the ballot and also:

"All such ballots for the same polling place shall be of the same size and similarly printed upon *yellow colored paper.*"

C. A. ROBBINS, *Ass't Att'y Gen'l.*

ITINERANT PHYSICIAN.—If residence in one city where he receives professional calls and office in adjacent city would not be an itinerant physician if he commutes daily.

May 6, 1916.

DR. W. E. ALLEN, Marion, Iowa.

DEAR SIR: Replying to yours of the 4th instant relative to the construction of section 2581, supplement to the code, 1913, relative to itinerant physicians, will say that the language material to be considered is as follows:

"Every physician who, by himself, agent or employee, goes from place to place or from house to house, or by circulars, letters or advertisements, solicits persons to meet him for professional treatment at places other than his office at the place of his residence, shall be considered an itinerant physician."

In the case which you present, I believe the physician who has his residence in one city where he receives professional calls and also has an office in another adjacent city, although a separate corporation, would not be an itinerant physician, for his office and his residence would be regarded as at the same place, even though separated by the corporation line separating the two cities, provided it is his custom to go daily from his residence to his office.

It may be that such a physician might have an office at some other place and yet not be an itinerant if he does not, by himself, agent or employee or by circulars, letters or advertisements, solicit persons who meet him for professional treatment at such other places.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

HEARSE—MOTOR VEHICLE.—A hearse is not an ambulance in meaning of motor vehicle law, but might be exempt under term "motor delivery wagon" and not required to have license.

May 8, 1916.

D. C. OEHLER, Hopkinton, Iowa.

DEAR SIR: Replying to yours of the 5th instant will say that this department has heretofore held that while a hearse is not an ambulance within the meaning of the automobile law, yet if it has a speed capacity of not more than ten miles per hour it should be exempt from the license fee as a motor delivery wagon under section 1571-m1, found on page 1 of the enclosed leaflet. This, however, would not exempt the hearse from taxation under the general law, as other vehicles are taxed.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

PRESIDENTIAL PREFERENCE PRIMARY ELECTION.—Publication of notice of—Price of $1.00 per square should apply; section 1293, 1913 supplement.

May 12, 1916.

TOM DARNELL, *County Auditor,* Indianola, Iowa.

Dear Sir: Replying to your recent inquiry relative to the compensation which should be allowed newspapers for publishing the notice of the presidential preference primary election under section 1087-a41, supplemental supplement, will say that while it may have been within the spirit of the law to allow for publishing this notice the same price only as is provided for the printing of the ballot, of which this notice is a substantial copy, yet it is not within the letter of that provision of section 1293, supplement to the code, 1913, for there is a difference between the *printing of the ballot* and the *publication* of substantially the same matter in a newspaper and in view of the fact that there is no other provision fixing a special price for the publication of such notice, I am of the opinion that the one dollar per square rate, provided for in the first part of this section, would apply.

As to whether or not the bill is figured correctly in the instant case would depend upon the number of squares of brevier type the matter printed would be equivalent of. This is a matter which should doubtless be overhauled by our next legislature.

I have conferred with other members of the office force and they concur in this view.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

CIVIL SERVICE COMMISSIONERS—Appointment of under Section 1056-a32, supplemental supplement, 1915.

May 17, 1916.

M. J. MITCHELL, *City Solicitor,* Fort Dodge, Iowa.

DEAR SIR: Replying to your favor, addressed to the attorney general, relative to the construction of section 1056-a32, supplemental supplement, 1915, will say that in my judgment the appointment might have been made as soon as the law took effect July 4, 1915, or as soon thereafter as the commission plan was adopted in cases where the adoption was made after this law took effect. Hence, there would be no objection to making the appointment at this time or at the beginning of the next fiscal year.

Replying to your second question will say that in my judgment the only ordinance required would be that appointing the commissioners. The language of the first part of the section is as follows:

> "In cities having a population of 15,000 or over the council shall * * * immediately after organization, *by ordinance* appoint three civil service commissioners."

However, as stated by you, the statute is complete in all other respects and would not require an ordinance covering the same matter.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

NOMINATION PAPERS—FILING OF.—Affidavit must be filed with, or at least before time expires for filing or be deprived of having name on primary ballot.

May 19, 1916.

L. H. MATTOX, *County Attorney;* Shenandoah, Iowa.

DEAR SIR: Replying to your inquiry over the telephone will say that I concur with you in the view that section 1087-a10 requires the candidate to file the affidavit stating that he is eligible to the office for which he is a candidate and that the failure to file such affidavit with the nomination papers, or at least within the time such nomination papers are required to be filed deprives him of the right to have his name printed on the primary election ballot.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

POLL TAX—Women not liable for even if granted right of suffrage.

May 26, 1916.

ALICE B. CURTIS, *Executive Secretary, Iowa Equal Suffrage Association.*

DEAR MISS CURTIS: Replying to yours of the 25th instant will say that section 1303, supplemental supplement, 1915, provides for a poll tax of fifty cents "on each *male resident* over twenty-one years of age."

You will note that male residents alone are liable and this department has held that residents, whether citizens of the United

States or this state or not, are liable for this tax in the same manner as citizens having the right to vote. By section 1550 of the supplement to the code, 1913, it is provided:

> "The road supervisor shall require all able bodied male residents of his district, between the ages of twenty-one and forty-five, to perform two days' labor upon the roads between the first days of April and October of each year."

This department has made the same holding with reference to this section. Hence, it would follow that women would not be liable for the payment of poll tax nor to work road poll tax even though granted the right of suffrage unless these sections are amended by the legislature in order to so provide.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

VOTERS.—All electors at polls at hour for closing should be allowed to vote.

June 1, 1916.

CHAS. STILES, *County Supervisor,* Patterson, Iowa.

DEAR SIR: Replying to your recent inquiry relative to the right of persons to vote after the hour fixed by law for the closing of the polls will say that this department has heretofore held that where a person entitled to vote is at the polling place at or before the time fixed by law for the closing of the polls and is prevented from voting before the expiration of said time by reason of the fact that all voting booths are occupied or voting machines in use that he may remain in the polling place and cast his vote as soon as the booth is vacant or the voting machine not in use, even though that may be after the time fixed for closing the polls, but this rule should not be extended so as to permit persons to vote who arrive at the polling place after the time fixed for closing the polls.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

PENITENTIARY.—Warden is without authority to deprive prisoner of good time earned by reason of the fact that he is charged with the commission of an independent crime not connected with the government of the prison and of which he has been duly acquitted.

June 8, 1916.

HONORABLE BOARD OF CONTROL OF STATE INSTITUTIONS.

GENTLEMEN: Replying to the inquiry submitted by your Mr. McConlogue, as contained in the letter of one Henry Smith, a prisoner confined in the Reformatory at Anamosa under No. 6976, will say that in my judgment the warden would be without power or authority to deprive the prisoner of any good time earned, by reason of the fact that he is charged with the commission of an independent crime not connected with the government of the prison, and of which crime he has been duly acquitted on trial, for, if he had been convicted of such crime and duly punished therefor, to impose additional punishment on him by depriving him of his good time, while serving sentence for another offense, would amount to punishing him twice for the same offense.

While not exactly in point, I call your attention to the decisions of our supreme court in the cases of *State vs. Hunter,* 124 Iowa, 569, and *State vs. Barr,* 133 Iowa, 132.

If the prison rules were against the commission of the act in question and such act did not constitute a crime, or if a prisoner was not indicted when put on trial for such crime but merely his good time forfeited by reason of the breach of this rule, I am inclined to think this might be done under sections 5703 and 5704 of the code, but where in a proper action it has already been adjudicated that the prisoner is not guilty of the offense with which he is charged, the power to deprive him of his good time because the warden may think him guilty, notwithstanding the verdict and judgment of acquittal by the trial court, does not exist.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

BOUNTY.—Adult wolf one of full size; one of 3 months cub wolf. No bounty should be allowed if animal held more than thirty days as it would then be classed as domesticated.

June 9, 1916.

A. M. SWANSON, *County Auditor,* Osage, Iowa.

DEAR SIR: Replying to yours of the 7th instant addressed to the attorney general will say that your question briefly stated is, when does a cub wolf cease to be a cub and become an adult wolf within the meaning of section 2348 of our code as amended. The language of this section necessary to be considered reads as follows:

> "A bounty of $20 shall be allowed on the skin of an adult wolf, $5 on that of a cub wolf."

I have been unable to find any decisions where the word "cub" has been construed. Webster defines a cub as being "a young animal." The term "adult" when used with reference to persons signifies a person of full age, and it has been held that one seventeen years of age is not an adult. See—

> First Amer. & Eng. Ency. of Law, 2d Ed., p. 737, and cases cited, and
>
> *Banco De Sonora vs. Casualty Co.,* 124 Iowa, 576.

Webster defines an adult as follows:

> "Having arrived at maturity, or to full size and strength; matured; as an adult person or plant.
>
> "A person, *animal,* or plant grown to full size and strength; one who has reached maturity."

Hence, I am of the opinion that an adult wolf within the meaning of this section is one which has attained its full size, and that a wolf three months of age should not be considered as an adult wolf within the meaning of this section.

With reference to your other question as to whether or not a person capturing a cub wolf and keeping the same until full grown may then obtain the bounty on the same, either as an adult wolf or as a cub, will say that the last sentence of the section above referred to is as follows:

> "Any person who shall demand a bounty on one of the above mentioned animals killed in another state or county or on a domesticated animal shall be fined not more than one hundred dollars nor less than fifty dollars."

Most of the other sections providing bounties on gophers, rattlesnakes, ground hogs, crows and the like require the proof to be made within thirty days after the time the animal is caught and killed.

In view of these provisions and the general spirit of the law, I am of the opinion that no bounty should be allowed in such case, either for an adult or for a cub because the animal would, in effect, be a domesticated animal.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

BOARD OF SUPERVISORS—RIGHT TO PURCHASE AUTOMOBILE FOR COUNTY OFFICERS.—No statute conferring such right or power upon the board.

June 10, 1916.

A. M. DEYOE, *Superintendent Department of Public Instruction.*

DEAR SIR: Replying to yours of recent date, addressed to the attorney general, will say that this department has heretofore held that after September 1, 1915, the board of supervisors is without power to fix the salary of the deputy county superintendent and that such power lies only with the convention of school representatives.

Your other question reads as follows:

> "Would a board of supervisors have a legal right to purchase an automobile for the use of any of its county officers and particularly the county superintendent?"

There is no express statutory authority conferring such right or power. However, the spirit of the times would seem to require the use of automobiles by the state, county, municipal and school officers where there is a reasonable necessity therefor. The state owns and operates many in its various institutions and some of the departments are provided with automobiles. It has been the practice of some of the counties in the state to purchase automobiles for the use of its highway engineer and other county officers. Likewise it has been the practice in many municipalities for the city to purchase and own for the use of its officers and employes one or more automobiles and, to the personal knowledge of the writer, some school corporations in the state have for years owned and operated automobiles for the use of its school board and other

officers in connection with the business of the corporation. All this has been done evidently with the acquiescence of the legislature even though without its express authorization and there will be no express provision found for the purchase of teams and other farming utensils required in operating the county farm and yet no one would question the power of the supervisors to purchase such equipment for such purpose.

While the question is not entirely free from doubt I am of the opinion that where reasonably required the court would sustain the power of the board of supervisors to purchase for the use of its county officers and employes an automobile, and with this power granted it would be for the board of supervisors to determine what offices required the use of an automobile and if they determine that the county superintendent was entitled to the use of such automobile, either alone or in connection with other offices, such use would be proper. The question is one which should probably be tested out in court and until the courts would hold otherwise the foregoing would be the ruling of this department.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

INTOXICATING LIQUORS—TRANSPORTATION OF.—The provisions of section 2421-b apply to shipments of intoxicating liquors made by a wholesale druggist under the provisions of sections 2401-c and 2401-d as well as to shipments made for personal use.

June 14, 1916.

CHICAGO, ROCK ISLAND & PACIFIC RY. CO., Law Department, Des Moines, Iowa.

GENTLEMEN: Yours of the 12th instant addressed to the attorney general has been referred to me for reply.

Your question briefly stated is whether or not section 2421-b, supplemental supplement, 1915, applies to intrastate shipments of intoxicating liquors made by wholesale druggists under and in compliance with the provisions of section 2401-d, supplement to the code, 1913.

The question is one not entirely free from doubt. The last mentioned section, which was enacted by the thirty-fourth general assembly, contains the following provision:

"The foregoing provisions having been complied with, the common carrier shall be relieved from all liabilities otherwise imposed by law for the transportation of intoxicating liquors."

The first mentioned section was enacted four years later and contains the following provision:

"No shipment billed in whole or in part as intoxicating liquor shall be delivered to the consignee until such consignee upon such record book enters in ink, in legible writing, his full name and residence or place of business, giving the name of the town or city, and the street name and number where there is such, and certifies that such liquor is for his own lawful purposes or private consumption."

Section 2401-c provides:

"Intoxicating liquors shipped under the provisions of this act may be inclosed in the same box, package or carton containing other drugs or merchandise. In all cases of such shipments of intoxicating liquors the bill of lading shall set out that intoxicating liquors are in the shipment, with the kind and amount of the same, and one copy of the bill of lading shall be signed for the wholesale drug corporation by the permit holder provided for in section one of this act, or any officer of such drug corporation."

Other provisions of the law require shipments of packages containing intoxicating liquors only to be plainly labeled so as to show the contents of such package. See Code section 2421.

It was probably the intention of the legislature to relieve the wholesale druggist from the necessity of complying with this provision where he complies with the provisions of section 2401-c and section 2401-d with reference to such shipments. Hence, the last sentence quoted from section 2401-d would not be intended to relieve the carrier from complying with the provisions of the subsequently enacted law. While the same reason that would relieve the shipper from having the contents of the box labeled might also relieve the carrier of the necessity of making delivery to the consignee in person, if the legislature had so provided, yet the language of the last sentence of section 2421-b is broad enough to cover shipments made by wholesale druggists under sections 2401-c and 2401-d for the provision is "No shipment billed in whole or in part as intoxicating liquor shall be delivered to the consignee," etc., and to hold that this section did not apply to

shipments made by the wholesale druggist under the other sections referred to would require the reading into this section of an exception not found therein, and, in view of this situation and the further provision of our statute that requires statutes regulating the sale and transportation of intoxicating liquors to be construed strictly and in such a manner as to prevent evasions, I am of the opinion that your question should be answered in the affirmative.

I am authorized to say that the attorney general concurs in this view although, as heretofore stated, the question is not entirely free from doubt.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

TOWNSHIP OFFICES.—No nomination should be declared where candidate has not received 5 votes and where total vote does not equal 5 per cent of vote for governor. In case of tie, delegates selected by board of canvassers or judges of election. If drawing cannot be had, each delegate may sit and cast one-half vote in convention.

June 16, 1916.

E. A. CROWLEY, *County Attorney,* Greenfield, Iowa.

DEAR SIR: With reference to the questions propounded by you over the telephone will say that I have given the matter some investigation and am of the opinion that in the case of candidates for township offices no nomination should be declared to have been made where the candidate has not received five votes and where the total vote received by him does not equal five per cent of the votes cast in his township for governor on the party ticket with which he affiliates. See section 1087-a19.

With reference to the cases where there were tie votes for any office or for delegates the tie should have been forthwith determined by the board of canvassers or the judges of election, as the case may be. See section 1087-a24.

In the case of delegates to the county convention the tie should have been drawn off by the election judges. However, I am of the opinion that by the consent of the contesting delegates the tie might be drawn off at any time before the time they are required to meet and an amended certificate returned to the county auditor in time for him to make his returns to the county convention. If it is not deemed of sufficient importance to reconvene

the judges of election for the purpose of this drawing, then, in my judgment, each of the delegates would be entitled to sit in the county convention and cast a half vote therein.

With reference to your third question relating to the shooting of fish will say that section 2540, supplemental supplement, prevents the taking of fish by any means unless by hook and line, with certain exceptions therein enumerated, and I think this would be sufficient to prohibit the shooting of fish.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

INTOXICATING LIQUORS.—If contained in box with other drugs and shipped by a wholesale druggist, box need not be labeled if amount of liquors is set out in bill of lading.

June 16, 1916.

THE CHICAGO, ROCK ISLAND & PACIFIC RY. CO., Des Moines, Iowa.

GENTLEMEN: Replying to yours of the 15th instant will say that while the question was directly involved in your former inquiry yet I will say that the holding of this department heretofore made has been to the effect that where the package contains intoxicating liquors only, then the box must be marked to show the contents, as required by section 2421 of the code, even though the shipment be made by a wholesale druggist.

However, where the liquors shipped by wholesale druggists are contained in the same box or package with other drugs, as permitted by section 2401-c, supplement to the code, 1913, then the box need not be labeled provided the kind and amount of the liquors contained in the shipment are set out in the bill of lading, as provided in the same section.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

DELEGATES TO VARIOUS CONVENTIONS—FUNCTIONS OF.—Failure to elect delegates.

June 17, 1916.

W. D. EATON, Law Dept., C., B. & Q. R. R. Co., Burlington, Iowa.

DEAR SIR: Replying to yours of the 13th instant addressed to the attorney general will say that the functions of the delegates which were selected at the April presidential preference primary

were fully performed when they met in county convention and selected the delegates to the Cedar Rapids state convention and they have nothing whatever to do with the convention to be held July 1st.

Any precinct which failed to elect delegates to the county convention at the June primary must go without representation in such convention. Dealing with the county conventions to be held July 1st, section 1087-a25, supplement to the code, 1913, provides as follows:

> "Said county convention shall be composed of delegates elected at the last preceding primary election."

Said section further specifically provides the manner of their election, stating:

> "That the delegates or a majority thereof, or when delegates representing a *majority of the precincts* thus elected shall have assembled in the county convention at the time herein prescribed and at the county seat, the convention shall be called to order by the chairman of the county central committee"

and also

> "If any precinct shall not be fully represented the delegates present from such precinct shall cast the full vote but there shall be no proxies."

No method is provided for filling the vacancy in the office of delegate to the county convention.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

ELECTIONS—ABSENT VOTER LAW.—Does not apply to school elections.

June 17, 1916.

ORAN L. ASBY, *Cashier, The Farmers Bank,* Kingston, Iowa.

DEAR SIR: Yours of the 10th instant addressed to the attorney general was referred to me for reply.

The absent voter's law would not, in my judgment, apply to a special school election. While the first section of the law provides that where the voter is to be absent from the county in which he is a qualified elector on the day of holding any general,

special, primary, county, city or town election, he may vote at such election as hereinafter provided, yet in the next section, which provides for application for ballot, it is recited that the application is to be made to the county auditor, or the clerk of the city or town, as the case may be, and as neither of these officers would have anything to do with the school election it was evidently not the intention of the legislature that the absent voter's law should apply to school elections.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

TAXATION.—Indebtedness of municipal corporation; when 5% of the actual value and when 1¼%.

June 19, 1916.

C. W. PARKS, *Town Clerk,* Carson, Iowa.

DEAR SIR: Replying to yours of the 16th instant will say that no municipal corporation may become indebted in the aggregate beyond five percentum of the actual value of the taxable property situated therein, including both real and personal property. This is a constitutional limitation.

However, the statutory limitation fixed by section 1306-b, supplement to the code, 1913, is one and one-quarter per centum of the actual value of the taxable property, unless by a vote of the people had as required by sections 1306-c and 1306-d, supplement to the code, 1913, in which event, if the affirmative vote in favor is a majority of all the electors voting at such election and also equal to a majority of all the votes cast at the last preceding municipal election, as required by section 1306-e, supplement to the code, 1913, said indebtedness may exceed the one and one-quarter per centum but it may never exceed the five percentum.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

NURSERY STOCK—STATE AGRICULTURAL COLLEGE—INSPECTION OF. —State entomologist should not be paid by the state for inspection of nursery stock produced by the state.

June 21, 1916.

W. H. GEMMILL, *Secretary,* Board of Education.

DEAR SIR: Replying to yours of the 20th instant, addressed to the attorney general, in which you call attention to the fact that

more or less nursery stock is produced by the Iowa State College, and, after calling attention to the provisions of section 2572-a47, supplement to the code, 1913, and to the fact that it has been the practice of the College to pay the inspection fee of the state entomologist for the inspection of such nursery stock, you inquire whether or not the usual and ordinary charge made by the state entomologist respecting nursery stock of others should be paid for inspections made by him of nursery stock produced by the college.

While the question is not entirely free from doubt yet in my judgment it should be answered in the negative. For all practical purposes it would amount to the state's paying its own inspection fee to one of its own officers from its own pocket. Rather than adopt the other view I would be inclined to the conclusion that the provisions punishing the sale of uninspected nursery stock would not apply to nursery stock produced by the state.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

BOARD OF CONTROL—Jurisdiction of, as to discharge of patients from insane hospitals.

June 21, 1916.

HONORABLE BOARD OF CONTROL OF STATE INSTITUTIONS.

GENTLEMEN: In yours of the 16th instant, addressed to the attorney general, you propound the following questions:

> "1. Has the board of control, on the advice of the superintendents of the hospitals for the insane, the legal authority to discharge an inmate from the institution 'as improved' and thereby relieve the state for all time from having jurisdiction over the patient without another commitment?
>
> "2. Supposing the patient had been discharged from the institution under the circumstances as set out above, the discharge reading 'discharged as improved', would that relieve the hospital from having jurisdiction over the patient without a re-commitment? In other words, could the institution, through its officers, or could the board of control order the return of a patient 'discharged as improved' back to the institution?

"3. Has the board of control, or do the superintendents of the hospitals for the insane have the right, under the law, to do more than to discharge the patients or parole them?"

Each of these questions should be answered in the negative. Your fourth question is:

"Will the word 'improved' or 'cured' add any particular status to the patient, more than he would have if he were merely discharged or paroled?"

In my judgment, the discharge of a patient "as improved" is unauthorized by the law and, perhaps, would only amount to a parole, or to placing the patient with relatives, as provided for in the last part of section 2288 of the code. However, in my judgment, there is a wide difference between a discharge "as cured" and one discharged "as incurable". The first part of section 2288 of the code provides:

"Any patient who is cured shall be immediately discharged by the superintendent, who shall furnish him with a certificate *to that effect,* and forward a copy thereof at once to the clerk of the district court of the county from which the patient was committed, and he shall record the same at length in the insane record in connection with the record of commitment. Such record shall be prima facie evidence *of the recovery of such person,* and restore him to all his civil rights."

