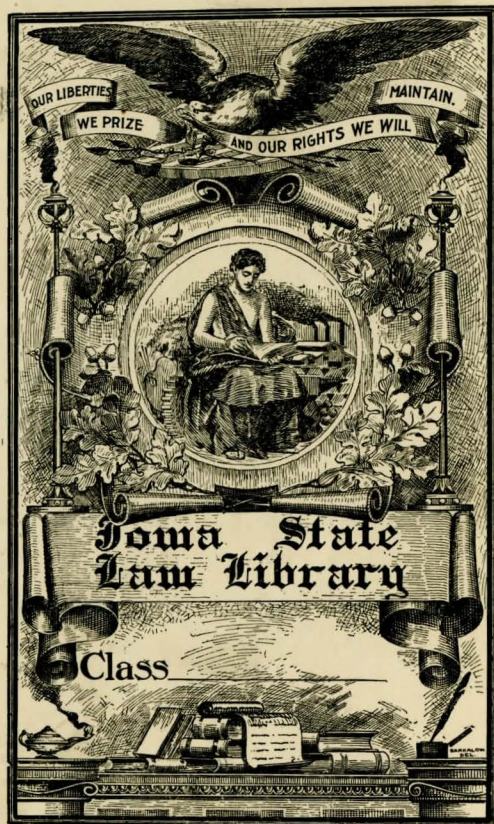


For Reference

Reading Room



TENTH BIENNIAL REPORT

OF THE

ATTORNEY-GENERAL

OF THE

STATE OF IOWA

GEORGE COSSON

ATTORNEY-GENERAL

FOR THE PERIOD BEGINNING JANUARY 2, 1913
AND ENDING DECEMBER 31, 1914.

Printed by Authority of General Assembly

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ATTORNEY GENERAL'S DEPARTMENT

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REPORT OF THE ATTORNEY GENERAL.

STATE OF IOWA,
Department of Justice,
Des Moines.

To the Honorable Geo. W. Clarke,

Governor of Iowa:

Pursuant to the provisions of Chapter 9, acts of the Thirty-third General Assembly, I hereby submit to you a report of the business transacted by the attorney general during the years 1913 and 1914.

As the work of the department has so greatly multiplied and the number of opinions increased, only such opinions as cover new questions and as are thought to be necessary in order to advise the several state departments and the several local officers, are included in this report.

In addition to acting as adviser and counsellor for the several state departments, the attention of the department of justice during the last biennial period has been almost continuously occupied in the matter of trying constitutional questions in the state and federal courts, and in the enforcement of the law.

CONSTITUTIONAL CASES.

During this biennial period cases testing the constitutionality of the following laws have been submitted in the supreme and federal courts: workmen's compensation act; the law giving the railroad commissioners supervision of the railway companies; capitol extension act; blue sky law; red light law; teachers' minimum wage; automobile registration law; ice cream standard of the pure food law; vasectomy law.

These cases have been contested with all the energy, skill and industry that money could buy. Not only the ablest lawyers in Iowa have been secured but in two of the cases very able lawyers from both New York and Chicago appeared for the plaintiffs. The state, however, has been successful in the suit involving the capitol extension act, teachers' minimum wage, automobile registration law and the ice cream standard of the pure food law in our supreme court. The cases involving the constitutionality of the red

light injunction and abatement law and the blue sky law were submitted to our supreme court, one in December 10, 1913, and the other April 8, 1914. No opinions, however, have yet been handed down.

The case involving the constitutionality of the workmen's compensation law was submitted in the federal court and a decision rendered in favor of the state.

The case testing the constitutionality of the vasectomy law was submitted in the federal court but the attorney general in that case conceded that an injunction should be granted. The law in its present form is so arbitrary and unreasonable that the department of justice refused to make a defense.

THE BLUE SKY LAW.

The case involving the constitutionality of the blue sky law was submitted in the federal court and originally held valid by Judge McPherson. Later, upon an application for a temporary injunction before Judges Smith, McPherson and Pollock, it was held that the act offended against the commerce clause of the federal constitution.

At a conference of the attorneys general of the United States it was agreed that the Iowa law was the strongest statute which had passed in the several states, and therefore it was recommended that the decision of Judges McPherson, Pollock and Smith be appealed from. Accordingly the appeal has been perfected before the supreme court of the United States. It was decided, however, in view of the experience in the submission of the Iowa and Michigan cases in the supreme and federal courts, and the Arkansas statute before the Arkansas courts, that a new bill should be drafted.

The National Association of Attorneys General appointed Attorney General Grant Fellows of Michigan, the Attorney General of Iowa and Attorney General Moose of Arkansas to draft a new bill. The commission has made its report and prepared a bill which will be recommended in this and in a number of the other states to the next legislatures.

The new bill is well indicated by its title. It is designated an inspection law for the purpose of preventing fraud in the sale of stocks, bonds and other securities. It is attempted by said act to accomplish this and no more; that is to say, it is attempted to pro-

tect the people against fraud but not unduly interfere with the private business of investment companies in the sale of stocks bonds and other securities in the state of Iowa.

THE MILWAUKEE CASE.

Another constitutional case of great importance is the case of the Chicago, Milwaukee and St. Paul Railway Company vs. The State of Iowa. This case involved the constitutional right of the board of railroad commissioners to require transportation companies to accept carload lots for points within the state where the cars of merchandise originated in a point outside the state. This case was submitted to the supreme court of the United States and oral argument made on behalf of the railway company and by the attorney general on behalf of the state, and a decision rendered April 13, 1914, sustaining the validity of the law and upholding the contentions of the state. This was of special value to the jobbers of the state and the wholesale merchants who do business in carload lots by following the re-consignment method.

It goes without saying that the sustaining of the constitutionality of the acts of the legislature, unless wholly arbitrary and clearly unconstitutional, is of paramount importance; otherwise, the work of the general assembly would come to naught.

THE ECONOMIC VALUE OF LAW ENFORCEMENT.

The matter of the enforcement of the law has occupied a large part of the attention of the department of justice. Law enforcement is always of very great importance.

The supervisors of this state, according to the reports made by the state examiners are now spending over twenty million dollars per annum. Notwithstanding this very large sum of money expended, we found unusually lax business methods. We found that the law was violated both in letter and spirit in several of the counties of the state. The examination thus far made indicates in the several counties of the state a shortage of \$400,000, a part of which has been returned but a considerable portion of which will never be returned to the county treasury due to the fact that a number of officers responsible for the shortage are dead, some have left the state, a large number are now out of business and the statute of limitations will be a bar to the collection of a large part of the amount.

A number of removal suits have been instituted. In several instances, however, resignations were handed in before any petitions were filed; one suit is now pending. In each instance thus far the state has been successful. The indirect result is of more importance than the direct result. Not only in the counties where prosecutions have either been threatened or instituted has there been a change in business methods, but the mere activity of the department has caused a change of methods in a large number of other counties.

Since the removal bill was passed, twenty-four officers have either been ousted or resigned to avoid prosecution. This includes mayors, supervisors, sheriffs, marshals and chiefs of police.

The removal bill should be amended making it applicable to all city, county and township officers, elective or appointive. No reason can be offered why the removal bill should apply to a limited number of city and county officers but not apply to the remaining number.

The general assembly of Massachusetts in 1913 followed Iowa in giving the attorney general of the state additional powers in the matter of the enforcement of the law and the supervision of local officers. This is in line with the best thought of the time. It has come to be recognized that since the state by its general assembly has authority to enact laws binding upon all the people, and through the supreme and inferior courts interprets the laws binding upon all the people, that it should also have the means of enforcing the law in every part of the state.

SPECIAL AGENTS.

In order, however, that this may be fully accomplished, the department of justice should have authority to appoint special agents to investigate violations of the law both of a social and economic nature in every part of the state. These special agents should have the same authority to make arrests as local officers and should have the co-operation of all peace officers in the matter of making arrests and the enforcement of the law.

REFORM IN COURT PROCEDURE.

In order that justice may be accomplished and efficiency secured, we not only need special agents for the purpose of securing evidence upon which to base convictions, but a change in our

criminal procedure. I therefore renew my recommendations made in the last biennial report, viz: that the legislature of this state pass a law similar to the Wisconsin law and the proposed amendment to the constitution of California providing in substance that no judgment shall be reversed or set aside or new trial granted in any action or proceeding, civil or criminal, on the ground of misdirection of the jury, or the improper admission of evidence, or for 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. This in substance has been the law of England for a number of years, and the American Bar Association at its last meeting held in Washington, D. C. in 1914, recommended that legislation of a similar nature be placed upon the statute books of every state in the Union.

The importance of this is made evident when we consider that for the biennial period ending January 1, 1915, 94 new criminal cases were appealed in this state; 99 were disposed of by our supreme court of which number 14 have been reversed upon defendants' appeal and four reversed upon the appeal of the state. During the same period of time in Wisconsin with over 100,000 more population, with larger cities and open saloons, only 21 criminal cases have been appealed and only one case reversed.

INSANITY.

I also renew my recommendation made in the previous biennial report with reference to procedure in the event that insanity is set up as a defense for crime. The importance of this recommendation is shown by the case of *State vs. Kelley*. Kelley was charged with the killing of two persons and indicted for murder in the first degree. Insanity due to drunkenness was set up as a defense. The jury did not bring in a verdict of guilty of murder but brought in a verdict of guilty of manslaughter and answered a special interrogatory saying that Kelley was insane at the time of the commission of the offense. The case was reversed by our supreme court and Kelley is now running at large.