Section 2289 relates to the discharge of incurables and reads as follows:

"The board of trustees shall order the discharge or removal from the hospital of incurable and harmless patients whenever it is necessary to make room for recent cases. In the interim between the meetings of the board, the superintendent in connection with two trustees, shall possess and exercise the same power."

Section 2290, which has some bearing on the matter, is as follows:

"When patients are discharged from the hospital by the authorities thereof without application therefor, notice of the order of discharge shall at once be sent to the commissioners of the county where they belong, and the commissioners shall

forthwith cause them to be removed, and shall at once provide for their care in the county as in other cases, unless such patients are discharged as cured."

C. A. ROBBINS, *Ass't Att'y Gen'l.*

SUPERINTENDENT OF PUBLIC INSTRUCTION.—Right to publish pamphlets or bulletins.

July 7, 1916.

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

DEAR SIR: Replying to yours of the 6th instant addressed to the attorney general will say with reference to the following provision found in section 2627-c, supplement to the code, 1913:

> "The superintendent of public instruction shall have general supervision and control over the rural, graded and high schools of the state . . . It shall be his duty:
>
> "2. To suggest, through public addresses, pamphlets, bulletins, and by meetings and conferences with school officers, teachers, parents, and the public generally, such changes and improvements as he may think desirable, and may publish and distribute such views and information as he may deem important.
>
> "6. To publish and distribute from time to time leaflets and circulars relative to such days and occasions as he may deem worthy of special observance in the public schools."

that in my judgment the publication of a volume containing 190 pages, approximately, would not be such a publication as would be within the meaning of the term "leaflet" or "circular", as referred to in sub-division 2 of the section above quoted. Webster defines "pamphlet" as follows:

> "A small book consisting of a few sheets of printed paper stitched together, often with a paper cover, but not bound; a short essay or written discussion, usually on a subject of current interest."

He also defines "bulletin" as follows:

> "Any public notice or announcement, especially of news recently received.
>
> "A periodical publication, especially one containing the proceedings of a society."

It could hardly be claimed that the book would fall within the terms "leaflet" or "circular" as made use of in sub-division 6 of the same section. However, sub-division 2 of said section provides that the superintendent of public instruction may "publish and distribute such *views and information* as he may deem important." This clause would evidently be broad enough to authorize the matter desired, if, within the sound discretion of the superintendent of public instruction, the matter desired cannot be embraced within a smaller compass, and, in my judgment, the same might be properly published with the consent of the executive council under the supervision of the document editor provided for by section 1144-j, supplemental supplement, 1915.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

MIGRATORY BIRDS.—Protection of. Could be shipped into this state in interstate commerce if imported into U. S. before passage of section 2563-k, supplement to the code, 1913.

July 24, 1916.

SPIEGEL BROS., Chicago, Ill.

GENTLEMEN: Replying to yours of the 21st instant relative to the effect of our statute for the protection of migratory birds, will say that section 2563-k, supplement to the code, 1913, provides as follows:

> "That no person shall, within the state of Iowa, kill or catch, or have in his or her possession, living or dead, any wild bird other than a game bird, or purchase, offer or expose for sale, transport or ship within or without the state, any such wild bird after it has been killed or caught, except as permitted by this act. No part of the plumage, skin, or body of any bird protected by this section shall be sold or had in possession for sale, irrespective of whether said bird was captured or killed within or without the state. For the purpose of this act the following only shall be considered game birds: The Anatidae, commonly known as swans, geese, brant and river and sea ducks; the Rallidae, commonly known as rails, coots, mudhens and gallinules; the Limicolae, commonly known as shore birds, plovers, surf birds, snipe, woodcock, sandpipers, tatlers, and curlews; the Gallinae, commonly known as wild turkeys,

grouse, prairie chickens, pheasants, partridges, and quail. All other species of wild birds, either resident or migratory, shall be considered non-game birds."

In my judgment, the same would not operate to prevent the importation into this state in interstate commerce of plumage which had already been imported into the United States and was an article of legitimate commerce in some of the other states of the Union at the time this act went into effect.

As to whether or not this act would operate to prevent the dealer in this state from buying, having in possession or exposing the same for sale may be a question of some doubt and, of course, this department would not want to assume the responsibility of saying in advance that the provisions of this law to this effect are unconstitutional.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

LABOR COMMISSIONER.—Discussion as to payment of wages when employee is discharged or quits.

July 29, 1916.

A. L. URICK, *Commissioner of Labor.*

DEAR SIR: Replying to yours of the 25th instant, as to your first inquiry, which reads as follows:

"1. Can a wage earner quitting a job demand his wages in full to date, or can such wages be legally withheld until the next nearest pay day?"

will say that unless there is a contract between the employer and the wage earner fixing a time, or times, when the wages are to be paid, then a wage earner quitting a job would be entitled to his wages in full to date. However, if by the terms of the contract of employment, or, if it is the custom of the employer to pay at stated periods during the month, and this custom is known to the employee and its terms assented to by him, then the wage earner quitting a job would not be entitled to his wages until such pay day rolls around. This answer is a sufficient answer to your second inquiry also, which reads as follows:

"2. If the wages of a wage earner upon his quitting a job can be withheld until next nearest pay day, does such rule mean that wages can be withheld until the day when such

wages would come due under the custom of an employer where the wage earner remains in his service? For instance, a firm establishes the custom of paying on the 20th of the month all wages earned to the first of the month in which payment is made. Can money earned between the 1st and 20th, or pay day, be withheld until the 20th of the succeeding month?"

Your third question reads:

"3. Can any wages earned be legally withheld until some future day when employe is discharged or laid off?"

This question should be answered in the negative. However, if the suit is based upon a contract to recover the wages, and, under the terms of the employment, they are not due until a later date, then the suit would fail, but the suit should rather be brought for damages for breach of the contract and the measure of damages would be the wages earned up to the time of discharge. See

Davidson vs. Laughlin, 138 Cal., 320; 71 Pac. 345; 5 L. R. A. (N. S.), 579, and especially the note at 580.

See also the note appended to

MacFarlane vs. Allan Pfeiffer Chemical Co., 28 L. R. A. (N. S.), 314.

Your fourth question is:

"4. If in any or all of above cases wages cannot be withheld after service ceases, what means can employes follow to protect their interest when working for employer,

(a) When work is done by contract on public work.
(b) When done by contract on private work.
(c) When done on private work and not under contract."

When quitting a job or on being discharged between pay days, the employe should, if possible, obtain a new agreement of his employer to pay at once. Where the wages are due or where there has been a deposit by the employer, then the courts are open for the recovery of all sums due. In addition to this, where the work is done under contract or private work upon any improvement, the laborer would be entitled to a lien by complying with the mechanics lien law, and where the work is by contract on public work, notice of the existence of the claim to the municipality for which the work

is being done usually results in the claimant's being protected. Where the work is not under contract and on private account, still the claim is preferred in case of an attachment for receivership.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

BOARD OF SUPERVISORS.—Entitled to per diem and mileage when selected as a committee and instructed to visit certain specific places and for the purpose of making specific investigation.

August 3, 1916.

GEORGE A. WILSON, *County Attorney,* Des Moines, Iowa.

DEAR SIR: Replying to yours of the 1st instant addressed to the attorney general, in which you call attention to the fact that it is proposed by the supervisors of your county to take a junketing trip with the Greater Des Moines Committee for the purpose of investigating the construction of roads and in which you inquire as to whether or not, under the holding of this department, they would be entitled to per diem or mileage while so engaged, will say this department has never had occasion to pass upon the exact question. This department has heretofore held that members of the board of supervisors are not entitled to per diem or mileage in attending state conventions of the board of supervisors, and has also held that the board of supervisors should be allowed, for committee work, their per diem and mileage for time spent in viewing other courthouses when the proposition is pending in their own county to erect a courthouse. The mileage, however, should cover all expenses aside from the per diem. The authority for the latter holding being found in section 469, supplement to the code, 1913, which provides,

> "The members of the board of supervisors shall receive four dollars per day each for each day actually in session, and four dollars per day exclusive of mileage when not in session but employed on committee service, and five cents for every mile traveled in going to and from the regular, special and adjourned sessions thereof and in going to and from the place of performing committee service."

I am of the opinion that this same section would authorize the payment of per diem and mileage where one or more members of the board of supervisors had been, by resolution of the board, se-

lected as a committee with instructions to visit certain specific places for the purpose of making certain specific investigations in any matter in which the county is interested, provided the excursion be confined within a reasonable territory considering the subject to be investigated.

However, this opinion should not be construed to either authorize a junketing trip for pleasure or to authorize more members of the board to make the investigation than is reasonably necessary or to authorize traveling of undue distances, or, in fact, any investigation that is not entirely warranted under the circumstances of the case and in view of future work to be performed by said board in your own county.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

FLAG.—Desecration of.

August 4, 1916.

W. E. MILLER, *Attorney,* Des Moines, Iowa.

DEAR SIR: Since writing my letter acknowledging receipt of yours of the 21st ultimo relative to the use of the stars and stripes by the American Express company will say that I have consulted Funk & Wagnell's Dictionary, 1916 edition (three years later than the edition to which you refer). Under the headings, "Ensign," "Standard," and "Colors" I find the following:

> ENSIGN: A distinguishing flag or banner; especially a national standard or naval flag, or the colors of a regiment.
>
> The ensign of the United States, both military and naval, is the stars and stripes. The American yacht ensign is marked by a foul anchor in the canton.
>
> STANDARD: A flag, ensign, or banner, considered as the distinctive emblem of a government, body of men, or special cause or movement.
>
> COLORS: The official flag or flags carried by a military body, regiment or warship; a designated one of these; the national flag.

I also call your attention to the fact that I have discovered that our statute, to which I have already called your attention, is a verbatim duplicate of the Nebraska statute construed by the supreme court of Nebraska in the case of *Halter vs. Nebraska,* 74 Neb., 757.

which case went on appeal to the Supreme Court of the United States and was held constitutional in *Halter vs. Nebraska*, 205 U. S., 34.

It would seem that the purpose of this statute was not only to prevent the use of the flag or pictures or representations thereof in connection with the advertising of merchandise or any other line of business but also to prevent the use of fractions, so to speak, of any such flag, color or ensign, for, as was cited in your letter, the prohibition is against the use of anything purporting to be either the flag, standard, color or ensign of the United States of America, "or a picture or representation of either thereof, upon which shall be shown the *colors,* the stars, and the stripes, *in any number of either thereof.*"

In view of the express desire of your company to, at all times, keep within the letter of the law, and, in view of your frankness in dealing with this particular matter, I felt it my duty to call your attention to these authorities, although I am not at this time prepared to say what, if any, action will be taken by this department in the matter.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

FLAGS.—On school buildings in permissible weather, yet no law as to its being taken down in inclement weather.

August 5, 1916.

MR. WM. JOHNSON, Adel, Iowa.

DEAR SIR: Replying to yours of the 1st instant addressed to the Adjutant General, and by him referred to this department, will say that section 2804-a, supplement to the code, 1913, provides:

> "That it shall be the duty of the board of directors of each school corporation of this state to provide a suitable flagstaff on each public school building maintained under the authority of such board of directors and to provide each of such school buildings with a suitable flag, and such flag shall be raised over such building on all days when weather suitable therefor shall prevail."

Section 2804-b, supplement to the code, 1913, provides:

> "That at the commencement of each school day the teacher, superintendent, principal or whoever has the general supervision of the school administration within any such building, may arrange for the raising of such flag, as herein provided for, over the said building, with appropriate services, when weather conditions will permit, at the beginning of each school day."

Section 2804-c, supplement to the code, 1913, provides:

> "That it shall be the duty of the custodians of all public buildings of the state of Iowa to raise over such building the flag of the United States of America, upon each secular day when weather conditions are favorable, and it shall be the duty of any board of public officers charged with the duty of providing for the supplies of any such building to provide in connection with other supplies for any such building of the state of Iowa, a suitable flag for the purposes herein provided."

It will be observed that neither of these sections provides for the taking down of the flag at night or at other times when the weather conditions are unfavorable, although it would seem that the first two sections quoted contemplate that the school flags should be raised daily, when the weather conditions will permit, and this, of course, would contemplate being taken down daily, except where the weather was unfavorable.

Hence, I am of the opinion that, while it would be the proper thing to take down the flag when the weather is such that the same may be injured, yet there is no law that would require this to be done and it will have to be handled according to the discretion of those charged with the duty of displaying the flag.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

AUTOMOBILES—PARKING OF.—Ordinance by city legal, use of streets for parking, placing of direction signs, publication of such ordinance, the city may by ordinance establish parking districts, place direction signs, and publish such ordinance in the regular manner.

August 11, 1916.

H. G. SPOONER, *Town Clerk,* Greenfield, Iowa.

DEAR SIR: Replying to yours of the 8th instant, addressed to the attorney general, and to your first question, which reads as follows:

> "Can the council pass an ordinance stating locations where automobiles can be parked?"

will say that this question should be answered in the affirmative as it was so held by our supreme court in the case of *Pugh vs. City of Des Moines,* 156 N. W., 892.

Your second question, "Can streets be used for parking purposes?" should also be answered in the affirmative, provided, however, that the parking should be at the places and within the periods of time specified by the ordinance.

Your third question, which reads as follows:

> "Can the council erect signs directing the public to 'Keep to the Right,' on turning at street corners?"

should be answered in the affirmative provided the same is not erected in such a manner and at such a place as to constitute an obstruction in the street.

Your fourth question, which reads as follows:

> "Would such an ordinance be legal if regularly passed by the council?"

should be answered in the affirmative.

Your fifth question, which reads as follows:

> "Would said ordinance become legal by posting typewritten copies in three public places?"

should be answered in the negative, provided there is a newspaper published in the town.

Your sixth question, which reads as follows:

> "Or, would it be necessary to have said ordinance published in a weekly newspaper?"

should be answered in the affirmative.

I am enclosing leaflet containing the automobile laws.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

MILITARY TRAINING.—Prohibition of in schools; authority of school board to furnish uniform; Hays-Chamberlain bill.

August 11, 1916.

L. H. MINKEL, *Superintendent,* Fort Dodge, Iowa.

DEAR SIR: Replying to yours of the 7th instant, addressed to the attorney general, and to your first inquiry, which reads as follows:

> "Does the Board of Education have authority to include among the branches to be taught in the high school 'Military Training' as a branch of physical education?"

will say that it is provided by section 2215-f5, supplement to the code, 1913,

> "It shall be unlawful for any body of men, other than the guard of this state and the troops of the United States, to associate themselves together as a military company or organization within the limits of this state without the written permission of the governor, which he may at any time revoke; but this provision shall not prevent civic, social or benevolent organizations from wearing uniforms and swords not in conflict with the other provisions of this act."

Hence it follows that your question must be answered in the negative.

Your second and third questions are as follows:

> "Would the Board of Education have authority to require of students to provide themselves with military uniforms to wear while participating in this exercise?
>
> "Could the Board of Education require boys to take this military training after four o'clock, the time when school usually closes?"

These should also be answered in the negative, and even though the consent of the governor to the formation of a military company in connection with the school be granted the answers should still be in the negative.

I understand there has been some recent legislation by Congress encouraging military training in schools, the bill being known as the Hays-Chamberlain Bill, and my understanding is that this bill provides for the furnishing by the government of uniforms and arms but no ammunition. With the consent of the governor, as provided for in the section above quoted, training might be had under this law, but I doubt if any student could be compelled to participate therein.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

INTOXICATING LIQUORS.—Sale of patent medicines containing alcohol by registered pharmacists.

September 5, 1916.

COUNTY ATTORNEY I. C. HASTINGS, Garner, Iowa.

DEAR SIR: Replying to yours of the 2d instant relative to the sale of a so-called medicinal article containing alcohol,—if there is a sufficient amount of medicinal ingredients to destroy the distinctive characteristic of alcohol or intoxicating liquor so that the same may not be used as an intoxicating liquor, it may lawfully be sold by registered pharmacists; on the other hand, if some medicinal elements are added, but not sufficient to destroy the distinctive characteristic of intoxicating liquor so that it is or may be used as a beverage, it may not lawfully be sold. See—

State vs. Benson, 154 Iowa, 314 at 315;
Berner vs. McHenry, 169 Iowa, 483;
State vs. Laffer, 38 Iowa, 422;
McNiel vs. Horan, 153 Iowa, 630.

An injunctive remedy is a very satisfactory way to deal with a matter of this kind. It does not give the jury a chance to look for an excuse to acquit the defendant.

GEORGE COSSON, *Attorney General.*

REGISTRATION OF VOTERS.—Entire new registration not required preceding general election 1916 if first registration was only made for previous elections in this year.

September 6, 1916.

J. W. JONES, Vinton, Iowa.

DEAR SIR: Complying with your request I am enclosing copy of opinion rendered B. Murphy of your city, the last page of which has reference to the registration of voters.

In talking with you I learned that your city was first required to register at special elections held this year and your exact question is whether or not an entire new registration must be made immediately prior to the general election in the year 1916 in view of the fact that a complete registration was made in April of this year for use in a special election which, with subsequent corrections, was used at the primary election in June of this year.

I am of the opinion that, in view of the fact that the only registration that has been made was made in this, a presidential, year, it would be a substantial compliance with the law and that no complete new registration need be made immediately prior to the general election in November of this year. Of course, corrections should be made and unregistered voters permitted to register. These views are sustained by the recent decision of our supreme court in the case of *Younker vs. Susong,* 156 N. W. (Iowa) 24.

With reference to your other question will say that there is no provision for transferring a voter's registration from one ward to another upon his removal to a different precinct. However, if, after having registered and before election day, he moves to a new precinct, he should register in such new precinct and the registration officers in such new precinct should certify the names of those so registering to the registration officers in the precinct of his prior residence in order that his name may be stricken off in such former precinct, as provided by section 1083 of the code.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

WITNESS FEES.—State only liable in criminal cases where in case of conviction court has ordered witnesses summoned at expense of county.

ABSENT WITNESSES.—Testimony taken on preliminary hearing may be made use of by state in trial.

September 6, 1916.

J. J. SHARPE, *County Attorney,* Hampton, Iowa.

DEAR SIR: Replying to yours of the 5th instant will say that, in my judgment, the only cases where the state will be liable for the witness fees or other costs incurred by the defendant in case of conviction are criminal cases where the court has ordered the witnesses summoned at the expense of the county, as provided by the statute. Of course, if in such case, the defendant is acquitted and judgment is entered against the state for all the costs, then all the costs should be certified.

In liquor injunction suits where the prosecution is successful the county is only liable for the costs incurred by the plaintiff unless the judgment of the court otherwise provides.

With reference to your other question as to the ability of the state to make use in the trial of the criminal case of the testimony of an absent witness given on preliminary hearing in the same case will say, in my judgment, there is no question but this may be done. In this connection I call your attention to the case of *State vs. Fitzgerald,* 63 Iowa, 268, where the testimony of a witness given on a preliminary trial was admitted because of his subsequent death and, I think, if he is beyond the reach of a subpoena the same rule would apply. I also call attention to the cases of *State vs. Kimes,* 152 Iowa, 240; *State vs. Brown,* 152 Iowa, 427, and *State vs. Conkling,* 153 Iowa, 216, each of which cases tend to sustain this rule and in the latter case the justice of the peace was permitted to testify when the evidence was not even taken down in shorthand or in any other complete manner but merely a memoranda made by the justice containing the substance of the evidence.

C. A. ROBBINS, *Ass't Att'y Gen'l.*

DRAINAGE.—Respective rights and burdens of dominant and servient estates discussed.

September 25, 1916.

GEO. E. WOLLENHAUPT, Massena, Iowa.

DEAR SIR: Replying to yours of the 21st instant will say that, as a general proposition, the owner of the dominant estate may not discharge upon the land of the servient estate at any given point an accumulation of water greater than would naturally flow across the line at such point by concentrating such flow by means of tile or other ditches. It would be his duty to procure, by agreement or by condemnation proceedings, an outlet through the lands of the servient estate.

Further than this, this department would not be at liberty to advise you.

I would suggest that you write the state document editor, Capitol Building, Des Moines, and procure a copy of the drainage law.

C. A. ROBBINS, *Assistant Attorney General.*

FEES—EXPERT WITNESSES.—Fixed by court, taking into consideration value of time employed and degree of learning or skill required. In no case to exceed $4.00 per day.

September 25, 1916.

J. W. MONAGHAN, *Clerk District Court,* Denison, Iowa.

DEAR SIR: Replying to yours of the 22nd instant addressed to the attorney general, will say that the only provision for expert fees is found in section 4661 of the code, which authorizes the expert witnesses, called to testify only to an opinion founded on special study or experience in any branch of science, or to make scientific or professional examinations and state the result thereof, to receive additional compensation *to be fixed by the court* with reference to the value of the time employed and the degree of learning or skill required, but such additional compensation shall not exceed four dollars per day while so employed.

Hence, it follows that even expert witnesses, so-called, would not be entitled to expert fees for testimony given before an insane commission or before any tribunal except a court.

C. A. ROBBINS, *Assistant Attorney General.*

STATE AID.—For normal institutes still effective.

October 3, 1916.

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

DEAR SIR: Replying to yours of the 25th ultimo addressed to the attorney general will say that you call attention to the provisions of section 2626 of the code which provided for the payment of fifty dollars to each county for institute purposes and to the further fact that this provision was repealed by the acts of the thirty-fifth general assembly and a substitute enacted therefor, and you also call attention to subdivision 10 of section 2627-c, supplement to the code, 1913, which reads as follows:

> "He (the superintendent of public instruction) shall appoint educational meetings or institutes to be held in each county once each year and not more than twice, and shall designate the time and place for holding them. The program therefor, and the instructors and lecturers therein, shall be subject to his approval."

You also call attention to the provisions of section 2738, supplement to the code, 1913, and especially to that portion which reads as follows:

> "To defray the expenses of said teachers' institutes, in addition to the fifty dollars received annually from the state and one-half of all examination fees collected in the county, one hundred fifty dollars from the general county fund shall be available for that purpose in counties having a population of thirty thousand or less, which amount shall be appropriated by the board of supervisors of such county at their January session in each year, and in counties of over thirty thousand, two hundred dollars shall be thus appropriated for such purpose."

You then inquire whether or not you still have authority to issue institute warrants notwithstanding the repeal of section 2626 of the code. In my judgment, this inquiry should be answered in the affirmative.

C. A. ROBBINS, *Assistant Attorney General.*

POPULATION—BY WHAT CENSUS DETERMINED.—Date of certificate rather than date of publication determines the change.

October 3, 1916.

H. M. LOGAN, *County Attorney,* Glenwood, Iowa.

DEAR SIR: Replying to yours of the 15th ultimo will say that this department has uniformly held that the population of a county is to be determined by the last certified or certified and published official census whether state or national. See the last sentence of section 177-c, supplement to the code, 1913.

The 1915 census was certified January 3, 1916, although not published or circulated perhaps until some later date. However, it is provided by section 177, supplement to the code, 1913:

> "Wherever in the code or the supplement to the code, the population of any county, city or town is referred to, it shall be determined by the publication above provided for *as of the date of said certificate,* and such census publication shall be evidence of all matters therein contained, and of said certificate thereto."

As this date, January 3, 1916, was the date on which terms of office began for that biennial period, the change in salary brought about by the change in population, whether such shall be an increase or decrease, would take effect January 3, 1916.

I am authorized to say that the attorney general concurs in this view as applied to your situation even though it may work a hardship in the offices of your county. The matter should be called to the attention of the next legislature in order that the situation may be remedied and the compensation made more constant. Probably, if the federal census should be made the guide in all those counties where state institutions are located, this would remedy the difficulty.

C. A. ROBBINS, *Assistant Attorney General.*

ELECTIONS—ABSENT VOTERS LAW.—Not available to one confined to his home or hospital within the county of his residence.

October 26, 1916.

MR. F. H. SCHMIDT, *Acting City Solicitor,* Sioux City, Iowa.

DEAR SIR: I am in receipt of your communication of the 24th instant relative to the right to vote under the absent voters law,

in the event that the elector is confined to his home or at a hospital on the day of election.

As you suggest in your letter, section 1081 of the Code authorizes registration at the home or in a hospital in case of sickness.

You then call attention to that part of section 1137-b, supplement to the code, 1915, which provides:

> "Any qualified elector of the state of Iowa, having duly registered where such registration is required, *who through the nature of his business,* is absent or expects in the course of said business, to be absent from the county in which he is a qualified elector on the day of holding any general, special, primary, county, city or town election, may vote at any such election as hereinafter provided."

I am of the opinion, however, that the phrase "who through the nature of his business" should not be construed in any limited sense. I have previously held that the law is available to students attending school elsewhere than the county of their residence.

I am of the opinion that the law should be so construed and so held as to be available to any one who is legitimately away from home on the day of election; therefore, the only question in the case you present is whether or not the person is confined at home or in a hospital in a county other than his residence, as the section provides *"to be absent from the county in which he is a qualified elector,"* etc. If, therefore, he is absent from the county, the law is available, provided he is registered where registration is required.

GEORGE COSSON, *Attorney General.*

CIGARETTES—SALE OF, IN ORIGINAL PACKAGES MAY NOT BE PREVENTED.—The small package containing 10 cigarettes is not an original package.

October 26, 1916.

WALTER P. MCCULLA, Cherokee, Iowa.

DEAR SIR: Replying to yours of the 23d instant relative to the sale of cigarettes in original packages, I know of no way that this can be prevented by the state, but the person selling them must be very sure that he is actually selling in an original package. The transportation of packages of ten each in bulk does not come within the rule as to shipment of original packages in interstate com-

merce and is not protected by the commerce clause of the federal constitution.

See *Cook v. Marshall Co.*, 196 U. S. 261;
Hodge v. Muscatine Co., 196 U. S. 276;
Cook v. Marshall Co., 119 Iowa 384.

GEORGE COSSON, *Attorney General.*

TAXATION.—Private banks may deduct from their banking capital such portion thereof as may be invested in government bonds or other non-taxable securities.

November 10, 1916.

HON. FRANK S. SHAW, *Auditor of State.*

DEAR SIR: In yours of the 7th instant you call attention to the provisions of section 1321 of the supplement to the code, 1913, prescribing a method of assessing private banks, also to section 1310 of the supplement to the code, 1913, providing for the assessment of moneyed capital to the owner at his place of business at the same rate as state, savings and national bank stock, also to the provisions of section 1304, subdivision 1, supplemental supplement, 1915, providing for the exemption of certain securities and you then propound the following question:

> "May private banks deduct securities mentioned in section 1304, subdivision 1, supplemental supplement, in giving in their assessment of taxable property?"

In my judgment, this should be answered in the affirmative, or more properly speaking, they would not be required to list such securities as a part of their banking capital or to otherwise list the same for the purpose of taxation. Your second question is:

> "In case the assessor has made illegal deductions from the taxable property of a firm or corporation, or if the board of review illegally exempts property from taxation, who should make the correction?"

If the amount of the illegal deductions appears on the face of the returns made by the assessor, in my judgment, the county auditor, under the provisions of section 1385-b, supplement to the code, 1913, would have the right to cancel such illegal deductions and proceed with the collection of such tax as should have been collected had no

such deduction been made. You then propound the following question:

> "If clerical errors appear on the tax list and are not discovered within one year after same are turned over to the treasurer does any officer have power to make correction? If so, who and for what period of time may such correction be made?"

In my judgment, the county auditor would have this power and that such power would continue to exist as long as the right to collect the tax exists. Your next question is:

> "If errors are discovered in computing taxes may the treasurer make demand for balance of taxes due as provided under section 1374 in the case of omitted property? In other words, if the property is not omitted, but through an error in computation an insufficient amount of taxes has been extended and collected, may the treasurer proceed in the same way as in the case of omitted property?"

In my judgment, this question should be answered in the negative. Your last question reads as follows:

> "If not does any officer have power to make the correction and for how many years prior to the current year?"

The county auditor may make the correction as long as the claim for the tax continues to exist, as above explained.

C. A. ROBBINS, *Assistant Attorney General.*

PUBLICATION OF TAX LIST.—Compensation for, is fixed by section 2419 of the code at not to exceed twenty cents per description and nothing additional may be allowed for headings.

November 17, 1916.

S. W. NEEDHAM, Sigourney, Iowa.

DEAR SIR: Yours of the 15th instant addressed to the attorney general has been referred to me for reply. You submit a sample of a publication of the delinquent tax sale and call attention to the notice which precedes the descriptions of property and to the headings used in connection with such descriptions including name and description, lot or section, township or block, range, amount of tax

payable, and also the names of the various townships in which the several descriptions are located and your question briefly stated is whether or not the maximum compensation to be allowed for such printing, namely twenty cents per description, includes these headings or whether or not additional compensation might properly be allowed for the printing of such heading.

This compensation is fixed by section 1419 of the code, the material portions of which are as follows:

> "Notice of the time and place of such sale shall be given by the treasurer and shall contain a description of each separate tract to be sold as taken from the tax list, the amount of taxes for which it is liable delinquent for each year, and the amount of penalty, interest and costs thereon, the name of the owner * * * to whom it is taxed; * * * the compensation for such *publication* shall not exceed twenty cents for each description. * * * If the treasurer cannot procure the publication of the notice for the sum herein fixed, then the notice may be given by posting the same in four of the most public places in the county."

From a careful reading of this section, it is clear that the cost of the entire notice is not to exceed twenty cents per description. The captions which you have marked are an essential part of the description and of the notice and some of them, while they would not be necessary if each description were complete, yet they are evidently made use of to economize space.

Hence, I am of the opinion that no additional charge would be warranted for that portion of the notice which you have encircled in lead pencil. If, however, the charges made for the remaining portions of the description do not equal the twenty cents maximum, then an additional charge might be made for the encircled portions, provided the cost of the entire notice, including such encircled portions, does not exceed the twenty cent maximum.

C. A. ROBBINS, *Assistant Attorney General.*

BOARD OF HEALTH—TRANSPORTATION EXPENSES.—Not payable from salary appropriation made by senate file 640 of the 36th G. A.

November 17, 1916.

DR. G. H. SUMNER, *Secretary, State Board of Health.*

DEAR SIR: Yours of the 6th instant addressed to the attorney general has been referred to me for reply. You call attention to the provisions of section 2564, supplement to the code, 1913, section 2375 of the code, section 2575-a44, supplement to the code, 1913, sections 2583 and 2575-a34, supplement to the code, 1913, also to section one of Senate File 640 of the acts of the thirty-sixth general assembly, which reads as follows:

> "There is hereby appropriated out of any money in the state treasury, not otherwise appropriated, an amount sufficient to pay the salaries of the various officers, whose salaries are fixed by law, for a term of two years, ending June 30th, 1917, and payable from the state treasury, and the auditor of state shall draw warrants therefor in favor of the officers entitled thereto, in monthly installments, when not otherwise provided by law."

Your question briefly stated is whether or not the "transportation expenses" referred to in the first mentioned section should be paid under Senate File 640 of the thirty-sixth general assembly, section one of which is above quoted.

After a careful consideration of all of these sections, I am inclined to the view that your question should be answered in the negative. These "transportation expenses" are clearly no part of the salary, even though it is made clear in the section fixing the salary that such transportation expenses are to be paid in addition to the salary. Such transportation expenses are not fixed by law as contemplated by Senate File 640 and, hence, for two reasons would not be included in the appropriation provided for in said section one of Senate File 640 of the thirty-sixth general assembly, namely that such expenses are not salary when they are fixed by law.

In other words, the appropriation made by the last mentioned section is clearly limited to the payment of salaries fixed by law and while such transportation expenses are to be paid in addition to the salary the same must be paid from some other source. If the language of this section making the appropriation had been broad enough to include such transportation expenses as well as salary, then I would be inclined to adopt your view.

C. A. ROBBINS, *Assistant Attorney General.*

STREET OBSTRUCTION—WHAT CONSTITUTES.—When city liable for injuries sustained because of such obstruction.

November 18, 1916.

D. C. FABER, *Iowa State College,* Ames, Iowa.

DEAR SIR: Replying to yours of the 17th instant will say that this department has heretofore given some consideration to the questions which you propound. Your first question reads:

> "Is an iron lamp post carrying red and white lights at the center of an intersection an obstruction to the street?"

This question should be answered in the affirmative but as to whether or not it is such an obstruction as would render the city liable in the event of injury sustained by any one lawfully using the highway colliding with such obstruction would, in my judgment, depend upon the other facts and circumstances, such as the width of the streets, the volume of traffic and, perhaps, other surrounding facts and circumstances; so that, in any given case it would probably be a question of fact for the jury's determination. Your second question is:

> "Is the city liable in case of accident on account of some one driving into the post, at night, in case the lights are out?"

The city might be liable in such a case if, under all the facts and circumstances as have been explained, it is negligence not to have the post lighted or if it was negligent to have it there at all. Your third question is:

> "Can a traffic post made of sewer pipe filled with concrete, and solidly attached to the pavement be considered an obstruction?"

In my judgment, this question should be answered in the same manner as the first. Your fourth question is:

> "Can a portable traffic sign, which would be tipped over in case of collision be considered in any case as an obstruction to the street?"

In my judgment, this question should be answered in the negative.

As bearing upon these questions I call your attention to the decisions of our own court in the case of *Herries v. City of Waterloo,* 114 Iowa, 374, where the city permitted a stone to be planted in the street; also to the case of *Wheeler v. Fort Dodge,* 131 Iowa, 566,

where the city was held liable for permitting an exhibition known as the slide-for-life feat to be performed with a wire partially across the street; also to the case of *Mickey v. Indianola,* 114 N. W., 1072, where suspended light wires were permitted to hang so low that plaintiff riding horseback became entangled therein.

While I do not know the scope of your bulletin nor how soon you expect to issue the same, yet I will say for your information that you will find a very valuable note extensively reviewing authorities and covering all phases of street obstructions attached to the case of *Elan v. Mt. Sterling,* 20 L. R. A. (N. S.) 512, and I would suggest that by writing the Lawyers' Co-Operative Publishing Company of New York you might get a copy of this opinion, together with the note, and the same might be of value to you.

C. A. ROBBINS, *Assistant Attorney General.*

INSURANCE COMMISSIONER.—What class of debenture bonds may be accepted as security from insurance companies under section 1806 of the code?

December 20, 1916.

HON. EMORY H. ENGLISH, *Commissioner of Insurance.*

DEAR SIR: In yours of even date addressed to the attorney general you call attention to the proposition of certain insurance companies to deposit with your department, as a part of their securities, certain debenture bonds issued by the Mulehead Ranch & Cattle Company, Gregory County, South Dakota, and you call special attention to Article 16 of the trust deed accompanying your letter which confers upon the bond holder the power to enforce election of his bond when due independent of the trustee, where such bond holder is the holder of at least one-fourth of the amount of the bonds. You then propound certain questions, which briefly stated, are:

First, whether or not you would be warranted in accepting securities of this sort in view of the provisions of section 1806 of the code which provides:

> "The funds required by law to be deposited with the Commissioner of Insurance by any company * * * and the funds and accumulations of any such company or association organized under the laws of this state held in trust for the

purpose of fulfilling any contract in its policies or certificates shall be invested in the following described securities and no other: * * *

"4. Bonds and mortgages and other interest-bearing securities being first liens upon real estate within this state or any other state worth at least double the amount loaned thereon and secured thereby exclusive of improvements, * * *"

And, second, whether or not you would be sufficiently protected by having a certified copy of the Trust Deed accompanying the bonds deposited with you by such insurance company.

With reference to the first question will say that it appears from pages five and seven of the Trust Deed that the bonds secured thereby mature on different dates—the first twenty maturing October 1st, A. D. 1921, and each successive twenty maturing a year later, except the last one hundred which mature October 1, 1926.

Our supreme court has held:

"Where a mortgage is given to secure notes coming due at different times, the notes have priority in the order of their maturity; and this rule is applicable even though there be a provision in the notes that the holder may elect to treat them all as due upon failure to pay any one of them at maturity. The holder of a subsequent note cannot, by treating it as a falling due upon failure to pay prior notes, entitle himself to a *pro rata* share of the security. *Leavitt v. Reynolds,* 79 Iowa, 348."

Hence, it follows that if the insurance company proposing to make the deposit with you owns and deposits the entire issue, then the bonds would be secured by first mortgage on real estate within the meaning of the section above quoted. Likewise would this be true if it owns and deposits the bonds maturing first in point of time, or first, second, third, etc., but this would not be true if the bonds maturing first in point of time are in the hands of some other holder and are not deposited by the company with you.

In my judgment, the provision in paragraph sixteen of the Trust Deed above referred to conferring upon the bond holder authority to enforce the provisions of the Trust Deed for the purpose of collecting his bonds independently of action by the trustee upon the conditions named therein is sufficient to protect the state and the policy holders for whose benefit the same are deposited.

However, as heretofore stated in answer to the first question only the bonds first maturing would be regarded as first mortgage bonds unless the entire issue is owned and deposited by one company.

Yours truly,

C. A. ROBBINS, *Assistant Attorney General.*

CIRCULAR LETTER TO ALL LOCAL OFFICERS CONCERNING THE ENFORCEMENT OF THE MOTOR VEHICLE LAW.

To the County Attorneys and Police Officers of the State of Iowa:

GENTLEMEN: Reports coming to this office from various parts of the state, together with an investigation made in the office of the secretary of state, show that the motor vehicle law is being flagrantly violated.

An investigation made by this department in the office of the secretary of state discloses the fact that there are between five and ten thousand automobiles and motor trucks which are being operated in the state for which no registration fee has been paid. This means that the several counties of the state are being deprived in the aggregate of at least fifty thousand dollars which should be expended upon the highways of this state. When any man fails to pay his share of the tax burden, some one else must pay enough more than his own to make up the loss.

All motor trucks, motor drays and delivery wagons which have a speed capacity of more than ten miles an hour must be duly registered and display metal number plates, the same as regular automobiles. A large number of these delivery wagons and delivery trucks are operating without being registered. (1571-m 1, Supplement to the Code, 1913.)

Every dealer must pay to the secretary of state the fee of fifteen dollars per year, for which he shall receive a distinctive dealer's number and two number plates, and as many additional sets as he may desire upon the payment to the secretary of state of one dollar for each duplicate set.

The dealer's number does not authorize the dealer to use an automobile for private or commercial purposes. A large number of dealers have secured no private registration for the individual car used for private and home purposes. Every dealer in the state who uses an automobile for private purposes must have one car registered for his private use, and if he uses automobiles for commercial purposes, each car so used must be individually registered. (1571-m 14.)

A number of dealers and owners are operating on paper numbers. The law does not recognize paper numbers for any purposes whatsoever. Two metal numbers must be displayed on each car driven upon the public highways. (1571-m 11.)

Every dealer is required to notify the secretary of state of each car sold by him, the date of sale, the make of the car and the factory number thereof, and no dealer shall permit the use of his demonstration or registration number by the purchaser of an automobile until application for registration has been made to the secretary of state by such purchaser.

I wish to direct the special attention of the county attorneys in the border counties of the state to the fact that a large number of residents of the state, living in such border counties, secure number plates in the adjoining states, and operate their cars continuously in this state under a foreign number plate. This is true in those counties bordering on states where automobiles are taxed as property in the regular way and a nominal fee is paid for the number plates. It goes without saying that this is in clear violation of law.

I wish to further direct your attention to section 1571-m23, Supplement to the Code, 1913, which provides that "Whoever operates a motor vehicle while in an intoxicated condition shall be guilty of a misdemeanor"; and that "Whoever operates a motor vehicle resulting in injury to another as a result of carelessness or accident, and knowing of such injury, leaves the place of said injury without disclosing his identity, giving his name and address and the registration number of his motor vehicle to the injured party or to a police officer, is guilty of a felony which may be punished by imprisonment in the penitentiary"; and to the fact that the second conviction for operating a motor vehicle while in an intoxicated condition makes the defendant guilty of a felony for which he may be punished by imprisonment in the penitentiary.

Operating a motor vehicle while intoxicated, or causing injury and failing to report the same, is ground for revocation of the license or the cancellation of the certificate of registration of the motor vehicle being operated.

I urgently recommend that county attorneys and police officers not only vigorously prosecute such offenders, but that they personally see that the trial court makes the report to the secretary of state with the recommendation that the certificate of registration be cancelled as provided by section 1571-m23.

I also direct attention to paragraph 10 of section 1571-m 18, which provides that "It shall be unlawful for any person to cause or permit any motor vehicle to be driven upon any public street or highway by any person under the age of fifteen years."

The statute expressly makes it the duty of the county attorney to see that this law is enforced. I am certain that if each county attorney in the state will co-operate with this department there shall be added to the revenues of the state for the use of the roads and highways at least fifty thousand dollars, and undoubtedly a number of accidents and injuries may be prevented. A vigorous, united effort on the part of county attorneys and police officers in enforcing the law relating to the operation of motor vehicles will not only prevent a number of accidents and injuries, but it will mean the saving of a large number of lives in the state of Iowa every year.

The number of deaths and accidents due to negligence and the violation of the law relating to motor vehicles is so great as to shock both our sensibility and our credulity.

We have more murders in the United States than in any civilized country in the world, our total death losses for three years by reason of homicide equaling the total number of death losses in the British army in the Boer war, but the number of deaths due to automobile accidents is so much greater than the number of deaths due to murder that there is no comparison.

The average loss of life per year in the entire city of London by reason of homicide is but twelve. For the month of August alone here in the state of Iowa we had over thirty deaths, more than five hundred accidents with more than four hundred injured persons.

For the month of July there were thirty-six deaths, 478 accidents and 418 persons badly injured. This means that for the months of July and August, 1916, there were 66 deaths, 978 accidents, and 818 persons injured.

If there had been the same loss of life and injury to cattle by reason of the foot and mouth disease, there would be a great demand for a special session of the legislature to discuss ways and means to stop the terrible epidemic; and if the same number of persons died as a result of some contagious disease, the whole state would be aroused at this shocking loss of human life, but coming as a result of automobile accidents, it hardly receives a passing notice.

Because of the seriousness of the situation and because of the great loss of revenue due the state by reason of the fact that a large number of persons are not paying their share of the tax burden in the form of registration fees, I have been so impressed with the necessity of action that I have detailed special men to give exclusive attention to the enforcement of this law, and these men will be available to co-operate with the several county attorneys, mayors and police officers in the state for this purpose.

So far as possible we want to collect every dollar due the state in the way of registration fees, and we hope to create such a sentiment in favor of the better observance of the law that the number of deaths, injuries and accidents may be greatly reduced. If but a few lives shall be saved as a result of our co-operative effort, it will certainly be worth what it costs in time and money to make the effort.

Our special agents have already commenced their work and at least two of them will give their exclusive time to the enforcement of this law. I shall be glad to co-operate with you and render you every possible aid in the enforcement of this law.

No great good will be accomplished by a sporadic effort to enforce the letter of the law. What we want is a deep-seated conviction and a persistent, continuous effort to enforce the law without fear or favor against every person who is guilty of a substantial violation of the law, and who is guilty of such careless driving or negligence as to injure the lives of others as well as himself. It is this kind of law enforcement which makes for permanency, accomplishes results and appeals to the sober judgment of all fair-minded people.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

CIRCULAR LETTER TO ALL LOCAL OFFICERS CONCERNING GAMBLING AND LOTTERY SCHEMES.

To the County Attorneys, Mayors and Police Officers of Iowa:

During the past month so many complaints have been made to the Department of Justice and so many requests from local officers have been received for opinions concerning gambling, raffling and lottery schemes, that I feel it incumbent upon me to direct a general letter to the law-enforcing officials of the state to the end that they may be advised as to the statutes of both the state and federal government, and the decisions covering these questions.

Complaint is made by merchants that they cannot continue to do a legitimate business when their competitor is permitted to sell an inferior article stimulated by the giving of rewards or prizes upon lot or chance which is clearly a gambling and lottery scheme.

All forms of gaming, gambling, raffles, slot machines, punch boards and lottery schemes of every description are prohibited by the constitution and the laws of this state, and likewise are prohibited by the laws of the federal government.