The insanity defense operates not only as a miscarriage of justice in Iowa but elsewhere. The attorneys general of several states are directing the attention of the governors and the legislatures to the evils of the present system. The attorney general of Alabama in his recent report strongly recommends a change in

the present law. England satisfactorily disposed of the question as early as 1883 in what is known as the Lunatics Act.

THE MASSACHUSETTS LAW.

Massachusetts in 1909 passed a law which is in substance the same as that of England and provides as follows:

"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 that 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 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 a conviction because of the death, or 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.

SECOND TRIAL.

In a number of states where a defendant is placed on trial for murder in the first degree and is found guilty of some lesser offense, if he appeals to the supreme court and the case is reversed, he can again be placed upon trial for the highest offense charged

in the indictment. Under the decisions of our court this may not be done. The result is that defendants are encouraged to gamble upon what the supreme court will do. They have everything to gain and nothing to lose by prolonging the litigation. This should be remedied if necessary by constitutional amendment.

If the defendant fails or refuses to testify, the county attorney should be permitted to comment upon this fact.

SENATOR ROOT.

The demand for reform in court procedure is not limited to persons of radical tendencies. The American Bar Association went on record in a clear and positive way favoring a change and Senator Root in his great address made one of the strongest indictments against our present system which has been made by any public official of high standing in the United States. Discussing the question of trial practice 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.*"

THE JAIL SYSTEM.

If our court procedure is to square itself with the modern methods of thought and action, it will be necessary to revolutionize our present method of punishment. The theory of vindictive punishment has no place in any system of penal reform. What is necessary is to quarantine the offender to the end that society may be protected and give him a sufficient amount of discipline until he can become a self-supporting citizen. He must right the wrong in so far as possible. The whole jail system should therefore be revolutionized by the abolishment of the city and county jail except as a means of detention awaiting trial, and there should be substituted custodial farms conveniently located so as to best accommodate every section of the state.

For the details of the plan see the report of the committee submitted to the governor on May 25, 1912. If in addition to these recommendations appeals to the supreme court should be limited to \$250 or in excess thereof, unless a constitutional question or a question involving real estate was at issue, litigation would be very much lessened, justice would be very greatly promoted and the direct and indirect benefits to the parties concerned and the people in general would be very great.

TRUSTS AND MONOPOLIES.

We now have a criminal law upon our statute books relating to trusts and monopolies but no civil remedy. The legislature should therefore pass what was known as the Miller or Francis bill at the last general assembly giving the state the injunctive method of dealing with trusts and monopolies. It should also pass a law similar to that on the statute books of Missouri giving the state a civil remedy of investigation instead of limiting the state to the criminal method by the grand jury.

AMENDMENT TO ROAD LAW.

The Thirty-fifth General Assembly specifically provided that the attorney general should be the counsellor and advisor for the state highway commission. Our work with the highway commission shows splendid results to have been accomplished under the new road law in so far as grading, permanent bridges and culverts and draining is concerned but systematic dragging has not been obtained and in my judgment will not be obtained under the present system. The recommendations of the highway commission for a patrol system of dragging should therefore be adopted.

ABOLISHING SUPERVISOR DISTRICTS.

Our investigation shows that the law authorizing supervisors to be elected under the district plan has a tendency to produce evil results. Therefore supervisor districts should be abolished and all supervisors elected at large. Sooner or later some general assembly will place county government upon a nonpartisan basis. Supervisors will be elected at large, will give their entire time and attention to the duties of the office, be paid a sufficient salary, appoint all the clerical help and actually supervise the entire business of the county.

STATE AND SAVINGS BANKS SHOULD HAVE AUTHORITY TO BECOME MEMBERS OF FEDERAL RESERVE BANKS.

The attorney general was early called upon to give an opinion as to whether state and savings banks were authorized to become members of the federal reserve banks. The opinion has been reserved. In order to remove the question beyond controversy, the general assembly should expressly authorize state and savings banks to become members of the reserve banks in order that our state banking act may harmonize with the federal currency act.

HABIT FORMING DRUGS.

Much has been recently said concerning the evils of habit forming drugs. Our statute now prohibits the sale of cocaine and all of its derivatives; provides that it shall not be sold except upon the original written prescription of a registered physician; that the first offenders may be prosecuted under information; that a second offense is indictable; especially enjoins upon peace officers and county attorneys the enforcement of the act; druggists found guilty may have their certificates to practice pharmacy revoked by the commission. However, the law may be strengthened in the following particulars: The red light injunction and abatement bill should be amended making a nuisance any building or place wherein is sold or unlawfully kept any opium, cocaine or any derivative of said drugs or other habit forming drugs, and subject to abatement under the same conditions as required for the abatement of a house of assignation or the abatement of a liquor nuisance with the same right to a permanent and temporary injunction against the owner of the building, the persons concerned or engaged in the making of the illegal sales as now obtain against persons operating a liquor nuisance or a house of ill fame. Any physician who wrongfully prescribes to any person any habit forming drug should be held to be guilty of unprofessional conduct and the board of health should be required upon hearing to cancel the certificate of any such physician, and should likewise be authorized and directed to cancel the certificate of any physician who is himself addicted to the use of habit forming drugs.

Physicians should also be required to keep a record of every prescription and file a copy with the state board of health and a duplicate carbon copy with the state pharmacy commission. The state pharmacy commission should also have both the authority

and better facilities for making inspection of the stock of drugs and the quantity of habit forming drugs kept by such pharmacies to see if the law requiring reports to be accurately kept has been observed. Every person making sales should be required to obtain a license from the state pharmacy commission to the end that the commission will have an accurate list of the number of persons dealing in such habit forming drugs. A strict account should be made of the total amount received and the total amount sold and a report made to the pharmacy commission. In addition the possession, except as prescribed by law, should be evidence that the same is kept for illegal purposes.

The laws of both New York and Massachusetts are considered model laws in dealing with and regulating the disposition of these habit forming drugs, but I am persuaded that the additional recommendations herein made will be necessary if the regulation is to be thoroughly effective.

LIMITING TIME OF APPEAL IN CRIMINAL CASES.

The time of appeal in criminal cases should be reduced from six to three months.

INDETERMINATE SENTENCE LAW.

An indeterminate sentence bill similar to the Heald bill introduced in the Thirty-fifth General Assembly should be passed and there should also be a limited indeterminate sentence law for misdemeanants.

The question of the repeater or recidivist will never be solved until we come to some form of indeterminate sentence law for misdemeanants as well as felons. Until we have an up to date reformatory for women with some form of indeterminate sentence law we shall never solve the social evil. The punishment of the women of the street by either a fine or jail sentence only aggravates the offense.

DELAY IN RECEIVING IOWA REPORTS.

Much complaint has been made by the bench and bar owing to the delay in receiving the Iowa Reports. Immediately preceding the receipt of the last volumes of the Reports a few days ago, there were about 125 criminal cases which had been decided by our supreme court since the publication of the last Report. It goes without saying that lawyers who depend upon the Iowa Reports, who do not take the Northwestern Reports, have no means of

knowing what our supreme court is actually deciding, and hence many cases may be brought under an erroneous conception of the law.

It should be said in justice to the reporter whose term of office expired January 1, 1915, that the delay was not caused by his negligence but due to the fault of the publishing company. The contract with the present publishing company should therefore be cancelled and let to some responsible publishing company who will furnish the Reports promptly upon the receipt of the necessary copy for a volume of the Reports. It would be well if the whole matter was placed under the charge of the supreme court giving the supreme court ample authority to protect the interest of the state.

CHIROPRACTORS.

Complaints are frequently made to the department concerning the practice of chiropractors in the several communities in the state. There are at least three chiropractic schools in the state of Iowa and there are probably several thousand chiropractors engaged in the practice in this state. In my opinion they should be recognized in the medical practice act with a requirement that they shall have the same preliminary education and the same knowledge of anatomy and other fundamental subjects required of osteopaths.

During the biennial period 72 new civil cases have been instituted. Fifty-two of the civil cases pending at the beginning of the term have been disposed of and 36 of the new cases making a total of 88 civil cases disposed of during the term. This with the 99 criminal cases makes a total of 187 cases disposed of during this biennial period. This does not represent a number of cases in various parts of the state where the attorney general or one of his assistants co-operated with the county attorney either in some criminal or civil case affecting the interest of the state.

SUMMARIZING OUR CONCLUSIONS, WE RECOMMEND:

First. The passage of a law similar to the proposed amendment to the constitution of California, the Wisconsin law, the law of England and that recommended by the American Bar Association, 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 the jury shall be required to bring in a special verdict showing (a) as to whether the defendant committed the offense and (b) as to his insanity, and providing that if both are answered in the affirmative the defendant shall be committed to the insane hospital for life unless released by the executive authority or some specially designated tribunal.

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

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

Fifth. Limiting appeals in civil cases unless the amount in controversy is \$250 or in excess thereof.

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

Seventh. The law should be so amended that in the event a verdict of guilty for a lesser offense than that named in the indictment is found and a retrial is granted, the defendant could again be placed upon trial for the highest offense charged in the indictment.

Eighth. Appointment of special agents to secure evidence of infractions of the law with the same power as local officers to make arrests.

Ninth. The abolishment of the jail system substituting custodial farms conveniently located to accommodate the various sections of the state.

Tenth. The establishment of a woman's reformatory equipped to receive women guilty of misdemeanor as well as those committing felony.

Eleventh. An amendment to our anti-trust laws giving the state the injunctive remedy similar to the Miller or Francis bill introduced in the thirty-fifth general assembly, and a law similar to a statute of Missouri providing a civil remedy of investigation as well as the criminal grand jury method.

Twelfth. The repeal and re-enactment of the blue sky law similar to that prepared by the commission of attorneys general

appointed by the National Association of Attorneys General for the purpose of drafting a model law.

Thirteenth. An amendment to the removal law making it apply to all city, township and county officers, elective or appointive.

Fourteenth. An amendment to the road law in harmony with the recommendation of the highway commission providing the patrol system to secure the dragging of roads.

Fifteenth. The abolition of supervisor districts and providing for the election of all supervisors at large.

Sixteenth. Amending the banking act giving state and savings banks the authority to become members of the Federal Reserve Banks.

Seventeenth. The amendment to the law relating to habit forming drugs.

Eighteenth. The cancellation of the present contract for the publication of the Iowa reports and the letting of a new contract and placing the matter under the supervision of the supreme court.

Nineteenth. Amendment to the Medical Practice Act recognizing chiropractors, and requiring the same standards as now required of osteopaths.

The work of each general assembly adds to the work of the department of justice. The Thirty-fifth General Assembly expressly made the attorney general the legal adviser of the highway commission and the passage of the workmen's compensation act also requires a very large part of the services of one of the assistants. In a number of states special attorneys are employed at twice the salary paid the assistants in this office as special counsel to the workmen's compensation commission.

We have a very capable and efficient office force. Mr. Fletcher, Mr. Robbins, Mr. Sampson and Mr. Rankin are all well equipped for the lines of work assigned to them and each have practiced law for a period of from ten to twenty-five years. Miss Gilpin, law clerk and stenographer, is acquainted with every detail of the office and Miss McNall and Mrs. Shipley are capable, experienced stenographers.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

SCHEDULES

Schedule A is a complete list of all appeals in criminal cases submitted to the supreme court during the years 1913 and 1914, and also all rehearings asked during that period, and shows the final disposition of the cases.

Schedule B is a list of all criminal cases pending on the first day of January, 1915.

Schedule C is a list of civil cases which were pending in the state and federal courts January 1, 1913, and have since been disposed of.

Schedule D is a list of civil cases which have been commenced and disposed of since January 1, 1913.

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

Schedule F is the official written opinions given by this office during the years 1913 and 1914.

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

SCHEDULE A.

The following is a list of criminal cases submitted to the supreme court, and also rehearings asked during the years 1913 and 1914 and the final disposition of the cases:

Title of Case	County	Decisions	Offense
State v. Andrews, C. C., Appellee....	Clinton.....	Affirmed Nov. 5, 1914....	Incest.
State v. Ayers, Manly, Appellant....	Davis.....	Affirmed Feb. 12, 1914....	Assault with intent to commit rape.
State v. Becker, Harry, Appellant....	Jackson.....	Reversed March 10, 1913....	Robbery.
State v. Beeson, Genour, Appellant...	Linn.....	Affirmed Nov. 22, 1913....	Murder.
State v. Blake, James, Appellant.....	Guthrie.....	Dismissed Dec. 29, 1914....	Assault with intent to murder.
State v. Boggs, E. A., Appellant.....	Grundy.....	Affirmed June 23, 1914.... (Petition for rehearing overruled Nov. 5, 1914.)	Larceny by embezzlement.
State v. Buford, John, Appellant.....	Monroe.....	Affirmed Jan. 14, 1913....	Murder.
State v. Burns, James, <i>et al</i> , Appellants	Lucas.....	Affirmed Feb. 18, 1913....	Breaking and entering.
State v. Chicago, Great Western Railroad Company, Appellant.....	Chickasaw.....	Affirmed May 22, 1914.... (Petition for rehearing overruled Sept. 25, 1914.)	Nuisance.
State v. Christopher, Louis, Appellant.	Dubuque.....	Affirmed Oct. 20, 1914....	Rape.
State v. Clark, James, Appellant.....	Polk.....	Affirmed Dec. 15, 1913....	Murder.
State v. Clark, W. J., Appellant.....	Bremer.....	Reversed April 9, 1913....	Larceny.
State v. Clark, W. J., Appellant.....	Bremer.....	Affirmed May 15, 1914....	Larceny.
State v. Cocherell, Curtis, <i>et al</i> , Appellants	Van Buren.....	Dismissed Sept. 21, 1914....	Conspiracy.
State v. Conklin, B. L., Appellant....	Washington....	Affirmed April 14, 1914....	Adultery.
State v. Cox, Donald, Appellant.....	Fremont.....	Affirmed March 14, 1914....	Rape.
State v. Davis, Gordon, Appellant....	Davis.....	Affirmed Feb. 22, 1913....	Assault and battery.
State v. Devinney, Orville, Appellant.	Polk.....	Stricken Nov. 22, 1913....	Assault with intent to inflict great bodily injury.

SCHEDULE A—Continued

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REPORT OF THE ATTORNEY GENERAL

Title of Case	County	Decisions	Offense
State v. Dietz, F. W., Appellee.....	Humboldt.....	Reversed Nov. 22, 1913....	Adultery.
State v. Dimmitt, Ed, Appellant.....	Polk.....	Affirmed Oct. 25, 1913....	Larceny of poultry in night time.
State v. Dowden, Walt., Appellant....	Polk.....	Affirmed May 16, 1913....	Liquor nuisance.
State v. Dreher, Gotfried, Jr., Appel- lant	Audubon.....	Affirmed April 13, 1913....	Breaking and entering.
State v. Faora, John, <i>et al</i> , Appellants	Wayne.....	Affirmed May 16, 1913....	Conspiracy.
State v. Fisk, Ray, Appellant.....	Jasper.....	Dismissed May 6, 1913....	Larceny by embezzlement.
State v. Ford, D. D., <i>et al</i> , Appellees..	Wapello.....	Dismissed Sept. 23, 1913..	Liquor nuisance.
State v. Foxton, H. V., Appellant.....	Bremer.....	Reversed May 16, 1914....	Cheating by false pretenses.
State v. Frutiger, E. C., Appellant....	Adair.....	Affirmed Nov. 28, 1914....	Practicing medicine without a license.
State v. Gabriella, Raffela, Appellant..	Polk.....	Affirmed Nov. 22, 1913.... (Petition for rehearing overruled Jan. 27, 1914.)	Murder.
State v. Gaston, Wm., Appellant.....	Polk.....	Affirmed Nov. 22, 1913....	Assault with intent to inflict great bodily injury.
State v. Gibford, Perl, Appellant.....	Warren.....	Affirmed May 16, 1913....	Cheating by false pretenses.
State v. Gish, B. H., Appellant.....	Hardin.....	Reversed Dec. 18, 1914....	Operating a motor vehicle without a registration number.
State v. Gorman, Ed, Appellant.....	Polk.....	Affirmed Dec. 19, 1914....	Burglary.
State v. Gulliver, Glenn, Appellant...	Mitchell.....	Affirmed Sept. 16, 1913.... (Petition for rehearing overruled Jan. 27, 1914.) (Modified on application April 8, 1914.)	Assault with intent to rob.
State v. Guy, Alfred, Appellant.....	Monroe.....	Dismissed Jan. 16, 1914....	Liquor nuisance.
State v. Haggin, George, Appellant....	Polk.....	Affirmed May 16, 1913....	Liquor nuisance.
State v. Hall, L. N., Appellant.....	Benton.....	Affirmed Dec. 21, 1914....	Entering a dwelling house in the nighttime with intent to commit adultery.

State v. Hampton, M. B., <i>et al</i> , Ap- pellants	Polk.....	Affirmed Nov. 22, 1913....	Assault with intent to inflict great bodily injury.
State v. Harrison, J. H., <i>et al</i> , Appel- lees	Mahaska.....	Affirmed March 11, 1913...	Liquor nuisance.
State v. Harrison, Roy, Appellant.....	Clarke.....	Affirmed Nov. 21, 1913....	Assault with intent to commit rape.
State v. Henrietta, James, Appellant..	Muscatine....	Affirmed Feb. 22, 1913....	Larceny.
State v. Hessenius, E. P., Appellant...	Cherokee.....	Affirmed March 24, 1914.... (Petition for rehearing overruled Sept. 25, 1914.)	Murder.
State v. Hill, Wm. F., Appellant.....	Dallas.....	Affirmed July 2, 1913.....	Wife desertion.
State v. Hintenleiter, J. L., Appellant	Polk.....	Affirmed Nov. 22, 1913....	Larceny by embezzlement.
State v. Hutchinson Ice Cream Co., C. J. Hutchinson, Mgr., Appellees.....	Polk.....	Reversed May 12, 1914....	Selling adulterated food.
State v. Johnson, Henry, Appellant....	Fremont.....	Reversed Dec. 13, 1913....	Murder.
State v. Jones, Tim, <i>et al</i> , Appellants	Polk.....	Affirmed May 19, 1914....	Robbery.
State v. Kaine, Ronald, Appellant....	Pottawattamie.	Affirmed June 6, 1913....	Robbery.
State v. Kelley, H. D., Appellant.....	Polk.....	Reversed Jan. 20, 1914.... (Petition for rehearing overruled April 10, 1914.)	Murder.
State v. Kilduff, Anna, Appellant.....	Scott.....	Affirmed June 6, 1913....	Murder.
State v. Kirk, Wm., Appellant.....	Johnson.....	Reversed Dec. 21, 1914....	Murder.
State v. Klute, Conrad, Appellant....	Boone.....	Affirmed April 10, 1913....	Murder.
State v. Krampe, Leo, Appellant.....	Jasper.....	Affirmed April 8, 1913.... (Petition for rehearing overruled Sept. 22, 1913.)	Nuisance.
State v. Kruse, Anna, Appellant.....	Polk.....	Affirmed Dec. 15, 1913....	Larceny in a building.
State v. Lehlan, J. F., Appellant.....	Linn.....	Reversed Jan. 14, 1913....	Rape.
State v. Lindsay, Earl W., Appellant..	Jasper.....	Affirmed April 8, 1913.... (Petition for rehearing overruled Sept. 23, 1913.)	Rape.
State v. Lockard, Charles, Appellant..	Fayette.....	Affirmed Dec. 15, 1913.... (Petition for rehearing overruled Feb. 14, 1914.)	Conspiracy.
State v. Madden, Earl, Appellant....	Union.....	Affirmed Oct. 6, 1914.....	Murder.
State v. Madigan, A., Appellant.....	Polk.....	Reversed March 14, 1914..	Murder.
State v. McCaskill, J. T. Appellant...	Black Hawk....	Reversed July 2, 1913....	Murder.