See section 28 of Article 3, of the Constitution of Iowa;

Sections 4962, 4963 and 4964 of the Code;

Sections 4965, 4965-a and 4965-b, Supplement to the Code of Iowa, 1913.

See also section 702 of the Code and section 704, Supplement to the Code, 1913.

Section 213, United States Statutes at Large, 60th Congress, 1907,1909, Vol. 35, Part 1, pages 1129-1130.

It is well recognized that all games of luck or chance whereby the person parts with his money in the hope or with the expectation of receiving something of value in return therefor are gambling and lottery schemes. It is also true that all schemes or transactions for which a consideration is paid and in which the person paying the consideration receives something each time, but the amount received depends upon luck or chance, are likewise gambling and lot-

tery schemes and prohibited by the laws of both the state and federal government, and this includes the sale of merchandise of any kind or character at the customary price if in connection therewith by reason of some luck, lot or chance, the person purchasing the goods has an opportunity of receiving some prize or reward. This precise question has been passed upon by the supreme court of the United States. See the case of *Horner v. Turner,* 147 U. S. 449, wherein it was held that the sale of official bonds of the Austrian government was an offense against the United States laws if accompanied therewith was a drawing contest whereby the purchasers of the bonds might receive a prize or reward of value.

The supreme court of the United States reviews the decisions of the several states, including the decisions of England, and finds that the courts invariably hold that such schemes are lottery and gambling schemes and therefore prohibited; and the fact that the purchaser of the bonds will receive the return of his money with interest does not make the transaction any the less an offense against the federal statutes.

The United States court in the case of *United States v. Jefferson,* 134 Fed. 299, held that the sale of Mother's Oats at the regular price per package amounted to a lottery scheme, if, as an inducement to stimulate the sale, coupons were placed in each package containing letters which spelled the word "Mother's," with the offer that the person receiving the coupons to spell the word in question should receive some prize or reward. The court held that the prize may be an inducement to make the purchase.

To the same effect, see the decision of the supreme court of Illinois, *Dunn v. People,* 40 Ill. 465.

The giving of prizes by lot or chance in connection with the subscription for a newspaper was likewise held to be a lottery scheme by the federal court.

United States v. Wallace, 58 Fed. 942.

See also *Belle v. State,* 37 Tenn. (5 Sneed) 407;
Arkansas v. Sanders, 9 L. R. A. (N. S.) 913;

And for the Iowa cases, see
Guenther v. Dewein, 11 Iowa 133;
State v. Maurer, 7 Iowa 406;
State v. Crogan, 8 Iowa 523;
State v. Cooster, 10 Iowa 453;
State v. Leicht, 17 Iowa 28;

State v. Bishel, 39 Iowa 42;
State v. Book, 41 Iowa 550;
State v. Miller, 33 Iowa 154;
State v. Boyer, 79 Iowa 330;
State v. White, 123 Iowa 425;
Blodgett v. McVey, 131 Iowa 552;
McClain's New Digest, Vol. 1, page 1085.

The advertising in any form, either by newspaper or otherwise, or the use of the mails in any form for the purpose of promoting or carrying on any lottery scheme, is prohibited by the federal statute and punishable by a fine of not more than $1,000 or imprisonment for not more than two years, or both; and for any subsequent offense imprisonment may be fixed at not more than five years.

See section 213 U. S. Statutes at Large, 60th Congress, 1907-1909, Vol. 35, Part 1, pages 1129-1130; U. S. Penal Code, sec. 213, 1909 Supp. to Fed. Statutes, Ann. p. 463; 4 U. S. Comp. Statutes, 1913, Sec. 10383.

From a reference to the state and federal statutes and a citation of the decisions of the courts of the United States and this state, it is clear that any scheme or transaction involving the payment of a consideration, either separately or as a part of the purchase price of some article, is a gambling and lottery scheme, if in connection therewith the purchaser may receive some prize or reward or thing of value as a result of lot or chance.

There is nothing, however, to prevent the giving of prizes as a reward of merit, quality or industry, or to prohibit a popularity contest. Prizes are offered by every state, county and local agricultural association, and if given for merit or quality or industry, the law is not violated. To be specific: persons may not make a wager on a horse race without violating the law, yet the association may offer a prize for the fastest horse or offer a prize or reward of merit for any article or thing exhibited at the fair.

A prize or reward given to a student receiving the highest marks of any in the class, or writing the best essay, the giving of prizes to persons obtaining the most subscriptions to a newspaper, to the person purchasing the most goods in a store, or to the person collecting the largest number of accounts, or votes given with each purchase to

be voted in a popularity contest, or prizes given for solving a puzzle, do not offend against the statutes.

For cases sustaining this position, see

Delier v. The Plymouth Co. Agricultural Society, 57 Iowa 481 at 485;

Eastman v. Armstrong-Byrd Music Co., 212 Fed. 662; 52 L. R. A. (N. S.) 108.

GEORGE COSSON, *Attorney General of Iowa.*

COPY OF FEDERAL STATUTE COVERING LOTTERIES AND GIFT ENTERPRISES:

"No letter, package, postal card, or circular concerning any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance; and no lottery ticket or part thereof, or paper, certificate, or instrument purporting to be or to represent a ticket, chance, share or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance; and no check, draft, bill, money, postal note or money order, for the purchase of any ticket or part thereof, or of any share or chance in any such lottery, gift enterprise, or scheme; and no newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be deposited in or carried by the mails of the United States, or be delivered by any postmaster or letter carrier. Whoever shall knowingly deposit or cause to be deposited, or shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of the provisions of this section, or shall knowingly deliver or cause to be delivered by mail anything herein forbidden to be carried by mail, shall be fined not more than one thousand dollars, or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than five years. Any person violating any provision of this section may be tried and punished either in the district in which the unlawful matter or publication was mailed, or to which it was carried by mail for delivery according to the direction thereon, or in which it was caused to be delivered by mail to the person to whom it was addressed."

Section 213, United States Statutes at Large, 60th Congress, 1907-1909. Volume 35, Part I, Pages 1129-1130.

CIRCULAR LETTER TO COUNTY ATTORNEYS DIRECTING ATTENTION TO THE ATTORNEY GENERAL'S REPORT WITH RECOMMENDATIONS CONCERNING TRIAL PRACTICE.

January 1, 1917.

To the County Attorneys of the State of Iowa.

GENTLEMEN: I am mailing you under separate cover a copy of my biennial report for the years 1915 and 1916, together with an opinion concerning gambling.

For a number of years I have been attempting to improve the entire penal system of Iowa along constructive lines; that is to say, I have labored for a more effective method of apprehending offenders, a more efficient method of securing prosecutions and a more humane and intelligent method of punishment. As a result we have secured the special agents bill, the Cosson laws making it mandatory upon local officials to act, giving the attorney general supervisory powers over county attorneys and authority to act in every part of the state, a removal bill providing for the removal of law enforcing officials, a red light injunction and abatement bill, which, though held unconstitutional because of the failure of the speaker to sign, has been re-enacted; we have secured a custodial farm, but not the legislation for establishing the same; we have secured a law providing for the compensation of prisoners and authorizing a part of the payment to support those dependent upon the prisoner, but the full effect of this law is dependent upon a modern industrial system in our penal institutions which will require additional appropriations for its establishment; and we have secured the most up-to-date and workable law for the working of prisoners upon the highway.

In the thirty-third general assembly I secured the passage of a law changing the time of criminal appeals from one year to six months.

While we have made progress of very great import in all these directions, nevertheless more criminal cases have been reversed during the past two years than at any time during the last twenty years.

In this report, I have set forth a table of criminal cases submitted during the past two years, the date and method of disposition and the name of the judge writing the opinion. It will readily be admitted that some of these cases should have been reversed, in that

the substantial rights of the defendant had been prejudiced in the method of trial, but in a number of them the guilt of the defendant from the whole record was so clear that no reasonable mind could have any doubt thereof. Such cases ought not to have been reversed.

In the event that the supreme court feels that the verdict for the higher offense cannot stand, but the evidence shows the defendant clearly guilty of an included offense, the rule in the Baker case should prevail. *(State v. Baker,* 157 Iowa, 126.) But inasmuch as the court rejected the extension of the application of this principle in the O'Donnell case *(State v. O'Donnell,* 157 N. W., 870), undoubtedly we should have legislation along this line, and we should have a law similar to that of Wisconsin and the other states referred to in my report, to the end that criminal cases shall not be reversed upon mere technicalities.

I trust that you will read the report carefully and write your representative and senator urging the passage of a law in accord with as many of these recommendations as seem to you desirable and necessary.

While I do not hesitate to frankly state that cases are now being reversed which ought not to be reversed, yet we must take our full share of the responsibility. As prosecuting officers, we must ever bear in mind that we are not commissioned by the people to see how many cases we can win, but we are commissioned as officers of the law to aid in establishing justice. This means that the guilty must be punished without fear or favor but the innocent must be protected.

During the past few years a number of cases have been reversed because of misconduct on the part of prosecuting lawyers.

In addition to my report, I am sending you a citation of cases wherein are shown forms of indictment for almost every criminal offense in our state with an explanation showing where the indictment has been sustained or held invalid or criticized. On page 15 you will find the list of cases where prejudice has been shown by reason of improper remarks of the prosecuting attorney. In the cases cited you will also find a discussion of the instructions relative to the offense in question.

If the county attorney will feel that it is just as much his duty to prevent error from getting into the record as it is the duty of the trial court, I am sure we will have fewer cases reversed by the supreme court with the necessity of a retrial with the resulting con-

sequence of a miscarriage of justice, together with a large amount of increased costs unnecessarily incurred.

I conclude the last day of my third term in this office with kind remembrances of the cordial relation and co-operation which has existed during these official years between the county attorneys of the state and the attorney general.

With greetings and best wishes for the New Year, I am,

Yours very truly,

GEORGE COSSON,
Attorney General of Iowa.

CIRCULAR LETTER TO DISTRICT JUDGES DIRECTING ATTENTION TO THE RECOMMENDATIONS MADE TO THE GOVERNOR, THE LEGISLATURE AND THE SEVERAL COUNTY ATTORNEYS.

January 1, 1917.

To the District Judges of the State of Iowa.

GENTLEMEN: I have felt that there was much opportunity for improvement in our criminal procedure when a state like Wisconsin, with over a hundred thousand more population and larger cities, had only twenty-two cases appealed during a biennial period and only four reversed, and our own state had thirty-five criminal cases reversed or the same number of reversals as affirmances of the cases argued.

The parallel is just as striking if we compare our own state with Kansas, Minnesota, Maryland, Connecticut or South Dakota.

I have accordingly covered the whole question in my biennial report, a copy of which I am sending you under separate cover. The responsibility which the supreme court should bear for this state of affairs is set forth in this report. I trust you will have time to read it with care. I, however, frankly confess the share of the responsibility which prosecuting attorneys and the Department of Justice must assume, and I have accordingly written the county attorneys concerning the matter and enclose you a copy of this letter.

I am also enclosing you a copy of the citation of Iowa cases showing forms of indictment approved in all criminal offenses, together with a ruling on instructions. This has just been furnished to each county attorney in the state. I feel that if the suggestions made to the governor and the legislature in the biennial report and the suggestions made to the county attorneys are followed, we may look for

much improvement during the coming years and that Iowa will be found in the forefront rather than the rear of the procession.

With kind personal regards to each of you and with greetings and best wishes for the New Year, I am,

Yours very truly,

GEORGE COSSON,
Attorney General of Iowa.

(See also Index to Opinions, page 253)

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Workmen's Compensation

OPINIONS

WORKMEN'S COMPENSATION OPINIONS

A SYMPATHETIC ADMINISTRATION.—The compensation statute should be administered in a true spirit of helpfulness.

January 18, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

Complying with your request for a brief statement of my views upon the spirit in which the compensation law should be administered, let me say that I am pleased to see you considering this subject so early in your administration. It is a matter of extreme importance. Experience has demonstrated the need of compensation legislation for the promotion of the public welfare and its provisions have been wisely framed. Unless the real spirit of this new legislation sufficiently pervades its entire administration, its high purpose may be largely defeated and the conditions become so unsatisfactory as to create danger of its abrogation and a return to the distressing situations which give rise to the effort for relief. Such a result in the matter of workmen's compensation would prove a public calamity and, therefore, every one in authority and having to do with determining the precise scope of such legislation, both in letter and spirit, should be alert. They should at all times so apply its provisions that the wisdom embodied in such legislation will be so evident that no considerate person will indulge the thought of even a partial backward step towards the old system characterized by incalculable waste to the detriment of every consumer of the product of human energy; by a distressing and unequal distribution of the misfortunes incident to necessary industrial pursuits, particularly those misfortunes to employes by personal injury losses; by a lowering tendency of moral standards in the making and enforcing of claims for such losses and by the perversion of human perception of individual responsibility in such cases.

The Iowa compensation statute is a long step toward an ideal system requiring every consumer of the product of human industry to pay his ratable proportion of fair money cost of those things which he necessarily destroys in conserving his life and welfare—personal injury losses not intentionally incurred. Losses, whether

through the fault of the employer or employe, or without fault of either, should be considered as legitimately an element of such fair money cost as expenditures for raw material, for machinery, or for wages.

You will soon find in your position as Iowa Industrial Commissioner that it is difficult for those affected by this statute to get into the real spirit of this legislation. Especially is this true of the courts and the lawyers who are so saturated with the idea that there should be no compensation paid by the employer except in those cases where the employer is to some extent at fault.

I respectfully suggest that you and the courts, whenever any matters arising under this statute come before them, should fully appreciate and be imbued with and guided by the manifest intention of the law to eradicate utterly the injustice to employers and employes (and to the public as well), found in the old order, and to substitute in its place an entirely new system based on the highest conception of man's humanity to man and the obligation which industry owes to those upon whom it depends, a new system which recognizes the aggregate of its attending accidents as an element of cost to be liquidated and balanced in money in the course of consumption, a new system dealing with employes, employers and the public as necessarily mutual participants in bearing the burdens of such accidents.

You should have in mind at all times that this new system was enacted to displace an antiquated system which dealt only with that small class of injuries which happen through the fault of the employer and gave no attention to the larger class of injuries due to an inadvertent failure to exercise average human care, even though such accident was without moral turpitude. This old system, as you know, placed employe and employer, whose interests are economically the same, in the false position of adversaries, to the misfortune of both parties and to the public, and thereby increased the opportunities for those concerned as judicial assistant to profit by such misfortunes.

You will agree with me that it will be most lamentable if this proposed solution of the problem of dealing justly with the unfortunate victims of our industrial life should not endure, or that it be not perfected to the best that human wisdom can attain, since the system proposed is freighted with hopes for the minimizing of human burdens and their equitable distribution.

Trusting that from the foregoing you can gather something of the spirit of the statute, which it is your great opportunity to administer, I beg to remain,

HENRY E. SAMPSON, *Assistant Attorney General.*

CONSTITUTIONALITY OF LAW—Iowa statute elective—May be affirmatively rejected by either employer or employe—Applies to all general employers except farmers—Citation of authorities upholding constitutionality.

HON. EDWARD C. TURNER, *Attorney General,* Columbus, Ohio.

Answering your inquiry relative to the matter of the constitutionality of the Iowa workmen's conmpensation act, will say that the Iowa statute is of the elective type, being optional both as to the employer and the employe; that it applies to all general employers, except farmers, who do not affirmatively reject its provisions; that it has been before the supreme court of our state where its provisions were interpreted and all of its parts held constitutional.

(Hunter v. Colfax Consolidated Coal Co., 154 N. W. 1037).

Its constitutionality was also upheld in a case brought in the United States District Court, which case was afterwards appealed and is now pending in the Supreme Court of the United States *(Hawkins v. Bleakly,* 220 Fed. 378).

I do not have a printed brief containing all of the authorities upon this subject but refer you to the following cases in which similar statutes have been upheld:

CALIFORNIA:

Western Indemnity Co. v. Pillsbury, 151 Pac. (Cal.) 398 (compulsory).

Mass. B. & I. Co. v. Pillsbury, 151 Pac. (Cal.) 419.

ILLINOIS:

People v. McGoorty, 270 Ill. 610;

Deibeikis v. Link Belt Co., 261 Ill. 454, 104 N. E. 211;

Crooks v. Tazewell Coal Co., 263 Ill. 343, 105 N. E. 132;

Dietz v. Big Muddy Coal & Iron Co., 263 Ill. 480, 105 N. E. 289.

IOWA:

Hawkins v. Bleakly, 220 Fed. 378;
Hunter v. Colfax Consolidated Coal Co., 154 N. W. (Ia.) 1037.

KANSAS:

Shade v. Ash Grove L. & P. Co., 144 Pac. (Kans.) 249, 92 Kans. 146.

KENTUCKY:

Ky. State Journal Co. v. Workmen's State Compensation Board, 170 S. W. (Ky.) 1166.

MASSACHUSETTS:

Young v. Duncan, 106 N. E. (Mass.) 1;
Pendar v. H. & B. Am. Mach. Co., 87 Atl. (R. I.) 1;
Opinion of Justices, In re, 209 Mass. 607, 96 N. E. 308.

MINNESOTA:

Mathison v. Minneapolis Street Ry. Co., 148 N. W. (Minn.) 71.

MONTANA:

Cunningham v. N. W. Improvement Co., 44 Mont. 180, 119 Pac. 554.

NEW JERSEY:

Sexton v. Newark Telephone Co., 86 Atl. (N. J.) 451;
O'Connell v. Simms Magneto Co., 85 N. J. L. 64, 89 Atl. 922.

OHIO:

State v. Creamer, 85 Ohio St. 349, 39 L. R. A. (N. S.) 694;
Porter v. Hopkins, 109 N. E. (Ohio) 629;
Zumkehr v. Diamond Portland Cement Co., 23 Ohio Dec. 224;
Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 35 Sup. Ct. Rep. 167.

TEXAS:

Middleton v. Texas Light & Power Co., 178 S. W. (Texas) 956;
Middleton v. Texas Light & Power Co., 185 S. W. (Texas) 556;
Memphis Cotton Oil Co. v. Tolbert, 171 S. W. (Texas) 309.

WASHINGTON:

State v. Clausen, 65 Wash. 156, 37 L. R. A. (N. S.) 466;
State v. Mountain Timber Co., 75 Wash 581;
Stoll v. Pac. S. S. Co., 205 Fed. 169.

WEST VIRGINIA:

De Francesco v. Piney Mining Co., 86 S. E. (W. V.) 777.

WISCONSIN:

Borgnis v. Falk Co., 147 Wis. 327, 37 L. R. A. (N. S.) 489.

UNITED STATES:

Mondou v. N. Y. & N. H. & H. R. Co., 223 U. S. 1.

Trusting that the foregoing will prove sufficient for your purposes, I beg to remain,

Yours very truly,

HENRY E. SAMPSON, *Assistant Attorney General.*

CITIES AND TOWNS AS EMPLOYERS—Laborers engaged in repair of public buildings and doing road and street work are employes—Public officers not employes—Volunteer firemen not employes.

December 3, 1915.

W. C. LOOSBROCK, *Town Clerk,* Dyersville, Iowa.

Replying to your letter of November 26th will say that in my judgment your laborers engaged in the repair of public buildings and in the cleaning of sewers and in the laying of water mains and in the doing of road and street work are employes within the meaning of section 2477-m16(b), supplement to the code, 1913.

It is expressly provided in said section 2477-m16(b) that the term 'employe' within the meaning of the Iowa workmen's compensation act does not include an official elected or appointed by the state, county, school district, municipal corporation or cities under special charter and commission form of government and under such a provision your town clerk and town treasurer and perhaps your weighmaster, your marshal, your night policeman, your special policemen and your street commissioner would be excluded, depending in each instance upon the nature of their appointment or employment.

Since your volunteer fire company is made up of men who receive no compensation and are not in the regular employ of the town it is my judgment that it cannot be said there exists the relationship of master and servant between such firemen and your town and that, therefore, they are not employes within the meaning of the Iowa workmen's compensation act.

HENRY E. SAMPSON, *Assistant Attorney General.*

EMPLOYES OF PUBLIC EMPLOYERS.—Officers of counties, cities and school boards are excluded, while the workmen of such public employers are included within the compensation act.

June 26, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

You ask to be advised whether or not the officers and employes of counties, cities and school districts are included as workmen within the meaning of the Iowa workmen's compensation act, and for answer to same permit me to call your attention to the provisions of section 2477-m16(b) which reads as follows:

> "'Workmen' is used synonymously with employe, and means any person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship for an employer, except * * * an official elected or appointed by the state, county, school district, municipal corporation, cities under special charter or commission form of government."

You will observe from the foregoing statutory definition that any officer who is elected or appointed by the county, city or school district is expressly excluded from the provisions of the Iowa compensation law, and in each particular case coming before you for decision you must first ascertain whether or not the injured person is an officer, either elected or appointed, and if so, then you must find that such person is not entitled to compensation under the act. If, on the other hand, such injured person is not an officer within the meaning of the statute, either elected or appointed, but is in fact a workman, as that term is defined by the statute, then compensation should be allowed.

You will at once observe from an application of the rule just stated that the supervisors, treasurer, clerk, sheriff, attorney,

recorder, assessor, etc., are officers of the county and therefore excluded; also, that the mayor, councilmen, commissioners, clerk, treasurer, attorney, engineer, etc., are officers of cities and towns and are therefore excluded, and that members of the school board are officers of school districts and therefore excluded.

By applying the same rule you will find that the county engineer, superintendent of the poor farm, road overseers, courthouse janitors, etc., are employes and therefore included; that the superintendent of city water works plant, the superintendent of a public electric light plant, the superintendent of streets, the city hall janitors, etc., are employes of a city and therefore included; that the school house janitors are employes of the school district and therefore included.

HENRY E. SAMPSON, *Assistant Attorney General.*

TOWN MARSHAL—Not employe. Public official. Excluded under compensation act.

November 27, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

You ask to be advised as to whether or not a town marshal is an official within the meaning of section 2477-m16(b), supplement to the code, 1913, and whether or not, in case of injury, a town marshal is entitled to compensation under the Iowa workmen's compensation act.