REPORT OF THE ATTORNEY GENERAL

SCHEDULE A—Continued

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REPORT OF THE ATTORNEY GENERAL

Title of Case	County	Decisions	Offense
State v. McClure, Charley, Appellant.	Davis.....	Affirmed March 11, 1913..	Seduction.
State v. Merrit, G. C., Appellant.....	Polk.....	Stricken May 19, 1914....	Uttering a forged instrument.
State v. Mertens, Roy, Appellant.....	Sac.....	Affirmed March 20, 1913...	Murder.
State v. Moon, Dr. Anna Longshore, Appellant	Black Hawk....	Reversed Oct. 6, 1914.....	Murder.
State v. Morton, Wm., Appellant.....	Polk.....	Affirmed June 22, 1914....	Murder.
State v. Nicolopoulos, George, Appel- lant	Polk.....	Affirmed June 7, 1913.....	Keeping a gambling house.
State v. Norman, Grover, Appellant...	Fremont.....	Affirmed April 9, 1913....	Seduction.
State v. Nott, Henry, Appellant.....	Taylor.....	Affirmed Oct. 20, 1914....	Murder.
State v. O'Callaghan, James, Appellant	Polk.....	Petition for rehearing overruled Feb. 22, 1913..	Breaking and entering.
State v. Ockij, John, Appellant.....	Monroe.....	Affirmed Feb. 10, 1914....	Assault with intent to commit murder.
State v. Ousley, Albert, Appellant....	Polk.....	(Petition for rehearing overruled May 12, 1914.)	
State v. Perry, John, Appellant.....	Pottawattamie..	Affirmed June 29, 1914....	Assault with intent to commit rape.
		Affirmed Jan. 27, 1914....	Burglary.
		(Petition for rehearing overruled May 16, 1914.)	
State v. Piernot, Antonie, Appellant..	Monroe.....	Affirmed Nov. 21, 1914....	Murder.
State v. Read, E. A., <i>et al</i> , Appellants	Page.....	Reversed Dec. 13, 1913....	Operating an automobile without lights.
State v. Reece, D. H., Appellant.....	Polk.....	Affirmed Dec. 15, 1913....	Breaking and entering.
State v. Render, Frank, Appellant....	Polk.....	Affirmed Dec. 13, 1913....	Keeping a house of ill fame.
State v. Russolo, Matt, Appellant.....	Appanoose.....	Affirmed May 16, 1913....	Nuisance.
State v. Sanders Ice Cream Co. & L. R. Sanders, Pres., Appellees.....	Polk.....	Reversed May 12, 1914....	Selling adulterated food.
State v. Schneider, Claude, Appellant.	Fayette.....	Affirmed May 19, 1914....	Violating Sunday labor law.
State v. Schumacher, C. M., Appellee.	Humboldt.....	Reversed Nov. 22, 1913....	Larceny by embezzlement.

State v. Sego, Charles, Appellant.....	Jasper.....	Affirmed April 10, 1913....	Robbery.
		(Petition for rehearing overruled Sept. 16, 1913.)	
State v. Smith, John N., Appellant....	Polk.....	Affirmed Nov. 22, 1913....	Obtaining money by false pretenses.
State v. Smithart, Orley, Appellant...	Keokuk.....	Affirmed Feb. 18, 1913....	Wilfully and maliciously injuring a chattel.
State v. Sodi, Ferdinand, Appellant..	Polk.....	Dismissed May 6, 1913....	Liquor nuisance.
State v. Sorenson, Andy, Appellant...	Polk.....	Petition for rehearing overruled Feb. 22, 1913..	Breaking and entering.
State v. Sparks, E. C., Appellant.....	Decatur.....	Affirmed Dec. 16, 1914....	Incest.
State v. Stutches, Joe, Appellant.....	Polk.....	Reversed Dec. 15, 1913....	Breaking and entering.
State v. Taylor, Agnes, Appellant.....	Humboldt.....	Affirmed June 5, 1913....	Adultery.
State v. Teale, Hugh, Appellant.....	Decatur.....	Reversed July 1, 1913....	Murder.
		(Petition for rehearing overruled Dec. 15, 1913.)	
State v. Thompson, Fred, Appellant..	Polk.....	Affirmed Oct. 25, 1913....	Seduction.
State v. Vochoski, Otto, <i>et al</i> , Appel- lants	Jones.....	Affirmed Dec. 19, 1914....	Rape.
State v. Walker, John, Appellant.....	Polk.....	Dismissed May 12, 1914..	Nuisance.
State v. Waltz, Major, Appellant.....	Story.....	Modified and affirmed Jan. 15, 1913.....	Maliciously injuring a building and fixtures.
State v. Warmuth, H. M., Appellant..	Cedar.....	Affirmed April 14, 1913....	Practicing as a physician without a license.
State v. Warne, R. L., Appellant.....	Fayette.....	Affirmed May 19, 1914....	Violating Sunday labor law.
State v. West, L. R., Appellant.....	Polk.....	Stricken Nov. 24, 1914....	Obtaining money by false pretenses.
State v. Wilkins, E. K., Appellant....	Polk.....	Affirmed Nov. 22, 1913....	Assault with intent to do great bodily injury.
State v. Wilson, Clifford, Appellant...	Calhoun.....	Affirmed May 6, 1913.....	Murder.
		(Petition for rehearing overruled Feb. 17, 1914.)	
State v. Wilson, Peter, Appellant.....	Mahaska.....	Affirmed Nov. 22, 1913....	Murder.
		(Petition for rehearing overruled June 19, 1914.)	
State v. Woodworth, Monteville, Appel- lant	Jones.....	Affirmed Dec. 16, 1914....	Assault with intent to commit rape.

REPORT OF THE ATTORNEY GENERAL

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SCHEDULE B.

The following is a list of the criminal cases pending in the supreme court of Iowa on January 1, 1915:

Title of Case	County	Offense
State v. Abbott, Ralph, Appellee.....	Johnson.....	Running a gambling house.
State v. Asbury, John, Appellant.....	Appanoose.....	Rape.
State v. Biewen, G. W., Appellant.....	Keokuk.....	Murder.
State v. Brazzell, Dorcas, Appellant.....	Dubuque.....	Murder.
State v. Bosch, John, Appellant.....	Taylor.....	Larceny.
State v. Bosworth, Mark, Appellant.....	Mahaska.....	Malicious injury to an electric railway.
State v. Bullington, J. E., Appellant.....	Polk.....	Larceny by embezzlement.
State v. Cessna, Charles, Appellant.....	Hamilton.....	Assault with intent to commit murder.
State v. Concord, Tom, Appellant.....	Polk.....	Burglary.
State v. Cooper, Chas., Appellant.....	Scott.....	False pretenses.
State v. Devinney, James, Appellant.....	Plymouth.....	Prostitution.
State v. Dunn, A., Appellant.....	Polk.....	Larceny from the person.
State v. Edmund, H. A. A., <i>et al</i> , Appellants.....	Story.....	Practicing medicine without a license.
State v. Fisher, Chester, Appellant.....	Cherokee.....	Assault with intent to do great bodily injury.
State v. Gardner, James, Appellant.....	Plymouth.....	Prostitution.
State v. Guidice, Francisco, Appellant.....	Mills.....	Murder.
State v. Hess, Frank, Appellee.....	Howard.....	Bastardy.
State v. Hesse, Wm., <i>et al</i> , Appellants.....	Monroe.....	Murder.
State v. Kiefer, Adam, Appellant.....	Buchanan.....	Cheating by false pretenses.
State v. McAnich, J. E., <i>et al</i> , Appellants.....	Jasper.....	Practicing medicine without a license.
State v. McCaskill, J. T., Appellant.....	Black Hawk.....	Murder.
State v. Madden, Earl, Appellant (rehearing) ..	Union.....	Conspiracy.
State v. Nicola, C. L., Appellant.....	Mahaska.....	Murder.
State v. Norman, F. J., Appellant.....	Taylor.....	Practicing as a physician without a license.
State v. Nott, Henry, Appellant (rehearing).....	Taylor.....	Murder.
State v. O'Donnell, Mathew, Appellant.....	Lee.....	Murder.
State v. Rand, Wm., Appellant.....	Union.....	Larceny from the person.

State v. Robinson, Joe, Appellant.....	Lyon.....	Rape.
State v. Rowell, L. J., Appellant.....	Cedar.....	Larceny by embezzlement.
State v. Schell, Phil, Appellant.....	Marion.....	Assault with intent to rob.
State v. Stalker, Wm., Appellant.....	Polk.....	Incest.
State v. Stanton, Wm., Appellant.....	Polk.....	Breaking and entering.
State v. Thomas, Alfred, Appellant.....	Polk.....	Murder.
State v. Treganza, J. A., Appellant.....	Hancock.....	Indecent exposure.
State v. Valvoda, Frank, Appellant.....	Howard.....	Seduction.
State v. Vochoski, Otto, Appellant (rehearing) ..	Jones.....	Rape.
State v. Ward, L. C., Appellant.....	Pottawattamie.....	Illegal killing of a deer.
State v. Will, Walter A., Appellant.....	Story.....	Desertion.