Answering your inquiry will say that, under the only reasonable interpretation which can be made of said section 2477-m16(b), all public officials are excluded from the term "employe" as used in the Iowa workmen's compensation act, and that by reason of such exclusion public officials cannot avail themselves of the privileges of compensation. In at least half of the compensation statutes of this country a clear distinction is expressly provided in the act between "employers" and "officials" among which may be mentioned those from the states of California, Illinois, Louisana, Maine, Michigan, Minnesota, Nebraska, West Virginia, Wisconsin, Wyoming and others. I know of no state which expressly provides that public officials are included within the term "employe."

If, then, a town marshal is a public official under the provisions of the Iowa statutes, he is expressly excluded from the pro-

visions of the Iowa compensation act, and it is my deliberate judgment that, under the statutes of Iowa, a town marshal is a public official within the meaning of said compensation act.

Section 652, supplement to the code, 1913, provides, among other things, that the mayor of each town shall appoint a marshal who shall be ex-officio chief of police. The supreme court held in the case of *Baxter v. Beacon,* 112 Iowa 744, that since the marshal of a town was an appointee of the mayor, a contract between the city council and a person to act as marshal at a stipulated salary was not valid.

Section 657, supplement to the code, 1913, provides for the removal of the town marshal by the mayor.

Section 5099 of the code names town marshals as included within the general term of "peace officers," and the supreme court in the case of *State v. Watson,* 66 Iowa 670, held that the town marshal was in fact a peace officer with authority to arrest persons guilty of vagrancy, and with authority to serve the orders of a justice of the peace committing such person to imprisonment.

For further authorities bearing upon this subject and tending to support the position here contended for, see: Mechem, Public Officers, pp. 855, 856; *Throop v. Langdon,* 40 Mich. 673; *Blynn v. Pontiac,* 151 N. W. 681; *Woodhull v. N. Y.,* 150 N. Y. 450; *Ex Parte Preston,* 161 S. W. (Tex.) 115; *State v. Schram,* 82 Minn. 420; *Scherl v. Flam,* 136 App. Div. (N. Y.) 753; *Lizano v. City,* 96 Miss. 640; *Sibley v. Connecticut,* 89 Conn. 682.

In view of the foregoing, it is my judgment that a town marshal is a public officer under the statutes of Iowa, and that as such he is excluded from the provisions of the Iowa workmen's compensation act.

I am aware of some language in my letter to W. A. Templeton, under date of April 24, 1914, which would justify one in thinking that at that time I held to a contrary view, but it should have been explained in that letter that the particular injury to which I was there referring was to one received by the manager of the city water works, and who performed the duty of street commissioner for the town while at the same time acting as town marshal. The injury in that case arose while the party was engaged in the performance of some manual labor in connection with the water works.

HENRY E. SAMPSON, *Assistant Attorney General.*

FIREMAN AN EMPLOYE.—Member of paid fire department of city is an employee within meaning of compensation act.

November 23, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

You ask to be advised whether or not a member of the paid fire department of a city is an employe within the meaning of the Iowa workmen's compensation act, and in answer to same will say that, in my judgment, such a fireman is an "employe" within the meaning of the definition set forth in section 2477-m16(b), supplement to the code, 1913.

This position is consistent with that taken by the Massachusetts Industrial Accident Board in the case of *Nelson v. City of New Bedford,* case no. 1209, Nov. 20, 1914, wherein it was held that a member of the fire department of the City of New Bedford was included within the provisions of the Massachusetts workmen's compensation act, which, by its express terms (section 6, ch. 807, Acts 1913), is made to apply to all laborers, workmen and mechanics in the service of the commonwealth or of a county, city or town or district having the power of taxation, under any employment or contract of hire, express or implied, oral or written, including those employed in work done in performance of governmental duties as well as those employed in municipal entrprises conducted for gain or profit.

HENRY E. SAMPSON, *Assistant Attorney General.*

APPRENTICES—Apprentice an employe. Compensation due depends upon terms of articles of apprenticeship and circumstances of case.

November 27, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

You ask to be advised whether or not an apprentice who earns no wages is an employe within the meaning of the Iowa workmen's compensation act.

Answering your inquiry will say that the courts have generally held apprentices to come within the term "employe," even though such apprentice received no direct wages and depended for remun-

eration upon the knowledge obtained. Such was the holding of the supreme court of Georgia in the case of *Smith v. W. & A. R. R. Co.*, 134 Ga. 216, the court saying:

> "If a person under due authority from a railroad company goes upon one of its engines hauling a train, for the purpose of learning the duties of a fireman, and performs services for the company in order to gain such experience and knowledge of the work as will render him competent to act as a regular fireman and to receive pay as such, thus becoming what is called 'a learner fireman' or 'an apprentice fireman,' he is, while thus acting, a servant of the company, although he receives no pay during the time of such preparatory service, and as such servant he is a fellow servant with the regular servants employed in the operation of the train on which he is engaged. *Weisser v. Southern Pacific Ry. Co.*, 148 Cal. 426 (7 Am. & Eng. Ann. Cas. 636, 83 Pac. 439).

I have found two English cases which are consistent with the view just expressed. The first is that of *Emerson v. Donkin Co.*, decided November, 1910, and found on page 74, Vol. 4, Butterworth's Workmen's Compensation Cases; the second being the case of *Turner v. Steamship Haulwen,* decided February, 1915, and reported at page 242, Vol. 8, Butterworth's Workmen's Compensation Cases.

In view of the authorities it is my judgment that an apprentice would be an employe within the meaning of the Iowa workmen's compensation act and that, as such, he would be entitled to compensation. As to the amount of compensation, this would depend upon the terms of the articles of apprenticeship under which such apprentice was employed and upon the particular circumstances of each case.

HENRY E. SAMPSON, *Assistant Attorney General.*

CASUAL EMPLOYMENT.—No employes excluded from Iowa compensation act unless employment is casual or not for the purpose of employer's trade or business.

July 25, 1916.

HOMER S. STEVENS, *City Solicitor,* Clarinda, Iowa.

Your letter of July 19th, addressed to the Hon. A. B. Funk, has been handed to me for attention.

The statement of facts, as set forth in your letter, is as follows:

> "The employer is a municipal corporation. One of the pumps used in the Water Works Station of the City became out of repair and it was necessary to secure the services of a man or two to assist in repairing the same. The injured party was employed to assist the Water Commissioner in installing repairs for the pump and they expected to complete the same in a few hours. While he was unscrewing a pipe with a pair of chain tongs, the injured party struck, with a hammer, the end of the tongs which grip the pipe for the purpose of loosening the chain tongs, and a small piece of metal flew off of the chain tongs and hit him in the eye. The attending physician says he has lost the sight of his eye. The injured party was to be paid at the rate of Two Dollars ($2.00) per day and had only worked a few hours when the accident happened. He was not an employe of the city previous to this time and he is a day laborer. It was the intention of the city to retain him in its employ only during this particular job of work."

The legal question involved in your inquiry is whether or not the injured employe of the town of Clarinda is an employe of such municipal corporation within the meaning of the statute, or is he excluded under the provisions of section 2477-m16(b), reading: "Except a person whose employment is purely casual and not for the purpose of the employer's trade or business." The statutes of most of the other states use the word "or" in place of the word "and." By reason of this peculiar language of the Iowa statute this department has been holding that no employes are excluded from the provisions of the Iowa workmen's compensation act, unless there are two essential elements present, first, that the employment is purely casual, that is indefinite, uncertain and temporary; and second, that such employment is not for the purpose of the employer's trade or business. In other words, if the employment is not of a casual character, it is not necessary that the employment be for the purpose of the employer's trade or business or, on the other hand, if the employment is for the employer's trade or business, it is not necessary that such employment be of a casual character.

For authorities bearing upon this subject see, 4 N. & C. cases, 502, footnote; 6 N. & C. cases, 958, footnote; *In re McAuliffe,* Ohio Ind. Com., Oct. 9, 1914; *Clements v. Columbus Saw Mill Co.,* Ohio Ind. Com., Oct. 21, 1914; *Mueller v. Oelkers Mfg. Co.,* 36 N. J. L. 117;

Grogan v. Frankfort Gen. Ins. Co., Mass. Workmen's Comp. Rep. (1913) 231; *In re Howard,* 5 N. C. C. A. 449; *Schaeffer v. De Grottola,* 4 N. C. C. A. 582; *Brown v. City of Mauston;* 3 N. C. C. A. 693-n; *In re Michaels,* Ohio Ind. Com., Oct. 24, 1914.

In the case of *Sabella v. Brazileiro,* 31 Atl. (N. J.) 1032, the court said:

> "The evidence shows that deceased was justified in the expectation that the employment would continue at least until the ship was loaded or so long as his services were required for the purpose. While this class of work was not constant defendant depends upon there being a ship of the prosecutor in port. It appears that the deceased was frequently called upon by the prosecutor to serve them in this particular class of work, being one of a class of stevedores ready to be called upon when required. We think this supports the finding that the employment was not casual within the meaning of the word as expressed in the statute. The ordinary meaning of the word "casual" is "something which happens by chance," and an employment is not casual—that is, arising from accident or chance—where one is employed to do a particular part of a service requiring someone regularly with the fair expectation of its continuing for a reasonable period."

In the case of *King v. Boston Brick Co.,* National Compensation Journal (October 1914), page 21, the Massachusetts Industrial Accident Board held that the employment of the person for one day as a driver for the delivery of brick, not for one particular job, but for the day, is not a casual employment even though the employment is for one day only.

In the case of *Mueller v. Oelkers Mfg. Co., supra,* the court held that the mere fact that the workman undertakes the work without any express agreement as to the amount which he shall be paid is not sufficient to constitute him a casual employe.

In view of the foregoing authorities, it is my judgment that an employe, working under the conditions set forth in the above statement of facts, would be included within the provisions of the Iowa workmen's compensation act.

HENRY E. SAMPSON, *Assistant Attorney General.*

CARPENTER WORK ON FARM—A carpenter engaged in building a barn upon a farm is not engaged in an agricultural pursuit.

March 27, 1915.

J. G. ZIEGLER, Lone Tree, Iowa.

Replying to your letter of March 19, addressed to Attorney General Cosson, and having reference to the Iowa workmen's compensation act, will say that if your son is a carpenter by trade, and if he was employed by Mr. Cummins to assist in the construction of a barn, and if your son was in no way connected with the doing of farm labor except in the building of such barn, and if he was in fact employed by the said Cummins as a carpenter and for no other purpose, and if he received personal injuries which arose out of and in the course of his employment, it would seem that your son would be entitled to compensation in accordance with the provisions of the law as set forth in chapter 147, acts of the thirty-fifth general assembly, provided the employer, Mr. Cummins, was carrying compensation insurance as required by section 42 of said chapter 147. If, on the other hand, Mr. Cummins had failed to provide such insurance or had rejected the compensation features of the act, then he would be liable to you not for compensation but for damages in accordance with the rules governing employer's liability.

HENRY E. SAMPSON, *Assistant Attorney General.*

COMMISSION MEN—Those following an independent calling are general contractors and not employes.

July 26, 1916.

MANHATTAN OIL COMPANY, Des Moines, Iowa.

Your letter of July 17th addressed to the Iowa industrial commissioner relative to whether or not your commission men are employes within the meaning of the workmen's compensation act has been handed to me for attention, and in reply to same will say that from your letter I understand that the arrangement which you have with your commission men provides that they may or may not devote all of their time to the sale of oil; that they do not remain entirely under the control and direction of your company; that they are paid a commission upon the quantity of oil which they sell; that they are responsible to the company for all oil delivered to them; that in the

sale of such oil they are responsible for the prompt payment for all oil sold by them, and that their work is more in the nature of a pursuit of an independent calling than it is of rendering a personal service to your company as employer.

Under such an arrangement, it is my judgment that your commission men are not employes within the meaning of the Iowa workmen's compensation act and that you would not be required, under the provisions of this statute, to carry compensation insurance for them.

I am sending you under separate cover copy of pamphlet entitled "Workmen's Compensation" and call your attention to the opinion found at pages 18 and 20 which bears upon the general subject.

HENRY E. SAMPSON, *Assistant Attorney General.*

INTERSTATE RAILROAD EMPLOYES—Whether or not an interstate railroad employe, injured through no negligence of the employer, can recover compensation under the Iowa compensation act, *quaere.*—Authorities.

November 14, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

Replying further to your inquiry relative to the extent to which the Iowa workmen's compensation act is limited in its application by the federal employers' liability act which affords a remedy to an employe of an interstate carrier by rail who has been injured by the negligence of the carrier will say that there is a sharp conflict of authorities between the courts upon the question of whether or not the state compensation act applies to injuries of interstate carriers by rail where the injuries were received while the employe was himself engaged in furthering interstate commerce. There has been no authoritative ruling by the United States supreme court upon your particular question although I understand there are two or three such cases now pending before that high court.

The New York Court of Appeals has held that the New York compensation act was applicable to injuries to employes of interstate carriers by rail, although such employes were themselves engaged in furthering interstate commerce, if the injuries were not received because of the negligence of the carrier. The court in its decision

pointed out that the federal act was based solely upon negligence and that, under the state act, the negligence of the employer was immaterial. During the course of its opinion the court said:

> "We think it is evident, also, that Congress has recognized the difference between these two kinds of statutes. In enacting the Federal employers' liability act it intended to occupy and exclusively pre-empt the field in which the liability of certain employers engaged in interstate commerce to their employes is prescribed when the latter were injured as the result of negligence. It did not intend to enter upon the filed of compensation for industrial accidents which were not the result of negligence, but left that field open for occupancy by the state until such time as it should assume to legislate upon this subject. The view that Congress intended to observe the distinction between the two kinds of statutes referred to is fortified by the fact that it has passed a workmen's compensation law exclusively applicable to Federal employes, in which liability is not made to depend either upon fault or contract (35 Stat. at L. 556-558, chap. 236, Comp. Stat. 1913, sections 8923-8929), whereas, as to certain private employments, it has regulated the subject only in those cases where the employe is injured as the result of negligence (35 Stat. at L. 65, chap. 149). The workmen's compensation statute of this state was not in any way designed to conflict with the authority of Congress over interstate commerce. As was said by this court in *Jensen v. Southern P. Co.* 'Its obvious purpose was to guard against a construction violative of the Constitution of the United States.' "

Winfield v. New York C. & H. R. R. Co., (1915) 216 N. Y. 284, affirming 168 App. Div. 351.

The supreme court of New Jersey has held that the federal employers' liability act does not prevent the applicability of the New Jersey workmen's compensation act in the case of an injury to a brakeman on an interstate train since the two acts deal with entirely different matters.

Rounsaville v. Central R. Co. (1915), 94 Atl. (N. J.) 392.

In the case of *West Jersey Trust Co. v. Philadelphia & R. R. Co.* (1915), 95 Atl. (N. J.) 753, the supreme court of New Jersey held that the fact that the deceased workman was engaged in furthering interstate commerce at the time of his death did not prevent his dependents from recovering compensation under the New Jersey act.

The supreme court of New Jersey, in the case of *Hammill v. Pennsylvania R. Co.*, 94 Atl. (N. J.) 313, held that the federal employers' liability act did not prevent the operation of a state compensation act in a case in which no claim for negligence on the part of the employers could be made. The court said:

> "The federal and state acts are not in pari materia. The one is an act creating a liability to the employe as in tort, based upon common-law negligence, or the failure to comply with some statutory provision for the safety of the employe; the other, so far as its section two is concerned, is a compensation act purely contractual in character, and requiring compensation for injury or death to be made as an incident of the mere relation, and quite irrespective of any question of negligence on the part of the employer. It was manifestly intended, among other things, to give relief in just such cases as the present one, where no claim of negligence on the part of the employer could reasonably be made. As to this class of cases, at least, we deem the federal act not to be exclusive. The authorities cited by prosecutor will be found to involve in each case a conflict between the federal act and a state act imposing a liability as in tort for a breach of a statutory or common-law duty."

The courts have uniformly held that the state compensation acts apply to those engaged in furthering intrastate commerce as distinguished from interstate commerce since the federal employers' liability act only applies to those who are injured while furthering interstate commerce. The supreme court of New York in the case of *Okrzsezs v. Lehigh Valley R. C.* (1915), 155 N. Y. Supp. 919, held that an employe of a railroad company located and operating within the state who was at work on the repair of a car is under the protection of the state compensation act and not under the federal employers' liability act since he was not engaged in furthering interstate commerce at the time of the injury, although the car had been used in both interstate and intrastate commerce.

On the other hand, the Illinois court has held that the state acts cannot in any case apply to injury to employes of interstate carriers by rail where the employe, when injured, was himself furthering interstate commerce. See the case of *Staley v. Illinois C. R. Co.* (1914), 186 Ill. App. 593.

Several decisions of the California court are to the same effect. See

Smith v. Industrial Accdt. Commission (1915), 26 Cal. App. 560; and

Southern P. Co. v. Pillsbury (1915), 151 Pac. (Cal.) 277.

In the case of *Young v. Duncan* (1914), 218 Mass. 346, the court of that state said that the Massachusetts act probably did not embrace employes subject to the federal employers' liability act.

If you desire to further investigate this important subject I would suggest that you examine the following additional authorities:

Michigan C. R. Co. v. Vreeland (1913), 227 U. S. 59;
Jensen v. Southern P. Co., 215 N. Y. 514;
Stoll v. Pac. S. S. Co. (1913), 205 Fed. 169;
Connole v. Norfolk & W. R. Co. (1914), 216 Fed. 823;
Kennerson v. Thames Towboat Co., 89 Conn. 367;
Grybowski v. Erie R. Co., 95 Atl. (N. J.) 764;
Berton v. Tietjen & L. Dry Dock Co., 219 Fed. 763;
Moore v. Lehigh Valley Co., 100 N. Y. Supp. 620.

You will observe from the foregoing that the supreme courts of New York and New Jersey and Connecticut have held that the state compensation act applies to injuries of employes of interstate carriers by rail where the employe, when injured, was himself furthering interstate commerce, if the injury was not caused by the negligence of the employer, while the supreme courts of Illinois and California take a different view. Until the United States supreme court passes upon this question it will not be known which of these two conflicting views will be adopted and, since there is high authority for both of these positions, your arbitration committee could find reasonable grounds for deciding this question in whichever way appeals to it as just and as intended by the legislature of Iowa.

HENRY E. SAMPSON, *Assistant Attorney General.*

SPHERE OF EMPLOYMENT.—Injury arising within or without sphere of employment depends upon facts in each particular case—without, no compensation; within, compensation should be allowed. Courts hold wide distinction between prohibitions limiting sphere of employment and prohibition dealing with conduct within sphere of employment.

November 15, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

I have for consideration your question involving the distinction between those prohibitions which limit the sphere of employment and those prohibitions which deal with the conduct of the employe within the sphere of employment and, especially, as such distinction affects the rights to compensation under the Iowa workmen's compensation act.

Answering your inquiry will say that the courts have uniformly held that there is a wide distinction between those prohibitions limiting the sphere of employment and those prohibitions dealing with conduct within the sphere of employment.

One of the earliest cases is that of *Plumb v. Cobden Flour Company* (1914), A. C. 62, wherein the rule was stated as follows:

> "There are prohibitions which limit the sphere of employment, and prohibitions which only deal with conduct within the sphere of employment. A transgression of the prohibition of the latter class leaves the sphere of employment where it was and, consequently, will not prevent recovery of compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere."

Lord Dunedin, who prepared the opinion, after discussing the tests which govern the right to compensation in accidents arising from prohibited acts, pointed out that there are prohibitions which limit the sphere of employment and prohibitions which only deal with conduct within the sphere of employment, and cited a number of cases.

In the case of *Chilton v. Blair & Co.*, 20 T. L. R. 623, the rule governing the question of "sphere of employment" was stated as follows:

> "It is well established that a workman who is seriously and permanently disabled by an accident may recover compensation if he was doing the work he was employed to do, though doing it

negligently and contrary to rules laid down. On the other hand, a workman cannot recover compensation, if he was not doing the work he was employed to do, but was doing something substantially different although intending to produce the same result."

In the case of *Whitehead v. Reader,* 2 K. B. 48, it was said by Collins, L. J., that:

"I agree in what has already been pointed out, that it is not every breach of a master's orders that would have the effect of terminating the servant's employment, so as to excuse the master from the consequences of the breach of his orders. We have to get back to the orders emanating from the master to see what is the sphere of employment of the workman, *and it must be competent to the master to limit that sphere.* If the servant acting within the sphere of his employment violated the order of his master, the latter is responsible. It is, however, obvious that a workman cannot travel out of a sphere of his employment without the order of his employer to do so; and if he does travel out of the sphere of his employment without such an order, his acts do not make the master liable either to the workman under the workman's compensation act 1897, or to third persons in common law."

It was held in the case of *Parker v. Hambrook,* 107 L. T. R. 249, that a workman employed to dig flints for road making, who went into a trench where he had been forbidden to go for the purpose of digging flints which were more plentiful there, and who sustained an injury by falling earth, could not recover compensation because said injury did not arise out of and in the course of his employment. During the course of the opinion the following illustration of the rule to be adopted in such cases was given:

"If I tell a workman to mend a certain window from the inside, the fact that he did it from the outside and not from the inside would not disentitle him or his dependents to compensation if he met an accident. But if I told him to mend one particular window and he goes and mends another window *where I have told him not to go,* that would disentitle him to compensation."

Illustrations of facts and circumstances where compensation is denied on the ground that the injury did not arise out of the employment may be found in the following cases:

Jenkinson v. Harrison, 4 B. W. C. C. 194;
Edwards v. International Coal Co., 5 W. C. C. 21;
Losh v. Evans, 19 T. L. R. 142;
Marriott v. Brett, 5 B. W. C. C. 145;
Naylor v. Musgrave Spinning Co., 4 B. W. C. C. 286;
Mulholland v. Hazelton, 36 Ir. L. T. 217;
Buchanan v. Baird, 4 B. W. C. C. 397.

And it might also be suggestive to read the case of

Byram v. Ill. Cent. R. R. Co., 154 N. W. (Ia.) 1006.