SCHEDULE C.

Civil cases pending January 1, 1913, which have since been disposed of:

IN DISTRICT COURT.

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

IN SUPREME COURT.

Mary Ann McKeown v. W. W. Morrow, John L. Bleakly, S. Y. Eggert, Administrator, James Murray, deceased.
State of Iowa, ex rel George Cosson, Attorney General, v. W. L. Baughn.
State of Iowa v. Carrie Livingston, et al.
In the Matter of the Estate of Hannah H. Adams, deceased, W. W. Morrow, Treasurer of State, v. Said Estate.
Frank G. Pierce v. Executive Council, et al.
Henry S. Keely v. Board of Supervisors of Dubuque County, et al.
In the Matter of the Estate of Almiron Culver, deceased, Melissa Gould, Administratrix, v. W. W. Morrow, Treasurer.

Martha Ellen McPherson, nee Casson, v. A. H. Day, Chief of Police, and Board of Control.
Nellie Ryan v. Wm. Hutchinson, Judge.
State of Iowa, upon the relation of Chas. W. Mullan v. The Marshall Dental Mfg. Co.

IN FEDERAL COURT.

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

BEFORE INTERSTATE COMMERCE COMMISSION.

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

State of Iowa, ex rel H. W. Byers, Attorney General, Board of Railroad Commissioners, v. Illinois Central Railway Company.
State of Iowa, ex rel H. W. Byers, Attorney General, Board of Railroad Commissioners, v. Chicago, Rock Island & Pacific Railroad Company.
State of Iowa, ex rel H. W. Byers, Attorney General, Board of Railroad Commissioners, v. Chicago, Milwaukee & St. Paul Railway Company.
State of Iowa, ex rel H. W. Byers, Attorney General, Board of Railroad Commissioners, v. Atchison, Topeka & Santa Fe Railway Company.
State of Iowa, ex rel H. W. Byers, Attorney General, Board of Railroad Commissioners v. Chicago, Burlington & Quincy Railroad Co.
State of Iowa, ex rel H. W. Byers, Attorney General, Board of Railroad Commissioners, v. New York Central & Hudson River Railroad Company.
State of Iowa, ex rel George Cosson, Attorney General, Board of Railroad Commissioners, v. Atchison, Topeka & Santa Fe Ry. Co., et al.

SCHEDULE D.

Civil cases which have been commenced and disposed of since January 1, 1913:

D. M. Creal, Treasurer of Page County v. Western Union Telegraph Company, Chicago, Burlington & Quincy Railroad Company.
George Cosson, Attorney General, v. C. B. Bradshaw, Judge of the 17th Judicial District.
John W. Cox v. W. A. Duckworth, Custodian of the Statehouse.
Albert Hagerla v. Mississippi River Power Company, a corporation.
John W. Rowley, et al., v. George W. Clarke, et al.
Chicago, Rock Island & Pacific Ry. Co., et al., v. N. S. Ketchum, et al.
John W. Rowley, P. L. Davis and W. H. Liming v. H. E. Duckworth, Auditor, R. E. Meek, County Treasurer, W. W. Morris, Chas. Woodrow and J. W. Kerr, Members Board of Supervisors.
Theo. Hamm Brewing Company v. Chicago, Rock Island Ry. Co.
In the Matter of the Estate of Anna Margrethe Anderson, de-

ceased, Wilhelmina Elizabeth Peterson, et al., legatees v. C. L. Hanson, Administrator, State of Iowa, ex rel State Treasurer.
Wm. McKinnon v. J. C. Sanders, Warden.
Della Pepper v. C. J. Applegate.
J. A. Shaver v. State Fair Association, et al.
Jno. P. Wallace, et al., v. R. T. Wellslager, George Cosson, Attorney General, et al.
N. C. Northrup v. W. A. Duckworth.
F. R. Thurber v. W. A. Duckworth.
L. Bughner and Lydia Bughner v. Heirs of J. W. Shorter; State of Iowa, Intervener.
M. M. Harrah v. W. A. Duckworth.
J. C. Hawkins v. John L. Bleakly, Auditor of State, Warren Garst, Iowa Industrial Commissioner.
L. S. Harper v. W. S. Allen, Secretary of State, George W. Clarke, John L. Bleakly, W. C. Brown, Executive Council.
L. I. Aldrich v. George Donohoe, Superintendent, Knoxville Inebriate Asylum.
William R. Compton Company, a Missouri corporation; Breed, Elliott & Harrison, an Indiana corporation, and McCoy & Company, a Maine corporation, v. W. S. Allen, Secretary of State, and George Cosson, Attorney General.
M. N. Bopp v. Ed. R. Clark, Sheriff.
Clarence H. Kemler v. Ole O. Roe, State Fire Marshal.
State of Iowa v. Henry Armstrong.
State of Iowa, ex rel Thos. F. Connor, v. John H. Herring.
State of Iowa, ex rel George Cosson, Attorney General, v. National Life Association, and Henry Pyle, President and General Manager of the National Life Association.
Rudolph Davis v. William H. Berry, John E. Howe, and David C. Mott, Board of Parole, and Jas. C. Sanders, Warden.
State of Iowa, ex rel George Cosson, Attorney General, v. Illinois Central Railroad Co., Chicago, Great Western Railroad Company, Minneapolis & St. Louis Railroad Company, and Fort Dodge, Des Moines & Southern Railroad Co., Homer Loring and Parley Sheldon.
Dr. H. S. Huckins v. Guilford H. Sumner, Secretary Iowa State Board of Health.
Thurlow T. Taft, A. U. Coats, John B. Hammond and W. F. Ghormley v. W. S. Allen, Secretary of State, and Harry B. Frase, County Auditor.

Charles Lockard v. Ed. R. Clark, Sheriff.

In the Matter of the Estate of Mary A. Mitchell, deceased.

John Forbes, County Treasurer of Pocahontas County, and Pocahontas County, Iowa, v. The Executive Council of the State of Iowa, George W. Clarke, W. S. Allen, John L. Bleakly and W. C. Brown, members of said Executive Council.

Charles Lockard v. J. C. Sanders.

Louis A. Yonker v. R. H. Wheeler, Administrator of the Estate of Mary Zarmstroff, deceased, and the Unknown Heirs.

State of Iowa v. United States Express Company, The Hamm Brewing Company, Intervenor.

SCHEDULE E.

Cases pending in the several courts of the state and the United States, January 1, 1915:

CASES PENDING 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. Cushman 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.

In the Matter of the Drainage Assessment in Drainage District No. 60.

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-Muel-ler Company.

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 Run-yon, County Auditor.

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.

R. F. Graeber v. A. B. Noble.

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.

CASES PENDING 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 prem-ises 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.

The Fairmont Creamery Company v. H. C. Darger and G. H. Tellier.

In the Matter of the Estate of John Peterson, deceased.

Earle G. Jones v. Charles C. McClaughry.

William Schubert, et al., v. Claus Barnholdt, et al.

W. C. Brown, Treasurer of State, v. Hattie N. Gulliford.

State of Iowa, ex rel Nels Thompson, v. W. A. Booth, William Donaghey, Art Hildreth, B. C. Briley and Ray J. Johnson.

J. C. Sanders v. J. M. Thrasher.

Lucille Addis v. Dr. C. F. Applegate.

CASES PENDING 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.

Chicago, Rock Island & Pacific Railway Company v. Board of Iowa Railroad Commissioners, et al.

Chicago, Great Western Railroad Company v. Board of Iowa Railroad Commissioners, et al.

Chicago & North-Western Railway Company v. Board of Iowa Railroad Commissioners, et al.

Chicago, Milwaukee & St. Paul Railway Company v. Board of Iowa Railroad Commissioners, et al.

Chicago, Burlington & Quincy Railroad Company v. Board of Iowa Railroad Commissioners, et al.

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

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

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

SCHEDULE F.

ELECTIONS—MEMBERS OF THE GENERAL ASSEMBLY.—Code section 1219 providing for the withholding of certificates of election in case notice of contest is given does not apply to contests with reference to a seat in the general assembly.

SIR: I am in receipt of your communication of this date requesting an official opinion as to whether or not in the event of a contest for the office of member of the general assembly of Iowa, and a notice of contesting the election of the opposing candidate is filed with the proper officer before the certificate of election is delivered to him, the certificate shall be withheld until the determination of the contest; or in other words, as to whether or not the provisions of section 1219 of the code are applicable to the members of the general assembly.

A careful consideration not only of the section in question but of the entire chapter in which the same is found, viz: chapter 7 of title 6 of the code, relating to contesting elections, together with the history and origin of the various provisions impels me to believe that the section in question does not apply to members of the general assembly. This being true, it follows that a certificate of election should be given to the person who has the majority of the votes on the face of the returns.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

January 13, 1913.

HON. JOSEPH H. ALLEN,

Chairman Credentials Committee, Senate Chamber.

INSANE—EXPENSES.—The county committing an insane person should pay the costs in the first instance, and if patient has a settlement in another county recover from it, if not from the state.

SIR: I am in receipt of your communication of the 7th instant submitting the following questions:

“1. In case an insane patient is committed to the state hospital by a county, and the patient is not a legal resident of such county, but is supposed at the time to have a legal settlement in another county, should the county committing such patient, in the first instance, under section 2308-a, code supplement, pay all expense of such patient, including the support of such patient in the state hospital during the time the legal settlement of such patient is being investigated?

“2. In case it is found upon investigation that such patient has a legal settlement in another county in the state, should the county of such patient's legal settlement reimburse the county committing such patient for all legal expense they have been to on account of such patient, including support at the state hospital during the time of investigation?