For illustrations of cases where the facts and circumstances were such as permitted the recovery of compensation see:

Sponatiski case, 108 N. E. 466;
Clem v. Chalmers Motor Co., 154 N. W. (Ia.) 848;
Milwaukee, C. G. Co. v. Ind. Coms., 151 N. W. (Wis.) 247;
State v. Brewing Co., 151 N. W. (Minn.) 912;
Terlechi v. Strauss, 89 Atl. (N. J.) 584;
Seller v. Boston R. D. C., 7 B. W. C. C. (Eng.) 99;
Goslan v. Gillies (1906), S. C. Scot. 68;
Ferguson v. Brick & Supplies Co., 7 B. W. C. C. 1054;
Spooner v. Detroit Co., 153 N. W. (Mich.) 657;
Miner v. Franklin Co., 26 L. R. A. (N. S.) (Vt.) 1195;
Malting Co. v. District Ct., 151 N. W. (Minn.) 912.

It may be suggestive to outline this subject as follows:

I.

Prohibitions dealing with conduct within sphere of employment:

(a) Deviations from specific duties, such as:

1. Machinist assisting in expediting repairs;
2. Substituting for foreman in feeding machine;
3. Employe assisting in loading and unloading wagons; greasing wagon wheel;
4. Foreman of excavation work tracing electric wire;
5. Emergency service to locate electric line trouble;
6. Employe taking refreshments from employer near machine.

(b) Disobedience of rules, directions or regulations, such as:
1. Railway porter jumping on footboard of baggage van;
2. Employe operating machine when sitting instead of standing;
3. Miner working in dangerous place;
4. Laborer riding on material hoist against implied prohibition;
5. Employe crossing railroad yard tracks.

II.

Prohibitions limiting sphere of employment, such as:
(a) Foreman utilizing shafting for hand work.
(b) Employe doing work expressly forbidden.

You will, therefore, observe that whether or not an injury arises within or without the sphere of employment depends entirely upon the facts of each particular case and, therefore, I can say no more to you than that, if the injury arose outside the sphere of employment, then no compensation should be allowed, but, if the injury arises within the sphere of employment, compensation should be allowed even though the injury is sustained because the work is being done negligently or contrary to rules.

HENRY E. SAMPSON, *Assistant Attorney General.*

IN COURSE OF EMPLOYMENT.—Injury to an employe, who, while returning from work, ran after passing wagon to secure ride home and broke his leg, did not arise out of employment.

December 16, 1915.

HON. WARREN GARST, *Iowa Industrial Commissioner.*

From your oral statement of the case which you now have up for consideration I understand that the employe was injured by breaking his leg while returning from work at the close of the day; that at the moment of the injury he was running after a wagon which was then passing by in order that he might secure a ride home; that it had been the custom of the employer to provide the employe with transportation from the place of work to the home of the employe, but that on this particular night no such conveyance was provided; that you desire advice upon the question of the legal liability of the employer in such a case.

It may be conceded for the purpose of this case that the injury arose during the course of the employment of the employe, but I cannot rid myself of the belief that the injury did not arise out of the employment and I call your particular attention to an opinion from the supreme court of Massachusetts in which it says:

> "It is not easy nor necessary to the determination of the case at bar to give a comprehensive definition of these words (personal injury arising out of and in the course of his employment), which shall accurately include all cases embraced within the act and with precision exclude those outside its terms. It is sufficient to say that an injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform. It arises 'out of' the employment when there is apparent to the rational mind upon consideration of all the circumstances a casual connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not to have been foreseen or expected, but after the event it must appear to have had its origin in the risk connected with the employment and to have flowed from that source as a rational consequence." *(McNicol v. Employers' Liability Assurance Corp.,* 215 Mass. 497.)

Trusting that the foregoing will aid you in arriving at a correct adjustment of the case, I beg to remain,

HENRY E. SAMPSON, *Assistant Attorney General.*

INJURY SUSTAINED AFTER CUSTOMARY QUITTING HOUR.—Compensation not allowed for injuries sustained after working hours.

November 24, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

As bearing upon your inquiry relative to whether or not compensation should be paid under the Iowa workmen's compensation act for an injury sustained by an employe who remained to work after the customary quitting hour, permit me to call your attention to the case of *Gordon v. Eby* (Case No. 10, California Comp. Act, March 20, 1914), in which Gordon was allowed compensation by the California commission for an injury due to an accident which happened a few minutes after five P. M., where five o'clock was the regular quitting time. In awarding compensation the commission held that sufficient evidence had been introduced to show that the contentions of the defendant to the effect that the accident did not arise out of or in the course of employment could not be sustained. It declared that the quitting time varied as the requirements of the work necessitated, that no instructions had been given to the employe as to the time for starting or leaving work, and that, whether rightfully or wrongfully, the employe filled an empty bucket when it was lowered from the roof by the employer because he thought his employer wanted it filled. The general rule was stated as follows:

> "The general rule in construing compensation laws is that the responsibility of the employer begins when his employe enters his premises to perform the services required of him, and terminates when the employe leaves such premises, provided that he does not loiter needlessly or arrive at an unreasonable hour in advance of the beginning of his duties. Gordon's injury was sustained while he was still on the premises of his employer and performing a service which he believed to be required of him by his employer, and this we think distinctly brings him within the provisions of the Workmen's Compensation, Insurance and Safety Act, although he may have remained overtime a few minutes in order to perform such service."

Trusting that the foregoing will prove helpful, I beg to remain,

HENRY E. SAMPSON, *Assistant Attorney General.*

NOTICE OF INJURY.—Must give notice to employer within ninety days of date of injury.—Failure cuts off right to compensation.—Good cause must be shown if not given until after fifteen days.—If employer can show he has been prejudiced by such delay he can be relieved to extent prejudiced thereby.

October 3, 1914.

HON. WARREN GARST, *Iowa Industrial Commissioner.*

For answer to the question submitted to you by the Globe Indemnity Co., permit me to refer you to section 9, chapter 147, acts of the thirty-fifth general assembly.

Under the law as therein provided, notice of an injury must reach the employer within ninety days from the date of the injury or the injured employe is forever cut off from any right to compensation under the act. If the employe fails to give notice to his employer until after the fifteenth day following the injury and prior to the thirtieth day following such injury, he can recover provided, however, the employer is unable to show that he has been prejudiced by reason of such want of knowledge, in which latter event the employer is relieved from paying compensation to the extent to which he has been prejudiced. If the employe notifies his employer within fifteen days following the injury, he is entitled to full compensation although in justice he should give immediate notice. A failure on his part to notify the employer immediately following the injury does not affect his right to recover compensation.

It would follow, of course, that if the employer or his representative had actual knowledge of the occurrence of an injury, notice by the employe would be unnecessary and his failure to give same would not prejudice his right to compensation.

The law further provides that if the employe can show that his failure to give the required notice was due to mistake, inadvertence, ignorance of the fact or law, or inability to fraud, misrepresentation or deceit of another, or to any other reasonable cause or excuse, then compensation may be allowed if notice is in fact given prior to ninety days following the injury, but the employer may show that he has been prejudiced by such delay of notification and be relieved to the extent that he has been prejudiced thereby.

For the benefit of the employer the employe should be encouraged to give prompt notice of injury, and for the security and protection

of the employe he should be advised of the serious consequences of his failure to give such required notice within the ninety-day period following the date of his injury.

HENRY E. SAMPSON, *Assistant Attorney General.*

REPORTS.—Employer to report all accidents to employes, including accidents to employes who come within federal employers' liability act, to commissioner.—Statutory requirement largely for statistical purposes.

July 5, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

You ask to be advised whether or not under the Iowa workmen's compensation act an employer, it being a railroad company, is required to report all accidents to its employes, including accidents to its employes who come within the provisions of the federal employers' liability act.

For answer to your inquiry permit me to call your attention to the provisions of section 2477-m36, supplement to the code, 1913, which reads as follows:

> "Every employer shall hereafter keep a record of *all* injuries, fatal or otherwise, sustained by his employes in the course of their employment. Within forty-eight hours, not counting Sundays and legal holidays, after the employer has knowledge of the occurrence of an accident resulting in personal injury, a report shall be made in writing by the employer to the industrial commissioner on blanks to be procured from the commissioner for that purpose."

You will observe from the remainder of the section that the said report shall contain the name and nature of the business of the employer; the location of the establishment; the name, age and sex of the injured employe, and shall state the date and hour of the accident, the nature and cause of the injury, and such other information as may be required by the commissioner.

It, therefore, appears that the purpose of this statutory requirement is largely for statistical purposes and the report should therefore be made, even though the injured employe may not be entitled to compensation under the Iowa workmen's compensation act.

The statute might also be for the purpose of submitting all cases to the attention of the Iowa industrial commissioner so that the

question of liability would not be left entirely to the discretion of the employer. I would, therefore, suggest that these reports be required.

HENRY E. SAMPSON, *Assistant Attorney General.*

STATUTE OF LIMITATION.—Right of dependents to maintain proceedings.—Jurisdiction of arbitration committee.—Statute of limitation not applicable to special proceedings.—Facts not such as would estop pleading and relying upon statute of limitation.

November 6, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

Pursuant to your request, I have examined the records in the cause of *Lykas v. Northwestern States Portland Cement Company,* now pending before your arbitration committee, and have considered the several questions raised by the pleadings therein.

Under the admitted facts of this case, as shown by said record, the Consul General of the Kingdom of Greece has the right and authority to maintain this proceeding on behalf of the dependents of deceased; that Theodore Lykas, deceased employe, was in the employ of the Northwestern States Portland Cement Company on or before July 20, 1914; that both the employer and employe, at the time of the injury, were within and operating under the compensation law of Iowa; that, on the 20th day of July, 19, 1914, the said Lykas sustained a personal injury resulting in immediate death, which injury arose out of and in the course of his employment; that the employer had actual notice of the injury at the time of its occurrence, and that the Consul General of Greece had knowledge of the death of deceased and the rights of dependents during the early part of the year 1915; that the average weekly wage of the injured employe at the time of his injury was $11.54; that this proceeding was commenced on the 7th of September, 1916, or two years and six weeks after the date of injury (July 20, 1914).

The following questions are still undecided and should have your careful consideration:

1. Are the persons who are maintaining this proceeding such dependents of deceased as to entitle them to compensation?

2. Inasmuch as there is no dispute between the parties as to the amount of compensation due does your arbitration committee have jurisdiction to arbitrate the issues in this case?

3. Is this proceeding barred by the general statutes of Iowa limiting the time for bringing *actions?*

4. If the general statute limiting the time for bringing *actions* is applicable to this special proceeding, when does the cause of action accrue and what action stops the running of said statute?

5. If the statute of limitation applies to this special proceeding, does it come within the third or some other division of said section 3447, supplement to the code, 1913?

6. If this special proceeding comes within the provisions of the statute of limitation and if the period for maintaining said action has expired, are the facts in this case such as would estop the defendants from pleading the statute of limitation in this particular matter?

Answering the first inquiry will say that there is some evidence in the record to show that the deceased left as dependents a wife and two minor children, and that these dependents are the persons in whose behalf the proceeding is brought. There are some errors in the spelling of the name of deceased and the name of the town in Greece where deceased lived before coming to this country, but these differences in spelling appear to be errors due to the unfamiliarity of those preparing the petition with Greek spelling. The answer of defendants does not deny that deceased left dependents, or that those bringing this proceeding are such dependents, and offers no evidence to disprove the allegation in the petition to the effect that this is a proceeding on behalf of the widow and minor sons of the injured person. There is, in my judgment, sufficient evidence to make out a *prima-facie* showing and to warrant your arbitration committee in finding in favor of the applicants in this cause, if you so desire, the matter being entirely within the sound discretion of your committee.

Answering the second inquiry will say that in my judgment your arbitration committee has jurisdiction to arbitrate the issues in this case, even though there is no dispute as to the actual amount of compensation to be paid, if any. The defendants quote that part of section 2477-m26, supplement to the code, 1913, which provides, "If the employer and the injured employe or representative or the dependents fail to reach an agreement *in regard to compensation,*" the industrial commissioner, upon the application of either

party, shall thereupon call for the formation of a committee of arbitration, and contends that, unless there is a dispute between the parties *in regard to compensation,* then the arbitration committee does not have jurisdiction. A reasonable interpretation of the statutory language relied upon by defendants does not, in my judgment, give it the very limited interpretation asked for by the defendants. This limiting language does not refer only to the amount of compensation, but rather as to whether or not the claimants are entitled to any compensation whatever, taking into consideration the law and the facts. See *Fischer v. W. F. Priebe & Co.,* 160 N. W. (Ia.) 48. There is no doubt in my mind but what your committee has jurisdiction to consider this cause, and that such an arbitration committee has jurisdiction in all cases where there is a dispute between the parties as to any question of fact upon which compensation depends.

The third and most important inquiry is whether or not the statute of limitation applies to the proceedings of an arbitration committee convened under the provisions of the compensation act.

Answering this inquiry, will say that the general statute of limitation is found in section 3447, supplement to the code, 1913, and provides in part as follows:

"Actions may be brought within the times herein limited * * * and not afterwards * * *"

Thus it will be seen that by the express language of this statute it is limited to "actions," and that it does not apply to special proceedings.

The supreme court of Iowa has held that the provisions of this statute are not applicable to special proceedings, as, for instance, proceedings to assess damages for the taking of land for a right of way for a railroad. *(Hartley v. K. & N. W. Ry. Co.,* 85 Iowa 455.)

The supreme court of Kansas, in the case of *Thomas v. Williams,* 25 L. R. A. (N. S.) 1304, held that the statutes of limitation did not apply to special proceedings, but were limited to actions, and cited the Iowa case of *Hartley v. K. & N. W. Ry. Co., supra.*

The supreme court of North Dakota, in the case of *Burleigh County v. Kidder County,* 125 N. W. 1063, held that the statute of limitation did not apply to the obligation created by statute requiring one county to pay part of the public debt of another county of which it was formerly a part, saying at page 1066 that this obligation was created solely by statute and as such was a special proceeding and not within the general statute of limitation.

In the case of *Fisk v. City of Keokuk,* 144 Iowa, 187, the supreme court also held that this statute did not apply to those civil proceedings which are not actions at law or proceedings in equity.

Other Iowa authorities *(Cuthbertson v. Locke,* 70 Iowa 49) might be mentioned holding to the same effect since they are uniform in this regard. This, then, leaves for our consideration the further question of whether or not the proceeding of an arbitration committee on a compensation matter is an action within the meaning of said section 3447.

The code of civil practice of Iowa (Title XVIII., secs. 3424, 3425) provides as follows:

> "Every proceeding in court is an action, and is civil, special or criminal."
>
> "A civil action is a proceeding in a court of justice in which one party, known as the plaintiff, demands against another party, known as the defendant, the enforcement or protection of a private right, or the prevention or redress of a private wrong. It may also be brought for the recovery of a penalty or forfeiture.
>
> "Every other proceeding in a civil case is a special action."

Section 3514 of the code provides that an

> "Action in a court of record shall be commenced by serving the defendant with a notice signed by the plaintiff or his attorney * * *"

The word "action" as used in said section 3447 has a technical meaning as was said by Judge Ladd in the case of *Morris v. Lowry,* 113 Iowa 544, where he said:

> "Every proceeding in court is an action (section 3424, code); and the word 'action,' as employed in the code has a technical meaning (section 3425), which is also in accord with the approved use of the language. We may not then, attribute to the legislature an understanding or use of it in any other sense."

The distinction between actions and special proceedings is fully discussed in paragraph 134, page 1010, Vol. I of Corpus Juris, wherein it is said:

> "Under the codes remedies are ordinarily expressly divided into actions and special proceedings, and even where this is not done in express terms these two classes of proceedings and the distinctions between them are recognized. * * * The codes and statutes usually define an action in express terms,

> and then provide merely that every other remedy is a special proceeding without in express terms either defining a special proceeding or otherwise distinguishing it from an action; so that the question as to whether a particular proceeding is an action or a special proceeding depends primarily upon whether or not it comes within the definition of an action. The definitions of an action usually speak of it as an 'ordinary' proceeding, and it is upon the meaning and application of this term that the distinction between actions and special proceedings is ordinarily based. It may accordingly be stated generally that actions include proceedings which are instituted and prosecuted according to the ordinary rules and provisions relating to actions at law and suits in equity, and that special proceedings include those proceedings which are not ordinary in this sense but are instituted and prosecuted according to some special mode. * * * In other words, if a proceeding is a remedy and is not an ordinary action, it must be a special proceeding." (See numerous cases cited.)

It will be observed from an examination of sections 3424 and 3425 that the term "action" is limited to proceedings in *court* or to proceedings in a *court of justice.*

The supreme court of Iowa in the case of *Box v. C. R. I. & P. Ry. Co.,* 107 Iowa 660, had occasion to describe the words "cause of action" and did so in the following language: "An action is a proceeding in *court.*" (Code, sec. 3424.)

In paragraph 1, page 927, Vol. I, Corpus Juris it is said:

> "The term 'action' is, however, restricted to proceedings in a court of justice and does not include nonjudicial proceedings, although they are before a court, as in cases where a court does not act in a judicial capacity." (See citations.)

The term "civil action" has a limited meaning and is a narrower term than "civil case," as will appear from an examination of the following authorities: Corpus Juris, Vol. I, p. 934, par. 25; *College of Phys. & Surg. of Keokuk v. Guilbert,* 100 Iowa 213, 219; *Herkimer v. Keeler,* 109 Iowa 681; *Morris v. Lowry,* 113 Iowa 544.

From this examination of the authorities as to the limited meaning of the term "action," we find that it differs widely from the term "special proceedings;" and the same wide difference is also found when we come to examine the authorities as to the meaning of the term "special proceedings."

Estee in his Pleading (1st ed.) 5, par. 21, defines "special actions" to be remedies pursued by a party which do not result directly in a judgment but only in establishing a right or some particular fact.

Justice Deemer, in Iowa Pleading and Practice, Vol. I, par. 3, points out that the following remedies are special proceedings:

Condemnation of property for a work of internal improvement, *Forney v. Ralls,* 30 Iowa 559; disbarment proceedings, *State v. Clark,* 46 Iowa 155; probating of a will, *Sisters of Vis. v. Glass,* 45 Iowa 154; rate hearing before railroad commissioners, *B. C. R. & N. Ry. Co. v. Dey,* 82 Iowa 312; appeal from action of the board of supervisors in selecting public newspapers, *Star v. Ingham,* 84 Iowa 580; appointment of a guardian, *Lawrence v. Thomas,* 84 Iowa 362; forcible entry and detainer, *Herkimer v. Keeler,* 109 Iowa 680; compelling an accounting by an attorney, *Union Bldg. & Svgs. Assn. v. Soderquist,* 115 Iowa 695; proceedings under the drainage act, section 1989-a1, Sup'l Code, 1913; establishment, relocation and vacation of highways, *Hatch v. Barnes,* 124 Iowa 251; proceedings before township trustees as fence viewers, *De Mur v. Rohan,* 126 Iowa 488; removal from office, *State v. Meek,* 148 Iowa 671.

Other instances are cited by this authority but the foregoing are sufficient to show the large number of remedies which are known as "special proceedings" as distinguished from "actions."

Under the classification which has been made by the authorities of "actions" and "special proceedings," it seems clear that the proceedings of an arbitration committee in a compensation matter are not actions and do not come within the provisions of said section 3447.

The supreme court of Iowa, speaking through Justice Salinger, in the case of *Hunter v. Colfax Consolidated Coal Co.,* 154 N. W. 1037, after discussing fully the nature of the proceeding before the arbitration committee, said:

> "The utmost it (arbitration committee) does is to provide administrative machinery for applying rates of compensation fixed by the legislature as between parties who have agreed to have the amounts of compensation, merely, thus determined."

The supreme court of Ohio in the case of *State v. Creamer,* 85 Ohio St., 349, held that the Ohio workmen's compensation act which provided for the creation of a state liability board of awards to establish the fund for premiums paid by employers and employes was not invalid as a delegation of judicial power to the board of awards.

An examination of the decisions in which the several compensation cases have been held constitutional will show that the courts have never considered that the arbitration committee was a court or that it was ousting the court of its judicial authority; but, on the other hand, they have held that the function of the arbitration committee was administrative in character, giving no judgments and entering no decrees, these committees being entirely without the power to enforce any decision which they might make.

The supreme court of Vermont, in the case of *Blood v. Bates,* 31 Vt. 147, was called upon to determine whether or not a board of arbitration was a court or a judicial tribunal, and decided that it was not, saying:

> "A board of arbitrators is not a court or a judicial tribunal in any proper sense of those terms; it has none of the powers that appertain to courts to regulate their proceedings or to enforce their decisions.
>
> "An award, when made, is more in the nature of a contract than of a judgment; it is but the consummation of the contract of submission, its appropriate and legitimate result. And that it is in the nature of a contract is fully established by the fact that when made, if found to be defective and void, it may still be ratified by the parties."

The supreme court of Louisiana, in the case of *Thompson v. Moulton,* 20 La. Ann. 535, distinguished an "action" from "arbitration" by saying that in the latter the dispute is submitted to one or more persons as arbitrators, while in the former the *suit* is instituted in a court of *justice* in order that some matter in controversy may, by a *judicial decree,* be definitely settled.

In view of the foregoing authorities, and others which might be mentioned, it is my conclusion that the proceeding of the arbitration committee in passing upon a compensation claim is not an *action* within the meaning of said section 3447 but is a special proceeding, and that it does not come within the provisions of the general statutes of limitation, and that the plea of defendants that this action is barred is not a valid defense.

It was held in the case of *State v. District Court,* 152 N. W. (Minn.) 838, that "proceedings under this act (Minnesota compensation act) are governed by the provisions contained in the act itself and not by the general provisions cited by the relator."

In answer to the suggestion that there must be some limit upon the time when proceedings for compensation may be instituted,

it may be said that, under the Iowa compensation statute, either the employer or employe may at any time apply to the industrial commissioner for the convening of an arbitration committee to pass upon and determine the rights of the parties.

Your fourth and fifth questions do not require any attention for the reason that they arise under section 3447, supplement to the code, 1913, and I have just decided that said section 3447 does not apply to special proceedings before an arbitration committee convened under the Iowa workmen's compensation act. Had I arrived at a different conclusion and held that said section 3447 did regulate the time within which a committee of arbitration under the compensation act could be convened, I would have been compelled to give special attention to these questions.

Answering the sixth question will say that while it is true that under the authorities (*Holman v. Omaha & C. B. Ry. & Bridge Co.,* 117 Iowa 268) one might be estopped by his previous actions from setting up and relying on the statute of limitation, yet the facts in this proceeding are not such as would, in my judgment, come within the ruling, and, therefore, the defendants in this case would not be estopped from pleading and relying upon the statute of limitation, if said statute limits the time for bringing proceedings of this character. Since, as I have previously held, the statute of limitation does not so limit the time for bringing special proceedings of this character, this particular question is not in issue.

In view of the foregoing, it is my judgment that this proceeding, now pending before your committee, is not barred by the statute of limitation, and that there is sufficient evidence in the record to warrant you in finding that the dependents, who are making the application for compensation in this cause, are entitled to compensation according to the provisions of the Iowa workmen's compensation act.

HENRY E. SAMPSON, *Assistant Attorney General.*

PARTIAL DISABILITY.—Employe entitled to compensation for total disability—Duty to accept employment when only partially disabled.

January 14, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

You ask to be advised as to the rights of the employe and liabilities of the employer under the Iowa workmen's compensation

act where an employe has so far recovered from an injury that his disability is only partial.

Answering your inquiry will say that under the provisions of section 2477-m9, supplement to the code, 1913, compensation is to be paid for those injuries which incapacitate the employe from earning full wages. Under the provisions of the statute an injured employe is entitled to compensation during the period of incapacity not to exceed a maximum number of weeks, and so long as his disability is total there can be no question as to his right to such compensation. When the employe has sufficiently recovered that his disability is only partial and when he is in such physical condition that he can perform certain light labor without impeding his recovery and without endangering a recurrence of his initial injury, it is his duty to accept such work as he can do, thereby reducing the amount of compensation to which he is entitled from his employer. If the employer has work suitable for him to perform in his partially disabled condition and offers to give him such work, then it is the duty of such employe to accept the work tendered, or, if such light labor can be found by the employe by making an honest effort to find same, then it is the duty of such employe to look for and accept such labor, thereby reducing the amount of compensation due from the employer.

An English case (*Taff Vale R. Co. v. Lane,* 3 B. W. C. C. 297) has decided that where the work is furnished at another place so that the workman must pay something for transportation, the adjustment of the compensation should include these added expenses.

In my opinion it would be an unreasonable and unwarranted interpretation of this provision of the statute to hold that an employe partially recovered from an injury should lose his right to full compensation under the Iowa workmen's compensation act where his employer or no one else in the vicinity where he lived had suitable work which he could do in his partially recovered condition, or where he was unable to find, after making a thorough and honest effort so to do, light labor such as he was able to perform without impeding his recovery or endangering a recurrence of total incapacity.

HENRY E. SAMPSON, *Assistant Attorney General.*

LOSS OF HEARING.—Not included within schedule—Compensation, if any, must be determined by board of arbitration, based on valuation fixed by legislature for specific injuries.

November 24, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

I have for consideration your question as to the amount of compensation due for loss of hearing, and in answer to same will say that the Iowa statute does not include the loss of hearing within the schedule found in section 2477-m9 (j), and that the amount of compensation due, if any, must be determined under the provisions of section 2477-m9 (j18), supplement to the code, 1913.

As an aid in arriving at the proper valuation to be placed upon such a loss, permit me to say that the Connecticut statute places the value of total hearing in both ears at 156 weeks and that of total hearing in one ear at 52 weeks. (Sec. 12, Pt. B. Ch., 288, Conn. Laws 1915.)

In the Indiana schedule for specific injuries, the period is fixed at 75 weeks for permanent and complete loss of hearing. (Sec. 31, Pt. 2, Ch., 106, Ind. Laws 1915.)

In the Oregon schedule for specific injuries, the period for permanent and complete loss of hearing in both ears is fixed at 96 months, while that of permanent and complete loss of hearing in one ear is fixed at 48 months. (Sec. 21, Ch., 122, Oregon Laws 1913.)

The Wisconsin statute is less liberal and provides in its schedule that total deafness in both ears should be compensated for a period of 160 weeks, while total deafness in one ear should be compensated for a period of 40 weeks. (Par. 5, Sec. 2394, Ch., 599, Wisconsin Laws of 1913.)

From the foregoing you will observe that the legislatures of the several states have adopted a rather wide range in their valuation. Under the statutes of Iowa the valuation is to be determined by a board of arbitration, which board is to take into account the valuation fixed by the legislature for specific injuries.

HENRY E. SAMPSON, *Assistant Attorney General.*

INJURY TO TEETH.—An injury causing a broken tooth is not compensable unless it results in total incapacity for more than the waiting period—Medical and surgical work should be furnished by the employer.

November 4, 1914.

HON. WARREN GARST, *Iowa Industrial Commissioner.*

Your question briefly stated is, what compensation if any should be paid to an employe whose tooth was broken in the course of, and as a result of his employment.

Section 2477-m9(j), supplement to the code, 1913, provides for a schedule of compensation to be paid for the loss of certain members of the body named therein but nowhere does it expressly provide that compensation shall be paid for the loss of teeth or for the loss of a tooth. In this respect the Iowa statute is different than some of the other state statutes which expressly include in such schedule a stipulated compensation for the loss of teeth.

The Iowa statute does provide for disability which is permanent, although partial, but this provision only applies to such disability as interferes with a man's ability to earn and receive his customary wages in the occupation in which he was engaged at the time of his injury. Inasmuch as the breaking of a tooth would not amount to the disability contemplated by this provision of the statute, the employe would not be entitled to compensation under section 2477-m9(j).

Section 2477-m9(h) of the Iowa statute provides, however, for the payment of compensation for an injury producing temporary disability and if the injury received by the employe not only resulted in a broken tooth but in wholly incapacitating him from work for a period in excess of the waiting period then such injured employe might recover compensation under said section 2477-m9(h) for the time he was incapacitated for work after the fifteenth day following the injury, but it is difficult to imagine any case where an injured employe would be incapacitated from labor by reason of a broken tooth.

Section 2477-m9(b) of the Iowa statute requires that the employer shall furnish reasonable surgical, medical and hospital services and supplies, not exceeding $100.00, and under this provision the injured employe would be entitled to such surgical, medical and hospital attention as his injury required and this, no doubt, would include such dental services as his injury made necessary.

Believing that the foregoing sufficiently answers your inquiry, I beg to remain

HENRY E. SAMPSON, *Assistant Attorney General.*

RULE IN HERNIA CASES.—Traumatic hernia covered by compensation act—All other kinds of hernia to be determined in each individual case.

January 14, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

Relative to the matter of a rule which should be made by your department relative to hernia cases, will say that under the Iowa workmen's compensation act the employe is only entitled to recover compensation for injuries which arise out of and in the course of his employment, and that therefore the burden is always upon the injured employe to prove that the injury on account of which he is attempting to collect compensation actually occurred during the course of his employment and that his incapacity is actually due to such injury and to no other intervening cause. It would therefore seem that as a general proposition the only cases of hernia which it can establish beyond question as arising out of and in the course of the employment are what are known to the profession as traumatic hernia. I think you would be safe in laying down the general rule that traumatic hernia is covered by the compensation act. In your ruling upon this matter you might also hold that all other kinds of hernia will have to be determined in each individual case and only after having the advice of skilled physicians or surgeons.

The foregoing will suggest to you the nature of the general rule which I think your department could properly make.

HENRY E. SAMPSON, *Assistant Attorney General.*

DOUBLE INJURY IN SINGLE ACCIDENT.—Where an employe in a single accident loses a member and also receives other injuries causing disability, he can recover compensation for entire period of disability.

February 4, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

Complying with your oral request for an opinion upon the question of liability of an employer to an injured employe who, as a re-

sult of a single accident, loses a foot and sustains other incidental injuries which cause disability, I am calling to your attention a recent case by the supreme court of Michigan, in which the court said:

> "The act provides that when, as the result of an industrial accident, the incapacity for work is total, the employer shall pay a weekly compensation equal to one-half the average weekly wages for a period not exceeding 500 weeks. This is the longest period of compensatory payments. A period of disability is in certain cases deemed to exist. For the loss of a foot, the period is 125 weeks. For the loss of any two members, as hands, arms, eyes, feet, legs, the period of total disability is deemed to be 500 weeks unless the weekly payments amount to $4,000 in a shorter period. If one of the results of the accident is the loss of a foot, the period of total disability is 125 weeks, although it may be in fact only six weeks. The period is not extended because as a result of the accident the employe was, in fact, totally disabled for a period of 125 weeks, or for any shorter period. If he is, in fact, disabled by the loss of a foot, or otherwise, for a greater period than 125 weeks, compensation continues until disability is removed, or the maximum of compensation is paid. The statute speaks in terms of disability. All of its provisions being considered, it does not mean that compensation must be paid during a period of actual disability and also, if a member is lost, during a period equal to the one during which total disability is deemed to continue. It does not provide a specific indemnity for the loss of a member in addition to compensation for disability. The aim of the statute is to afford compensation if the employe is disabled. When the period of disability ends, compensation ceases." *Limron v. Blair,* 181 Mich. 76.

In view of the foregoing opinion, which is consistent with the holdings of other courts upon the same subject, it is my judgment that an employe who, in a single accident, loses a member and at the same time sustains other injuries, is entitled to compensation for the period fixed in the statute for the loss of that member, and if his disability is for a period longer than that fixed for the loss of such member, his compensation shall continue for the total period of disability, not to exceed 400 weeks.

HENRY E. SAMPSON, *Assistant Attorney General.*

INJURY DUE TO FREEZING.—Injury due to an exposure peculiar to the employment is such an injury as would be compensable.

February 5, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

You ask whether or not an employe of an ice company engaged in harvesting ice and having an opportunity whenever necessary to visit a shanty within easy access of his work, where he can warm himself, can recover compensation for injuries due to frost-bitten fingers resulting in incapacity.

For answer to your injury permit me to call your attention to the case of *Canady Cement Co. v. Pazuk,* 22 Que. K. B. 432, in which the court held that the loss of a portion of an employe's foot as the result of its freezing where he was exposed to intense cold for ten hours in the discharge of his duty "is an accident" within the meaning of the Quebec workmen's compensation act. By way of cross reference see the cases of *Warner v. Couchman,* L. R. (1911), 1 K. B. 351; *Young v. Northern Tel. Power Co.,* Calif. Ind. Acd. Comm. (June 2, 1913); the Opinion of Minn. Labor Dept. Bulletin 9, page 28 (June, 1914); *Dorrance v. N. Eng. Pine Co.* (Conn.) Super. Ct., 1 Natl. Compensation Journal 23 (July, 1914).

It would appear from the foregoing that an injury due to freezing can be considered an "accident" and, if so, it certainly would be included within the provisions of the Iowa workmen's compensation act which includes all "personal injuries."

HENRY E. SAMPSON, *Assistant Attorney General.*

LIGHTNING.—Injury due to lightning, under ordinary circumstances, not such an injury as arises out of employment.

November 15, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

Replying to your inquiry as to whether or not lightning stroke is a personal injury arising out of and in the course of the employment within the meaning of the Iowa workmen's compensation act will say that by express provision of the statute (section 2477-m, supplement to the code, 1913) the compensation act applies only to those personal injuries sustained by the employe which arise out of and in the course of the employment. Such has been the

interpretation placed upon similar language in the several state compensation acts and I refer you particularly to the cases of

M. St. P. & S. S. M. R. Co. v. Ind. Com. of Wisc., 153 Wisc. 552;
City of Milwaukee v. Miller, 154 Wisc. 652;
Rayner v. Sligh Co., 180 Mich. 168;
In re Employers' Liability Assur. Corp., 215 Mass. 497;
Bryant v. Fissell, 84 N. J. L. 72;
Kelly v. Kerry Co. Council, 42 Ir. L. T. 23.

In the case of *Hoenig v. Industrial Commission of Wisconsin*, 150 N. W. (Wisc.) 996, it was held that a workman who was killed by lightning while at work was not entitled to compensation for the reason that he was not exposed to a hazard from lightning stroke peculiar to the employment and that, therefore, the injury did not arise out of the employment. There was some evidence in the case of an expert nature for the purpose of showing that the employment of deceased at the water's edge was peculiarly dangerous from exposure to lightning, but this evidence did not convince the arbitration commission that the employment was extra hazardous in this regard. Judge Kerwin in speaking for the court said:

> "The question, therefore, arises whether the injuries received by Hoenig were incident to and grew out of the employment. This proposition turns upon the nature of the hazard to which deceased was exposed at the time and place of injury. Was he exposed to a hazard from lightning stroke peculiar to the industry?"

The Commission answered in the negative holding that there was no hazard incident to or growing out of the employment substantially different from that of ordinary out-of-door work during a thunderstorm accompanied by rain.

The same position was taken in the case of *Kelly v. Kerry Council*, 42 Ir. L. T. 23, where a workman, who was engaged on the road during a storm in clearing out gulleys to prevent the road from being flooded, was struck by lightning and killed, and it was held that his death was not caused by an accident arising out of the employment and compensation was, therefore, denied. The court said:

> "I am unable to find any special or peculiar danger from lightning to which these men were exposed from working on

the road. No expert or other evidence was offered to me that their position on the road exposed them to any greater risk of being struck by lightning than if they had been working in a field or a garden or a factory. The antecedent probability that they would be struck by lightning was no greater in their case than it was in the case of any other person who was within the region over which the thunderstorm passed. * * * * * It is only under very special circumstances, when the employment of the workman exposes him to peculiar risk from lightning not shared by men in other employments, that an accident by lightning can be said to arise out of his employment."

It is true that the English case of *Andrew v. Failsworth Industrial Society*, 92 K. B. 32, awarded compensation for the death of a bricklayer who was killed by lightning, but that was a very peculiar circumstance and an examination of the facts in that case shows that it differs very materially in its facts from the ordinary case. In the English case, the position of the injured person, as shown by the evidence, was much more hazardous because of the employment than ordinarily. At the time he was struck he was working on a scaffold which was at a height of twenty-three feet above the level of the ground. Expert evidence was given which showed that the position of a man on a scaffold of that height was one of special danger from lightning. The court, in affirming the decision of the arbitration committee, said:

"If I come to the conclusion that, as a matter of fact, the position in which the man was working was dangerous, and that in consequence of the dangerous position the accident occurred, I could fairly hold that the accident arose out of the employment. Now, was it a dangerous position? Was the man exposed to something more than the normal risk which everybody, so to speak, incurs at any time and in any place during a thunderstorm? We know that lightning is erratic, and possibly no position and circumstances can afford absolute safety. But, if there is under particular circumstances in a particular vocation something appreciably and substantially beyond the ordinary normal risk, which ordinary people run, and which is a necessary concomitant of the occupation the man is engaged in, then I am entitled to say that that extra danger to which the man is exposed is something arising out of his employment."

The court in deciding this case of *Roger v. School Board,* 1912 S. C. 584, said:

> "To be struck by lightning is a risk common to all and independent of employment, yet the circumstances of a particular employment might make the risk not the general risk, but a risk sufficiently exceptional to justify its being held that accident from such risk was an accident arising out of the employment."

It is, therefore, my conclusion that under the ordinary circumstances an injury due to lightning is not such an injury as arises out of the employment and entitling one to compensation.

For a discussion of a similar matter see the note at page 708, Vol. 6 of Negligence and Compensation Cases entitled, "Frostbite, freezing and heat prostration as accidents arising out of the employment within the meaning of compensation acts."

HENRY E. SAMPSON, *Assistant Attorney General.*

NERVOUS SHOCK—Incapacity due to a nervous shock received in the course of his employment is compensable.

November 24, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

You ask to be advised whether or not incapacity through nervousness caused by accident without accompanying physical impact is a personal injury within the meaning of the Iowa workmen's compensation act, and in answer to same will say that the authorities are not in harmony upon this question. The English courts have held that mental, nervous or hysterical effects of an accident are included within the term "personal injury" in the English workmen's compensation act of 1916.

In the case of *Eaves v. Blaenclydach Colliery Co.,* (1909) 2 K. B. 73, the workman had recovered from muscular injury to his leg but suffered from traumatic neurasthenia and anaesthesia of the leg as a consequence of such accident, and it was held that his right to compensation did not cease when the muscular injury was ended, but continued as long as the nervous effects remained and caused total or partial incapacity for work.

A year later this doctrine was extended to a remarkable degree in the case of *Yates v. South Kirkby,* 2 K. B. 538, in which it was held that a nervous shock sustained by a workman engaged in coal

mining caused by excitement and alarm, resulting from a fatal accident to a fellow workman engaged in the same employment, was (a) "personal injury by accident arising out of and in the course of the employment" within the meaning of the act.

Of course there are English cases holding that to entitle a workman to a continuation of the compensation the neurasthenia must be genuine and there must be no suspicion of malingering. (*Turner v. Brooks,* 3 B. W. C. C. 22; *Holt v. Yates,* 3 B. W. C. C. 75.)

In the case of *Reich v. City of Imperial,* 1 Calif. Ind. Accdt. Com. Dec. (1914) 337, it was held that compensation should be paid where an employe becomes insane following great excitement and mental shock incident to the peril and attempted rescue of fellow workmen in the course of his employment, and where such excitement is shown to be an effective cause of the mental breakdown and no intervening cause for insanity or insane condition or predisposition thereto prior to the accident.

In the case of *Paolo v. Frankford Ins. Co.,* 1 Mass. Workmen's Comp. Cases (1913) 31, compensation was allowed where an employe while digging a trench was covered by an earth fill which caved in on him but which did not cause any broken bones or disclose any other objective symptoms, but on account of which accident the patient received a nervous shock from scare or some slight injury to the central nervous system due to the pressure of the dirt or congestion from pressure and partial asphyxiation. In that case there was no evidence of physical marks of injury.

In the case of *Coslett v. Shoemaker,* 38 N. J. L. J. 116, compensation was allowed on account of a nervous condition producing temporary disability. The employe was a carpenter, and while at work fell from a temporary scaffold, resulting in some slight injury from which he afterwards recovered, but even after his recovery he could not work steadily because of his unnerved condition which medical witnesses characterized as traumatic neurasthenia.

The Massachusetts board allowed compensation in the case of *Lata v. American Mutual Liability Insurance Co.,* 1 Mass Comp. Cases (1913) 283, where an employe claimed further compensation on acount of dizziness and a highly nervous condition which followed an injury and incapacitated her for work, there being evidence to prove that the incapacity would continue as a result of a highly nervous state and delusion from which she was suffering.

I might mention two cases in which the court held that the evidence was insufficient to prove that the mental condition was

caused by accident arising out of the employment, and that since the claimant had failed to meet the burden of proof, compensation could not be allowed. (See *Keck v. Moorehouse,* 2 Calif. Ind. Accdt. Com. Dec. (1915) 264; *Wilson v. Lake Co.,* 38 N. J. L. J. 172.)

It would seem from the foregoing that the weight of authority is in favor of holding that a nervous shock, due wholly to an accident occurring in the course of his employment, is compensable even though unaccompanied by any specific physical injury.

HENRY E. SAMPSON, *Assistant Attorney General.*

MEDICAL SERVICES—Employer to furnish reasonable medical, surgical or hospital services—May be required by order of court or by industrial commissioner—Employe's right to secure same—Penalty not specified but implied—Employer may select physician except in unusual cases.

April 27, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

Replying to your inquiry relating to the statutory provision requiring medical attention under the requirements of the workmen's compensation act will say that in 1913 the general assembly of Iowa, through its paternal interests in the welfare of the workmen of the commonwealth, enacted what is known as the workmen's compensation law by which it is sought to place at least a part of the cost of industrial injuries upon the industry which produced the loss. Among the various provisions found therein is one providing for the payment of compensation, and another providing that at any time after the injury and until the expiration of two weeks of incapacity, the employer, if so requested by the workman or anyone for him, or if so ordered by the court or Iowa industrial commissioner, shall furnish reasonable medical, surgical and hospital services and supplies under section 2477-m9, sub-section b, supplement to the code, 1913.

Under the provisions of this section just quoted the employer is required to furnish reasonable medical, surgical and hospital services and supplies under the following conditions, to-wit:

1. Where the relationship of master and servant exists;

2. Where the injury to the employe arises out of and in the course of his employment;

3. Where the necessity for such surgical, medical and hospital services and supplies are required within the first two weeks of incapacity; and

4. When the request for such medical, surgical and hospital services and supplies are requested by

a. The workman or employe.
b. Someone for the workman or employe.
c. By order of the court.
d. By order of the Iowa industrial commissioner.

It will be observed that the statute uses the word "furnish" and this would seem to place the burden of supplying such medical services upon the employer. The word "furnish" has no legal or technical definition different from its ordinary use in commercial parlance which is "to supply with anything necessary or needful." As ordinarily understood it means "to supply or to provide." It therefore seems evident that the legislature intended that the employer should act in the furnishing of reasonable medical, surgical or hospital services. Such an interpretation is also evident from an examination of similar statutes from other states, and I call particular attention to the statutes of New Jersey, Michigan, Illinois, Rhode Island, Maryland and Nebraska.

In discussing this subject Justice Marshall in the case of *Milwaukee v. Miller,* 144 N. W. (Wis.) 188, said:

> "Thus, the burden for all reasonable medical aid and surgical treatment, medicine, etc., is cast on the employer, limited as to time, with the very wise and necessary safeguard against imposition that the choice of the medical or surgical attendant shall be left with him and that, if the injured person unnecessarily chooses his own physician, he will do so at the peril of having to bear the burden of the expense. That is a very valuable protection to injured persons as well as to employers. The natural effect of a firm enforcement of it will be to expedite the return of honest claimants to the walks of industry and prevent them from having their misfortunes exploited for other's benefit. If the advantage to be gained by a firm administration of such provision would be greater on one side than on the other, it is the side of the employees. Therefore in case of a personal injury to an employe in the line of his duty, the law should be construed and applied so as to secure to his employer reasonable opportunity to conserve the mutual inter-

ests of the two parties to the misfortune by supplying the medical and surgical needs of the injured."