“3. If it is found by evidence in district court, or otherwise, that such patient is not a legal resident of any county of the state, should the board of control, under sections 2283 of the code and 2270, 2727-a28-a and 2308-a, code supplement, accept such patient as a state patient and approve bills to reimburse the county committing such patient for all legal expense on account of such patient, including support at state hospital during time of investigation of patient's residence?”

Section 2308-a of the supplement to the code, 1907, provides:

“That in all cases where the commissioners of insanity of a county find to be insane a person who does not have a legal settlement within that county, the costs and expenses of the arrest, care, investigation and commitment of such person authorized by law, including the costs of appeal if an appeal be taken and the person is found to be insane on appeal, shall be paid in the first instance by the county in which such person is found to be insane. If such person is found to have a legal settlement in another county of this state, such costs and expenses shall be audited and paid by the supervisors of that county in the manner provided for the payment of other claims. If such person

be found to have no legal settlement within this state, such costs and expenses shall be paid out of any money in the state treasury not otherwise appropriated, on vouchers executed by the auditor of the county which has paid them and approved by the board of control of state institutions. Such vouchers shall contain an itemized statement of the costs and expenses, and payment shall be made to the treasurer of the county."

It is clear from this section and sections 2270, 2283 and 2727-a28, supplement to the code, 1907, that in the event an insane patient is committed to the state hospital by a county in which the patient has no legal settlement, such county must pay the expenses of the arrest, care, investigation and commitment of such person, including the costs of appeal if an appeal be taken and the person is found to be insane on appeal, in the first instance, and that if it is found that the patient has a legal settlement in some other county in the state, the county committing the patient should proceed as by law provided to recover from the county where such insane patient has a legal settlement the amount expended by the county as costs and expenses of arrest, care, commitment, etc.

If it is found that the patient has no legal settlement in any county in the state of Iowa, the expenses should be paid by the state under the provisions of the law above cited.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

January 13, 1913.

HON. JOHN L. BLEAKLY,
Auditor of State.

COMPENSATION OF OFFICERS.—Hold-over members now occupying seats in the senate of the thirty-fifth general assembly, are entitled to the additional compensation provided by the acts of the thirty-fourth general assembly.

DEAR SIR: I am in receipt of your communication of the 11th instant requesting an opinion on behalf of the joint committee on retrenchment and reform as to the right of hold-over senators to receive the increased compensation as provided in section 1, chapter 1, acts of the thirty-fourth general assembly.

The only constitutional provision covering this question is found in section 25 of article 3 of the constitution of the state of Iowa, and only so much of said section is applicable which provides as follows: "No general assembly shall have the power to increase the compensation of its members."

It is significant that the constitutional provision does not prohibit the increased compensation to members of the general assembly *during the time for which said members shall have been elected*, yet in section 21 of article 3 of the constitution, the inhibition on a senator or representative being appointed to any civil office of profit under this state which shall have been created, or the emoluments of which shall have been increased, except such offices as may be filled by elections by the people, expressly refers *to the time for which he shall have been elected*.

It is clear then that the language used in section 25, viz: "That no general assembly shall have the power to increase the compensation of *its* members" is capable of but two constructions: the term "*its* members" either refers to the members of the particular session then sitting at which session the increase was voted, which is known as the thirty-fourth general assembly, or else it refers to the members of the general assembly as a continuing legislative body; that is to say, the term "general assembly" as used in section 25 of the constitution either refers to that particular session, or else it refers to the general assembly of Iowa whenever in session, and would apply to the members of the general assembly at the time the increase was voted, or at any time thereafter, regardless of the number of times such men might be re-elected.

Under this latter interpretation, no member of the thirty-fourth general assembly could ever receive any increase in compensation no matter how many terms he might be returned by his constituents. This construction is so untenable and illogical that a mere statement of the proposition is sufficient to indicate its fallacy. It follows then that the words "*its* members" refer to the members of the particular general assembly at the time the increased compensation is provided.

I am therefore of the opinion that while the thirty-fourth general assembly could not increase the salary of any member of the thirty-fourth general assembly, an amendment to the law increasing the salary of the members of the general assembly would not in any way prohibit members of succeeding general assemblies

from accepting the increase, and that a holdover senator is as much entitled to the increase in salary as members of the lower house of the thirty-fourth general assembly who have been re-elected and are now members of the thirty-fifth general assembly, and that all members of the thirty-fifth general assembly are entitled to the increase.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

February 14, 1913.

HON. J. H. ALLEN, *Chairman,*

Committee on Retrenchment and Reform, Statehouse.

COMPENSATION OF OFFICERS.—Where a seat in the legislature is contested and finally determined in favor of the contestant, such contestant is entitled to the salary for the full term, even though the incumbent was seated and performed the duties of the office.

DEAR SIR: I am in receipt of your request of the 12th instant for an official opinion as to who is entitled to the salary in the nineteenth senatorial district wherein C. F. Kimball contested the election of M. C. Goodwin.

The undisputed facts appear to be that notice of contest was given by Mr. Kimball before the board of supervisors had issued a certificate of election, and the said board in view of said notice of contest refused to issue a certificate of election to Mr. Goodwin, although on the face of the returns Mr. Goodwin was entitled to the seat. The senate, however, seated Mr. Goodwin temporarily pending the determination of the contest.

The contest having been determined in favor of C. F. Kimball by the senate on the 15th instant, it follows that C. F. Kimball has been the *de jure* officer or senator during the entire session and that M. C. Goodwin has been a *de facto* senator from the time his seat was recognized by the senate until the determination of the contest on the 15th instant.

The question then for determination is whether a *de facto* officer shall enjoy all the emoluments of the office during his incumbency which might be enjoyed by a *de jure* officer.

It has long been a general rule, laid down by the courts of this country, that the doctrine of *de facto* and *de jure* officers operates only for the protection of the public and not to give the person claiming to be a *de facto* officer the emoluments of the office. The right to a public office carries with it the right to the salary and emoluments pertaining thereto. It is further held that if the salary has been paid to the *de facto* officer, it may be recovered from him in a suit by the person entitled to such fees.

The foregoing propositions are established in a long line of cases, among which are the following:

Scott v. Chicago, 205 Ill., 281;

Phelon v. Granville, 140 Mass., 386;

Dolliver v. Parks, 136 Mass., 499;

State v. Schram, 82 Minn., 420;

Fylpaa v. Brown Co., 6 S. D., 634.

In the case of *Coughlin v. McElroy, et al.*, 74 Conn., 397, in deciding that the *de jure* officer might recover from the *de facto* officer, the compensation paid, the court said:

"That, in cases like the present, the legal right to the office carries with it the right to the salary and emoluments thereof, that the salary follows the office, and that the *de facto* officer though he performs the duties of the office has no legal right to the emoluments thereof, are propositions so generally held by the courts as to make the citation of authorities in support of them almost superfluous."

Our own court has also directly passed upon this question and adopted the rules above cited.

In regard to the office of sheriff, our court in *McCue v. County of Wapello*, 56 Iowa, 698, said:

"The doctrines of the law applicable to officers *de facto* do not extend so far as to confer upon them all the rights and protection to which an officer *de jure* is entitled. The doctrines operate only for the protection of the public. They cannot be invoked to give him the emoluments of the office as against the officer *de jure*. * * * We may add that the right to the possession of an office carries with it the right to emoluments pertaining to the place. When an officer seeks to recover these emoluments he must show his right to the possession of the office. The rule is based upon the ground that the officer *de jure*, who has been ousted from his place by an in-

truder, has a property interest in the emoluments of the office, of which he cannot be deprived by one having no title thereto. This property right demands protection, and the officer *de facto* cannot recover emoluments to which the officer *de jure* is entitled."

It follows, therefore, that the contest having been decided by the senate in favor of C. F. Kimball he is entitled to the salary for the full session.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

February 17, 1913.

HON. J. H. ALLEN, *Chairman,*

Committee on Retrenchment and Reform.

ATTORNEYS' FEES.—No department of the state, except in cases especially authorized by law, has authority to employ special counsel at the expense of the state except in cases where the attorney general is interested.

GENTLEMEN: I am in receipt of your communication of the 18th instant directing attention to the enclosed claim submitted by Dr. T. U. McManus, president state board of medical examiners, for attorney's fees in connection with certain proceedings which the board was interested in. You request an opinion as to whether the doctor had authority to employ outside attorneys in matters of this nature and whether said claim can now be audited and paid under the laws of the state.

I direct your attention to section 4, chapter 9, acts of the thirty-third general assembly, which provides:

"No compensation shall hereafter be allowed to any person for services as an attorney or counsellor to any department of the state government, or the heads thereof, or to any state boards or commissions, except in cases specially authorized by law, and then only on the certificate of the attorney general that such services were actually rendered, and that the same could not be performed by the officers of the department of justice provided, however, that in any case where the attorney general is an interested party, the execu-

tive council may employ special counsel and audit and pay a reasonable compensation for legal services rendered by him."

It is clear that none of the departments of state has authority to hire private counsel and have such counsel paid by the state.

If this attorney fee is paid it will have to be paid by the attorney general.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

February 20, 1913.

HONORABLE EXECUTIVE COUNCIL,
Statehouse.

COMPENSATION — MEMBERS OF THE GENERAL ASSEMBLY. — The amount of salary to be paid member of the general assembly elected to fill vacancy after the expiration of the first half of the session discussed and opinion of former Attorney General Remley cited.

SIR: I am in receipt of your communication of the 7th instant requesting an opinion as to whether or not a member of the senate duly elected to fill a vacancy and qualifying on February 21, 1913, after the first half of the salary for the session has been paid to his predecessor, who served during the first of the session, is entitled to the full salary for the term.

The statutory provision covering compensation of members of the general assembly is found in section 12 of the code as amended by chapter 1 of the thirty-fourth general assembly, and as so amended reads as follows:

"The compensation of the members of the general assembly shall be: To every member, for each regular session, one thousand dollars, and for each extra session the same compensation per day while in session, to be ascertained by the rate per day of the compensation of the members of the general assembly at the preceding regular session; and in going to and returning from the place where the general assembly is held, five cents per mile, by the nearest traveled route; but in no case shall the compensation for any extra session exceed six dollars per day, exclusive of mileage."

The exact question you submit arose by reason of a vacancy created in the office of representative of the twenty-sixth general assembly. The question was submitted to former Attorney General Remley and in an official opinion given to the auditor of state, General Remley held that since there was no method pointed out by statute to prorate the amount earned, that the member elected to fill the vacancy was entitled to the full compensation for the entire session and accordingly his time was certified for the full amount and duly paid by the auditor of state.

I doubt very much the soundness of this opinion but it has the force of law until overruled by legislative enactment, court decision, or subsequent opinion of the attorney general. In view of the fact that the opinion was given in 1896, it is presumed to have received the sanction of the general assembly then in session or at least each succeeding general assembly. This being true, I am of the opinion that it would not be improper to certify to the auditor of state the full compensation to the senator from the thirty-ninth district for the entire session.

The general assembly should, however, at this session pass a law making it clear just what compensation is to be received by a member of the general assembly who is elected for the unexpired portion of the session.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

March 15, 1913.

HON. JOSEPH MATTES,
Senate Chamber.

PENITENTIARIES—COMPENSATION OF TURNKEYS AND GUARDS.—The board of control may promote and demote turnkeys and guards from one class to another, but cannot change the compensation fixed for each class by section 5716 code, as amended by Senate File 44.

GENTLEMEN: I am in receipt of your communication of the 19th instant directing my attention to Senate File No. 44 which repeals and re-enacts section 5716, supplement to the code, 1907,

relating to the compensation of wardens, officers and employees at the penitentiary and reformatory.

You request (1st) the amount of compensation to be paid turnkeys and guards; and (2d) as to the time the law goes into effect.

In my opinion the salary to be paid turnkeys and guards is the amount named in the act, but the board of control is authorized to make classification, and I see no reason why the board could not at any time promote a person from a lower to a higher class and likewise demote a guard or turnkey from a higher to a lower class.

The law goes into effect on the day of its publication and the board of control is authorized to make classification of turnkeys and guards at any time subsequent to the publication of the act and fix the salaries of the other officers and employees named in said act not exceeding the amount specified therein.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

April 29, 1913.

HONORABLE BOARD OF CONTROL OF
STATE INSTITUTIONS.

SUPERINTENDENT OF PUBLIC INSTRUCTION, SALARY OF.—That portion of Senate File 70 increasing the salary of the superintendent of public instruction and authorizing the appointment of inspectors and a chief clerk becomes effective July 4, 1913, although other provisions are not operative until July 1, 1915.

DEAR SIR: I am in receipt of your communication of the 30th ultimo, directing my attention to Senate File No. 70, relating to the office of the superintendent of public instruction, the appointment of inspectors and the salary of such officers, and requesting an opinion as to whether or not the law contemplates the appointment of a deputy, a chief clerk and not to exceed three regular inspectors on the 4th of July, 1913; also as to whether you will be justified in issuing warrants in payment of the salaries for the persons above mentioned, and also the increase of salary to the superintendent of public instruction in the amount designated in section 8 of said act.

The confusion arises by reason of the fact that the time for the appointment of the superintendent of public instruction is deferred in said act until the thirty-sixth general assembly which will be in session from about January 10 to April 15, 1915, but the person so appointed will not assume the duties of his office until the first secular day of July following his appointment, or the first secular day of July, 1915. The law does provide, however, that the present incumbent shall hold office until the appointment and qualification under the provisions of the act and his continuance in office is under the operation of the act.

Our supreme court has held that a law may generally go into effect at a given time and specific provisions may not go into effect until a time subsequent as fixed by the general assembly.

It is clear from a reading of the whole act that the law generally goes into effect on July 4, 1913, there being no publication clause, but that wherever specifically designated in the act, certain provisions are not to be operative until such time thereafter as prescribed by the general assembly.

I am therefore of the opinion that all of the act in question goes into effect on July 4, 1913, except where a later date for some specific provision has been designated by the general assembly. This being true, the superintendent of public instruction is authorized to appoint inspectors and do all other acts contemplated therein and the state auditor is authorized to draw his warrant in payment of salaries for such inspectors and other subordinates, and he is also authorized to draw his warrant for salaries in the amounts as specified in section 8 of said act.

Respectfully,

GEORGE COSSON,
Attorney General of Iowa.

July 1, 1913.

HON. JOHN L. BLEAKLY, *
Auditor of State.

BLUE SKY LAW.—That portion stricken from the bill is no part of the law even though erroneously retained in the enrolled bill.

The fact that the stricken portion remained in the bill does not invalidate the remainder of the law.

SIR: I am in receipt of your communication of the 12th instant directing my attention to paragraph 4 of section 18 of

chapter 137, acts of the thirty-fifth general assembly, commonly called the blue sky law, wherein the name "agent" is defined, and specifically that part of paragraph 4 which reads as follows:

" * * * or who shall execute, issue, sell, offer or negotiate for sale, any contract, bond or other instrument, by the terms of which title to real estate located outside the state of Iowa is to be transferred upon the completion of certain payments or the performance of certain conditions therein specified;"

And further directing my attention to the fact that the particular part of said section was, by amendment which duly passed both houses, stricken from said law, but by error and oversight was included in the enrolled bill and now forms a part of said chapter in the official publication of the session laws of the thirty-fifth general assembly; and requesting an opinion in view of the fact that Judge Brennan has recently held that you cannot go behind an enrolled bill, as to whether or not it is your duty to enforce the provisions of said act and require of persons "who execute, issue, sell, offer or negotiate for sale any contract, bond or other instrument, by the terms of which title to real estate located outside the state of Iowa is to be transferred upon the completion of certain payments or the performance of certain conditions therein specified" a permit from the secretary of state, file a bond and pay the regular fee therefor, and in the event that such person has failed to comply with the provisions of said act, whether or not they are subject to the penalty or fine and imprisonment as provided in section 11 of said act. You further request an opinion as to whether or not in the event that it is held that said part of the law is unconstitutional as having failed to pass either branch of the general assembly, the same would invalidate the remaining part of said act, or whether only so much of the part of said act above referred to shall be held invalid.

I have carefully read the opinion of Judge Brennan and I note he states that in this state it is not permissible to go behind the enrolled bill to determine the validity of an act, and it must be admitted that language may be found in our supreme court decisions to this effect, but the exact question presented to Judge Brennan and the exact question presented here has never been passed upon by our supreme court.

Section 17 of article 3 of the constitution of the state of Iowa provides:

"No bill shall be passed unless by the assent of a majority of all the members elected to each branch of the general assembly, and the question upon the final passage shall be taken immediately upon its last reading, and the yeas and nays entered on the journal."

In all legislative bodies, whether operating under written or unwritten constitutions, the very essence of a law or rule of action depends upon the proposed measure receiving the assent of a majority of all the members entitled to sit or at least a majority of all those present. This is not peculiar to any state or any country or any legislative body. It goes to the very essence of representative government. In my opinion it is vital and fundamental. I am therefore of the opinion that it cannot be set aside upon any legal theory that it is not permissible to go behind an enrolled bill. To hold that the enrolled bill, or rather a piece of paper filed in the office of the secretary of state and published in the official publication of the legislative acts of a general assembly, is final and conclusive, and that it is impossible to go behind the same to determine its validity or any part thereof, is to disregard the most substantive provisions of the constitution relating to legislative procedure. It would result in holding that the acts, not the intelligent, deliberate acts, but the negligent acts of one person, known as the enrolling clerk, could have all the force and effect of any provision in the law duly passed by a majority vote of both branches of the general assembly and duly signed by the governor. To state it differently: this would permit a person to be deprived of his property and his liberty, and in this case actual imprisonment could be inflicted without the assent of a single member of the general assembly, the governor of the state or even the enrolling clerk who made the mistake. Such a result might be caused wholly by reason of the negligence of one person known as the enrolling clerk.

Notwithstanding the opinion of Judge Brennan I cannot believe that the supreme court will announce a rule of law so subversive of the fundamental rights which have been considered as a part of the inalienable rights of the English speaking people since the time of the Magna Charta. I am therefore of the

opinion that the enrolled bill should govern in case of doubt, but that where it is clearly shown beyond all reasonable doubt by the legislative journals that an act, or a part of an act, did not pass both houses of the general assembly that the same ought not to be enforced as a law of the state, and that hence you ought not to require persons who execute, issue, sell, offer or negotiate for sale any contract, bond or other instrument, by the terms of which title to real estate located outside the state of Iowa is to be transferred upon the completion of certain payments or the performance of certain conditions, to secure a permit and be subject to the provisions of the law, or that any prosecution should be had against such persons for a failure so to do.

I am further of the opinion that the provision of the law above referred to will not invalidate the remaining portion of said act. It is a cardinal rule of law that a part of an act may be held unconstitutional without invalidating the remaining portion of said act. This is so elementary that it needs no citation of authorities.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

August 14, 1913.

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

BOARD OF CONTROL.—The board of control has power to purchase land for reformatory for females, for custodial farm and state colony for epileptics and to improve and equip the same and to provide necessary employees.