It also appears from an examination of the statute that such medical services may be required by an order either of the court or the Iowa industrial commissioner, and the inference is also clear that if such reasonable medical and surgical services are not furnished by the employer then such employe has the right to secure same. The logic of the foregoing statutory provision relating to the requirement of such services is that the duty of the injured employe who needs or who supposes he needs medical and surgical treatment to give his employer reasonable notice thereof. The right of the employer to have such notice necessarily implies the right to reasonable opportunity to exercise it. The penalty for refusing or neglecting to furnish such services or of disobeying the order of the court or commissioner is not specified in the Iowa law as it is in most of the similar laws but by implication it must be said that he must then bear the expense incurred by others in supplying the services. If the employer furnishes such services and they are refused by the employe then the employer can go no further and cannot be liable for services secured elsewhere. The statute requires that such services be reasonable, but as to what is reasonable is a question of fact which must be determined in each case, and if there are any peculiar circumstances which make the medical services furnished by the employer unreasonable, then the employer should either provide such reasonable services promptly when so advised or permit the employe to secure such services at the expense of the employer. Circumstances may require that the employe select his own physician in unusual cases, but except in such unusual cases the employer may select the physician which he furnishes, provided, of course, that such services are, under all of the circumstances, reasonable.

HENRY E. SAMPSON, *Assistant Attorney General.*

PERIOD FOR MEDICAL SERVICE—Employer required to furnish medical service from date of injury until expiration of two weeks of incapacity.

November 14, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

In your letter of inquiry you refer to a case where the injured employe was first thought to be but slightly injured and requiring but slight medical attention immediately following the injury,

but that a week later the injury became so much worse that it incapacitated the employe from labor and required the best medical and hospital service, and you now ask to be advised for what period of time the employer should furnish the hospital and medical attention required by this injured employe.

Answering your inquiry will say that the law governing this matter is found in section 2477-m9(b), supplement to the code, 1913, which provides in part as follows:

> "At any time after the injury and until the expiration of two weeks of incapacity, the employer, * * * shall furnish reasonable surgical, medical and hospital services and supplies, not exceeding one hundred dollars."

It will, therefore, be observed that the statute fixes the time when the service should commence and the time when his duty to furnish such service may end, but does not limit this service to any specified number of weeks. The statute says that the service shall be furnished "at any time after the injury," so that this statute, as I interpret it, requires the employer to furnish medical attention as soon after the injury to one of his employes as such service is needed, and this, then, fixes the time when the medical service should first be provided. The statute then proceeds to fix the time when such service may be discontinued by the employer and does so by saying that it shall continue "until the expiration of two weeks of incapacity." If, then, the employe was able to work for a period of one week following the injury, his incapacity did not begin until the eighth day following the injury, and if the employer is required to furnish medical attention "until the expiration of two weeks of incapacity" then such service should, under the statute, be furnished until the twenty-third day following the injury.

It is, therefore, my judgment that a reasonable interpretation of the statute quoted above, and, in fact, the only interpretation of which it is capable, is that the employer is required to furnish his injured employe medical attention as soon after the injury as such services are required, and that he shall continue to furnish such services until the expiration of two weeks of incapacity, whether such incapacity date from the time of the injury or not. Of course all such services required of the employer are limited to a total expenditure of one hundred dollars since the statute provides that it shall not "exceed one hundred dollars."

HENRY E. SAMPSON, *Assistant Attorney General.*

DOCTOR'S BILLS AND BURIAL EXPENSES.—Employer should pay reasonable medical, surgical and hospital services and supplies, not exceeding $100; reasonable expenses of last sickness and burial; and compensation required to be paid dependents of injured employe.

January 14, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

You ask for an interpretation of section 2477-m9, supplement to the code, 1913, and particularly to sub-divisions (b) and (c) thereof, having reference to the liability of an employer for doctor's bills and burial expense where such injured employe is killed as a result of an injury arising out of and in the course of his employment.

Answering your inquiry will say that said sub-division (b) provides that "any time after an injury and until the expiration of two weeks of incapacity the employer * * * shall furnish reasonable surgical, medical and hospital services and supplies not exceeding $100.00." Said sub-division (c) provides "that where the injury causes death, the compensation under this act shall be as follows: The employer shall, in addition to any other compensation, pay the reasonable expense of the employe's last sickness and burial, not to exceed $100.00." Sub-division (d) provides that "if death results from the injury, the employer shall pay the dependents of the employe wholly dependent upon his earnings for support at the time of the injury, a weekly payment equal to 50 per cent of his average weekly wage, but not more than $10.00 nor less than $5.00 for a period of not more than three hundred weeks."

An answer to your inquiry first requires a determination of whether said sub-division (b) is applicable to cases where death results from the injury, or whether the sole liability of the employer for the expense of said employe's last sickness and burial is controlled by said sub-division (c). Answering this question will say that in my judgment the provisions of sub-divisions (b) and (c) are applicable to cases resulting in death and that sub-division (c) does not fix the entire liability of the employer for expenses of medical services and burial in such cases. The purpose of the foregoing provisions of the statute was in my judgment to provide for the payment by the employer of the customary expenses incurred in such cases of injury so that the dependents of the employe would not be required to pay out of the compensation intended for their keeping the heavy expenses incurred in doctor's bills and burial expenses. If the total liability of the employer for the last sickness

and burial was limited to $100.00, then in most cases where the death of the employe occurred sometime after the injury the entire $100.00 would be used up in providing him with reasonable surgical, medical and hospital services and supplies and there would be nothing left to take care of the burial expenses which burden would then fall upon the dependents of the employe.

Reading the foregoing sections together, and giving them a reasonable interpretation the employer is required to furnish reasonable surgical, medical and hospital services and supplies not exceeding $100.00 in all cases where there is an injury, and said services are needed during the first two weeks following such injury and such is true even though death may finally result from such injury. Of course, if the injury results in instant death there would be no expense of this character.

The employer is also required in death cases to pay the reasonable expense of the employe's last sickness and burial not to exceed $100.00. If the employe died within two weeks following the injury and there were no expenses connected with his last sickness which were not included under sub-division (b) then the employer would only be liable for the reasonable burial expenses of the employe not to exceed $100.00. If, however, the death did not occur until after the expiration of the two weeks' period following incapacity and there were expenses connected with the employe's last sickness which could not be paid under said sub-division (b), then all such expenses, together with the expense of burial, not to exceed $100.00, should be paid by the employer. Such an expense would include the reasonable surgical, medical and hospital services and supplies after the expiration of the two week period of incapacity or any other legitimate expense which might properly be considered as a reasonable expense of the employe's last sickness.

In addition to the foregoing the employer is also required to pay the dependents of the employe wholly dependent upon his earnings for support at the time of the injury the compensation provided for under sub-division (d), and in this connection it should perhaps be pointed out that the language "in addition to any other compensation" found in sub-division (c) refers not only to the compensation to be paid the dependents under sub-division (d) but also to the expenses required to be paid under sub-division (b).

Summing up the foregoing, then, it is my judgment that in death cases the employer should not only pay the reasonable surgical, medical and hospital services and supplies, not to exceed $100.00,

but also the reasonable expenses of the last sickness and burial, and also the compensation required to be paid the dependents of the injured employe.

HENRY E. SAMPSON, *Assistant Attorney General.*

EMPLOYES HIRED OUT.—Employe injured while being hired out by his employer is entitled to compensation from his original employer and not from the man hiring his services.

January 14, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

You ask to be advised whether under the circumstances hereinafter set forth the injured party would be considered the employe of Longerbone Bros. or Frank Cram & Sons.

You say that Longerbone Bros. are excavating contractors and that they employ men with their teams at so much per day, that whenever the said Longerbone Bros. have more teams than they can use on their own work they hire these teams out to Frank Cram & Sons at so much per day; that Longerbone Bros. pay the teamsters whether they are working for them or for Frank Cram & Sons; that Frank Cram & Sons pay Longerbone Bros. for the services rendered by the teamsters employed by Longerbone Bros.; that the teamsters have no direct arrangement with Frank Cram & Sons and do not receive their compensation from them; that one of these teamsters employed by Longerbone Bros. was injured while doing teaming work for Frank Cram & Sons; and that the question has now arisen as to whether or not compensation should be paid by Longerbone Bros. or by Frank Cram & Sons.

Under the foregoing statement of facts it is my judgment that the teamster was an employe of Longerbone Bros. since he was employed by and paid by said Longerbone Bros.; that there exists the relationship of master and servant, and that Longerbone Bros. were liable for compensation due such injured employe; that the contract between Longerbone Bros. and Frank Cram & Sons was a contract for service as distinguished from a contract of service which existed between the injured employe and Longerbone Bros. There is no relationship of master and servant existing between the injured employe and Frank Cram & Sons. There is no compensation due except in those cases where there exists the relationship of master and servant and where the injured employe is working under a contract of service.

Support for the above opinion is found in the case of *Pigeon v. Employers'* L. A. C., 216 Mass. 51, in which the original employer was held liable for compensation in a case in which the employe, a driver in the employment of a general employer, was sent by his employer to work for a city in removing street sweepings, receiving his general instructions as to the place and kind of work from the city superintendent. It was there held that the evidence warranted a finding that the decedent was not loaned absolutely to the service of the city, but that his general employer retained general direction of his conduct.

See also the recent case of *Rongo v. Waddington & Sons,* 94 Atl. (N. J.) 408, in which the supreme court of New Jersey held that a teamster who was regularly employed by a teaming company which hired out its teams with drivers to another (the teamster being paid by the company, but being directed in his work by the other) is an employe of the company, the court going on to say:

> "Vanderbilt had no direct dealing with the petitioner; he had nothing to say about how much wages the petitioner should be paid; the only contract he made was a contract with Waddington for the supply of a team consisting of a wagon, horses and driver, for which he paid as a team."

HENRY E. SAMPSON, *Assistant Attorney General.*

LOSS OF FIRST AND SECOND FINGERS—Method of payment where one injury causes the loss of two members.

October 3, 1914.

HON. WARREN GARST, *Iowa Industrial Commissioner.*

I have before me the letter of the Gurties Sash and Door Co. addressed to you in which they inquire as to the amount of compensation which should be paid for the loss of the first and second fingers and the method by which same should be paid.

For answer to the questions therein submitted I refer you to section 10-(j-1), and 10-(j-2) of chapter 147, acts of the thirty-fifth general assembly wherein it is expressly provided that for the loss of the first finger the compensation should be 50 per cent of the daily wages for a period of thirty weeks; and for the loss of the second finger 50 per cent of the daily wages for a period of twenty-five weeks.

As to the manner of payment in such a case will say that the injured employe lost the index finger which entitled him to thirty weeks and the second finger which entitled him to twenty-five weeks and that, therefore, he was entitled to compensation for a period of fifty-five weeks. It would not be in accordance with the spirit of the law to permit the employer to make payments for each of those two fingers at the same time and you should not approve a settlement which contemplates the paying of 100 per cent of the wages of the injured employe for the first twenty-five weeks following the second week of the injury and 50 per cent for an additional five weeks. There is no provision in the above named statute by which more than $10.00 per week could be paid (see, section 10-(j-19)). This fact would make improbable and unworkable the theory that weekly payment for each finger lost should be made each week continuing until the claim of the less valuable fingers dropped out of the account and until the one most valuable is fully paid.

Believing that this method of payment is the one contemplated by the statute and the one best suited to serve the injured employe, I am,

HENRY E. SAMPSON, *Assistant Attorney General.*

AVERAGE WEEKLY WAGE.—Compensation based on wages at time of injury even though injured employe had been but recently advanced in wages.

November 27, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

I have before me the file in the case of *George Winburn v. Des Moines Saw Mill Company* and have not only examined the record but have made some personal investigation of the facts surrounding this case. If I am correctly informed, George Winburn has been in the employ of the Des Moines Saw Mill Company for several weeks; that during the most of said period of employment he was doing common labor work in the log yard; that shortly prior to the date of his injury he was promoted to the position of operating a cut-off saw; that while acting as a common laborer he was paid at the rate of between $1.75 and $2.00 per day; that in his new position of operating a cut-off saw he was paid $2.50 per day.

Since the loss sustained by Employe Winburn was that of an index finger, which loss is scheduled at thirty weeks, the only ques-

tion left open for determination is the average weekly wage of Employe Winburn at the time of his injury.

Answering this inquiry will say that under the facts as I understand them the average weekly wage should be determined under and in accordance with the provisions of section 2477-m(d) and that when so computed it would make the average daily wage of Employe Winburn at the time of his injury, and in the grade in which the employe was employed at the time of the accident, at $2.50, and that his average annual earnings when so computed would be $750 and that his average weekly earnings, when so computed, would be $14.42 and that the amount of compensation due, when so computed, would be $216.30.

Trusting that the foregoing will be sufficient to enable you to properly determine the compensation due George Winburn in the above case, I am, etc.,

HENRY E. SAMPSON, *Assistant Attorney General.*

ADDITIONAL COMPENSATION.—Average weekly compensation based on different sources of wages paid.—Insurance premium paid based on wages received from all sources.

March 28, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

You ask whether or not in figuring compensation due injured employes under the Iowa workmen's compensation act account should be taken of all the different sources of compensation including rent, board, washing, etc.

In answer to your inquiry will say that it is expressly provided by the provisions of section 2477-m9, supplement to the code, 1913, that the amount of compensation due injured employes should be based on the average weekly wage but not more than $10.00 nor less than $5.00 per week. The courts have repeatedly held that if in addition to the fixed wage other compensation is paid, then the additional items of compensation should be included when arriving at the average weekly wage of such injured employe. For cases bearing upon this subject see *Brandy v. Owners S. S., Raphael,* 4 B. W. C. C. 6; *Shailes v. Blue Anchor Line,* 4 B. W. C. C. 16; *Great Northern Ry. Co. v. Dawson,* 92 Lt. 145.

As instances of where such additional compensation has been included, I may mention the cases where the actual cost of food and

lodging was included, and when tips received as a part of the earnings were included, etc. The provisions of section 2477-m15 (g), supplement to the code, 1913, should be kept in mind in all cases of this character.

If, however, the average weekly compensation is based upon the different sources of wages paid, then it would seem but right and proper that the premium paid for workmen's compensation insurance should be based on the total wages received from all such sources.

HENRY E. SAMPSON, *Assistant Attorney General.*

WAGES PARTLY IN CASH, PARTLY IN PROPERTY.—Weekly wage paid in part cash and part property ought not to change rule.

April 8, 1915.

MR. E. E. MEYER, Wyoming, Iowa.

I have for attention your letter of April 7th in which you state that you have an employe whom you are paying at the rate of $17.50 per week, $15.00 of said wages being paid in cash and the balance in meat and lard which you estimate averages $2.50 per week. You now ask to be advised whether or not under such circumstances the basis upon which to figure compensation for this employe would be $15.00 per week or $17.50 per week, and in answer to same will say that, in my judgment, your said employe is entitled to compensation upon the basis of $17.50 per week. The mere fact that a portion of the weekly wage is paid in property instead of cash ought not to change the rule.

The arrangement which you have is more in the nature of an agreement between yourself and employe, whereby the employe agrees to give you credit on his wage account for $2.50 per week, for which sum you agree to furnish him with meat and lard for his family.

HENRY E. SAMPSON, *Assistant Attorney General.*

LUMP SUM SETTLEMENT.—When and how such settlements may be made.

December 3, 1915.

MR. H. B. LEWIS, S. & L. Bldg., Des Moines.

Your letter of September 28th addressed to the industrial commissioner has been referred to me for attention and in reply to

same will say that in my judgment there is no authority under the statutes of Iowa under which a judge of the district court can legally enter an order in his court commuting future payments to a lump sum settlement case except in those cases where the period of compensation can be *definitely determined.* If the period of compensation is possible of definite determination and if the employer and employe have reached an agreement in regard to the compensation due and have filed a memoranda thereof with the Iowa industrial commissioner and if such memoranda of agreement is approved by the Iowa industrial commissioner, all as provided for in section 2477-m25, supplement to the code, 1913, then commutation can be made as provided for in section 2477-m14, supplement to the code, 1913.

In view of the foregoing answer, it is unnecessary at this time for me to answer the other inquiries submitted in your letter. As soon as I can find time I will give the matter further attention.

HENRY E. SAMPSON, *Assistant Attorney General.*

PARTIAL RECOVERY.—Compensation statutes do not guarantee employment at old occupation.—Compensate for total disability.

December 1, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

You ask to be advised as to whether or not, under the Iowa workmen's compensation act, an injured employe is entitled to compensation until he is able to return to the employment at which he was engaged at the time of his injury, and in answer to same will say that I do not so understand the law.

In a recent issue of the Weekly Underwriter I noticed a reference to a case similar to yours just handed down by the compensation commissioner of Connecticut in which the employe, injured November 18, 1915, was discharged from the hospital December 19, 1915, and on the 12th of January, 1916, was pronounced able to resume light work, which light work was offered him, but since his father did not wish him to do such light work he refused same and the commissioner held that his total incapacity ceased on the day when he was discharged from the hospital and that the employer, by offering and keeping open for him suitable employment at a wage equal to what he was first receiving, had satisfied the requirement of the compensation act.

The California industrial accident commission recently passed upon a case somewhat similar. The injured employe was a bricklayer's foreman. After he had sufficiently recovered to resume his work as a foreman he was unable to find such employment but was offered work as a bricklayer which he felt physically unable to do. The commission held that the California statute does not contemplate compensation for mere pain and inconvenience but only for disability to labor. The statute does not say disability to labor at the kind of labor which the injured employe was doing at the time of the accident. Compensation was denied.

I find from an examination of the statutes from other states and from decisions rendered by other commissioners that the compensation statutes do not guarantee employment at the old occupation, but do undertake to compensate for disability to earn wages. If the injured employe can earn wages at some occupation, then to that extent the person has not suffered total permanent disability.

HENRY E. SAMPSON, *Assistant Attorney General.*

PARENT OF MINOR IS DEPENDENT.—Parent of minor entitled to earnings unless minor is legally emancipated.—Statute conclusively presumes parent is dependent.

April 11, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

You ask me to be advised whether or not the parent of a minor is entitled to the earnings of the employe at the time of the injury and in answer to same will say that by the express provisions of section 2477-m16-c it is provided that "the following shall be conclusively presumed to be wholly dependent upon the deceased employe: (3) a parent of a minor entitled to earnings of employe at the time the injury occurred subject to the provisions of sub-division f, section 2477-m9, supplement to the code, 1913."

Under the statutes of Iowa the parent of a minor is legally entitled to the earnings of such minor employe unless he has been legally emancipated by some one of the several legal forms of emancipation. The statute provides that the parent shall be conclusively presumed to be wholly dependent and therefore the question is not open to a determination of whether or not such parent is in fact dependent. In this respect the statute of Iowa is different

from those of several other states and hence the decisions from states where the statute is different are not applicable.

HENRY E. SAMPSON, *Assistant Attorney General.*

SURVIVING SPOUSE.—Compensation is payable to the surviving spouse.—Remarriage does not terminate.

April 1, 1916.

CHAS. D. HAYNES, Omaha, Nebr.

Replying to your letter of March 28th having reference to the Iowa workmen's compensation act, will say that the Iowa statute governing the matter of compensation to surviving spouses is found in section 2477-m16-c-1, supplement to the code, 1913, and reads as follows:

> "The surviving spouse, unless it be shown that the survivor wilfully deserted deceased without fault upon the part of the deceased, and if it be shown that the survivor deserted deceased without fault upon the part of deceased, the survivor shall not be regarded as a dependent in any degree. No surviving spouse shall be entitled to the benefits of this act unless she shall have been married to the deceased at the time of the injury."

Section 2477-m16-c-4 reads as follows:

> "If the deceased employe leaves dependent surviving spouse, the full compensation shall be paid to such spouse; but if the dependent surviving spouse dies before payment is made in full, the balance remaining shall be paid to the person or persons wholly dependent, if any, share and share alike. If there be no person or persons wholly dependent, then payment shall be made to partial dependents."

I find no express provision in our statute terminating payment of compensation in case of the remarriage of the surviving spouse.

HENRY E. SAMPSON, *Assistant Attorney General.*

REMARRIAGE OF SURVIVING SPOUSE.—Subsequent marriage of surviving spouse does not forfeit right to compensation.

December 15, 1915.

HON. WARREN GARST, *Iowa Industrial Commissioner.*

You ask to be advised as to whether or not the surviving spouse, who is entitled to compensation under the Iowa workmen's compensation act, forfeits such right to compensation by remarriage.

Answering your inquiry will say that in my judgment the words "surviving spouse" as used in section 2477-m16-c1, supplement to the code, 1913, indicate the person, not the state, and is used synonymously with wife. Hence, the subsequent marriage of the surviving spouse does not take away her right given by the statute as the widow of the deceased.

This view is supported by the case of *Ga. R. & B. Co. v. G. A. R.* 57 Ga. 277. See also the cases of *Commonwealth v. Powell,* 51 Pac. 438; *Brady v. Banta,* 46 Kans. 131; *In re Ray's Estate,* 35 N. Y. Supp. 481.

This view is entirely consistent with the purposes of the act when we note that under the Iowa statute the surviving spouse takes not only for herself but also for other dependents.

The compensation statutes of some states expressly provide that compensation shall cease upon the remarriage of the surviving spouse and of course in those jurisdictions the above rule would not obtain, but there is no provision in the Iowa statute for terminating the right of the surviving spouse to compensation upon her remarriage.

HENRY E. SAMPSON, *Assistant Attorney General.*

COMPENSATION INSURANCE REQUIRED.—An employer failing to provide compensation insurance is in same position as though he rejected the act.

June 26, 1916.

HON. A. B. FUNK, *Iowa Industrial Commissioner.*

You ask to be advised as to the status of an employer who has not affirmatively rejected the compensation features of the act but who has neglected to provide the compensation insurance required under section 2477-m41, supplement to the code, 1913, or been relieved from complying with said section by proceeding under

the provisions of section 2477-m49, and in answer to same will say that, in my judgment, the employer is in exactly the same situation as though he had affirmatively rejected the compensation features of the act. Of course I am assuming that the employes of such employer have not rejected the act as by law provided. In this connection see Bradbury's Workmen's Compensation (2 Ed.) Vol. I., p. 311.

I must admit that the language of said section 2477-m41 is not entirely clear and that my opinion is based upon a consideration of the entire statute made after an examination of the history of this legislation. We will not know for a certainty whether or not the supreme court will arrive at the same conclusion until they have had the matter before them and rendered their decision, and until that time I think that the statutes should be interpreted in the manner comtemplated by the legislature, and as above stated.

HENRY E. SAMPSON, *Assistant Attorney General.*

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