GENTLEMEN: I am in receipt of your communication of the 10th instant directing my attention to chapter 17, acts of the thirty-fifth general assembly, and also chapter 236, acts of the thirty-fifth general assembly, which chapter authorizes the establishment of a state epileptic colony, and requesting to be advised (1st) as to whether you are authorized to establish a new location for the Iowa industrial reformatory for females, engage the services of a superintendent or executive officer and erect build-

ings; (2d) whether or not you are authorized to purchase a district custodial farm, erect buildings, engage an executive officer and establish said farm; (3d) whether or not you are authorized to erect buildings and engage an executive officer for the state colony of epileptics and fix the compensation of these executive officers; (4th) as to whether or not you are authorized to employ a manager and fix his compensation for the purpose of establishing and maintaining industries at the several institutions under the control of the board of control and specifically in chapter 17, acts of the thirty-fifth general assembly.

Section 1 of chapter 17, acts of the thirty-fifth general assembly, provides in part that for the purpose of providing for the erection and improvement of buildings, for appurtenances and connections, for the Iowa industrial reformatory for females, district custodial farm, and state colony for epileptics, for the purchase of land for one or more of said institutions, including a new location for the Iowa industrial reformatory for females, and for establishing and maintaining industries in any or all of said institutions, there shall be levied annually for five years a special tax of one-half mill on the dollar, etc.

Section 2 of the act provides in part that no part of the levies herein provided for shall be expended for new buildings the probable cost of which shall exceed five thousand dollars, without first submitting to the general assembly for its approval plans and specifications prepared by an architect, together with estimates of the cost of such buildings.

This provision does not apply, however, in the event of fire or other casualty.

It is clear then from the act in question that the board is authorized to purchase land for a new location for the Iowa industrial reformatory for females; that the board is also authorized to purchase land for a district custodial farm; that the board is also authorized to purchase land for a state colony for epileptics. It is also clear, however, from the provisions of section 2 of the act that buildings may not be erected at a probable cost in excess of five thousand dollars at any of the several institutions.

In view of the provisions of section 236 of the acts of the thirty-fifth general assembly, which act gives the board of control the same power and control over the epileptic colony as is now given by the law as it appears in sections 2727-a1 to 2727-

a51, inclusive, supplement to the code, 1907, relating to other institutions under the control of the board of control, I am of the opinion that all the necessary officers, managers and guards may be secured by the board of control as soon as the funds will permit for the purpose of the establishment and maintenance of an epileptic colony.

No buildings, however, may be erected from the funds secured pursuant to the provisions of chapter 17, acts of the thirty-fifth general assembly, at any one of the several institutions, in excess of five thousand dollars without first submitting the plans to the legislature pursuant to the provisions of said act.

The money may, however, be used for the purpose of securing 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 appears from the act that the primary purpose of the legislature was to secure the ground for the several institutions in question leaving it for succeeding general assemblies to provide for the erection of permanent buildings.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

September 15, 1913.

HONORABLE BOARD OF CONTROL
OF STATE INSTITUTIONS.

PREVENTION OF PROCREATION OF DELINQUENTS.—Chapter 187, acts of the thirty-fifth general assembly, relating to prevention of procreation by delinquents and defectives should be construed to apply only to those convicted after taking effect of said act and should not be construed to apply to misdemeanants or persons confined in county or city jails.

DEAR SIR: I am in receipt of your communication directing my attention to chapter 187, acts of the thirty-fifth general assembly, relating to the prevention of the procreation of certain delinquents and defectives, and requesting to be advised:

1st. As to whether the act applies to prisoners confined in the penal institutions referred to in said act who were convicted

prior to the taking effect of said act; that is to say prior to the 4th day of July, 1913; and

2d. Does the act include persons convicted of misdemeanors and confined in jails and minor prisons of the state.

First. The first question is not free from difficulty. In this question is involved (a) the intention of the legislature, that is to say, whether or not the legislature intended the act to apply to persons confined or convicted prior to the taking effect of the act; and (b) if the legislature did so intend, is the act constitutional.

Assuming then that the legislature intended the act to apply to persons convicted or sentenced prior to the taking effect of said act, the same would be unconstitutional as being *ex post facto* if it may be considered as a means of punishment or even if it contained directly an element of punishment. If, however, it is looked upon wholly as a sanitary and police measure in the interest of society at large, and directly in the interest of the possible offspring of the persons referred to in the act, then it would clearly not be unconstitutional.

It is a cardinal principle of construction that every act should be so construed as to relieve it of grave constitutional questions if possible. This being true, and it also being uncertain as to whether it was the intention of the general assembly to make the act apply to persons convicted of crime prior to the taking effect of the act I am of the opinion that the act should be construed to apply only to those persons who have been convicted of crime subsequent to the taking effect of said act.

Second. After a careful consideration of the entire act I am clearly of the opinion that it was not the intention of the legislature to include therein misdemeanants or persons confined in county and city jails.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

October 21, 1913.

HON. W. H. BERRY,

Chairman Board of Parole,

Des Moines, Iowa.

AUTOMOBILES.—Automobiles are required to be registered only during the years in which they are used upon the public highways of the state. In order to be entitled to registration at half rates the machine must have been registered for four successive years or have been in use for a period not less than four years.

SIR: I am in receipt of your communication of the 28th ultimo requesting an official opinion upon the following questions:

"1. Do the laws of Iowa require the owner of a motor vehicle to register his machine each year and pay the proper fee therefor regardless of whether the machine is used upon the public highways?

"2. If the records in this department show that an owner of a motor vehicle registered his machine in 1911, but do not show registration for 1912 and 1913, and then the owner seeks to register the machine for 1914, what is the duty of the secretary of state in the premises? Should the secretary make an original investigation to ascertain whether or not such machine had been used in the years 1912 and 1913, unless there were facts or circumstances first called to his attention to indicate that such use of the vehicle had been made?

"3. Under what conditions may an owner of a motor vehicle register his machine for one-half license fee?"

First. Section 3 of chapter 72, acts of the thirty-fourth general assembly, relating to the registration of motor vehicles, provides:

"Every owner of a motor vehicle which shall be operated or driven upon the public highways of this state shall, except as herein otherwise expressly provided, cause to be filed in the office of the secretary of state, a verified application for registration * * *."

It is very clear that the law does not contemplate the registration of a motor vehicle unless the same is to be used or is actually used upon the highways, which term includes streets and alleys and all public roads. In the event that the machine is not so used, it should be subject to taxation the same as ordinary personal property.

Second. Section 3 of chapter 130, acts of the thirty-fifth general assembly, which section is a re-enactment of section 7 of chapter 72, acts of the thirty-fourth general assembly, provides:

"Registration shall be renewed annually in the same manner and upon the payment of the annual fee as provided in section 8 for registration, to take effect on the first day of January in each year; provided, that the secretary of state shall withhold the re-registration of any motor vehicle the owner of which shall have failed to register the same for any previous period or periods for which it appears that registration should have been made, until the fee for such previous period or periods shall be paid. All certificates of registration issued under the provisions of this act shall expire on the last day of the calendar year in which they were issued."

The act in question requires the secretary of state to withhold re-registration of any motor vehicle the owner of which shall have failed to register the same for any previous year, if it appears that registration should have been made for such previous years. This does not contemplate that the secretary of state is to refuse to register all motor vehicles which have at one time been registered but which the records do not show a successive registration. It is, however, the duty of the secretary of state where it appears, that is to say, where the records on the face show that the machine should have been registered, or where other satisfactory evidence is brought to the attention of the secretary of state that the same should have been registered, to refuse to register the machine for the current year until the fee for such previous period or periods shall have been paid.

The secretary is not required to make complete examination in each individual case and satisfy himself beyond all reasonable doubt that some previous registration fee has been paid, but he is to use such diligence and effort as he can consistently do without interfering with the work of the department to determine this question.

The thought of the general assembly, however, seems to be if persuasive evidence is brought to the attention of the secretary of state that a car offered for registration has previously been wrongfully withheld from registration, that the secretary may withhold the current registration until he is satisfied (a) that there was

lawful justification in failing to previously register the car; or (b) until such previous registration fee is paid.

Third. Section 4 of chapter 130, acts of the thirty-fifth general assembly, which is a re-enactment of section 8 of chapter 72, acts of the thirty-fourth general assembly, provides:

"The following fee shall be paid to the secretary of state upon the registration or re-registration of a motor vehicle in accordance with the provisions of this act; eight dollars upon the registration of a motor vehicle having a rating of twenty horse power or less; and for each such vehicle which shall exceed twenty horse power in rating, the owner shall pay at the rate of forty cents per horse power; provided, that if a motor vehicle shall have been licensed for four separate successive years under the laws of this state, and for which there shall have been paid four registration fees as provided by statute therefor, or any motor vehicle which shall have been in use for a period of not less than four years prior to August 1st of such registration period for which registration is about to be made, the annual registration fee thereafter shall be one-half that amount; and further provided, that the annual fee for the registration or re-registration of any electric or steam motor vehicle in accordance with the provisions of this act shall be fifteen dollars; and further provided, that the annual fee for the registration or re-registration of a motor bicycle or motor cycle in accordance with the provisions of this act, shall be three dollars; and provided further, that the fee for registering any theretofore unregistered motor vehicle under the provisions of this act, which motor vehicle shall be purchased on or after August 1st of any year, shall be one-half of the annual fee therefor, for the remainder of that calendar year; and provided further, that each manufacturer or dealer selling or otherwise disposing of motor vehicles, theretofore unregistered in this state, to residents of this state shall report to the secretary of state each such sale made on or after August 1st of each calendar year; such reports shall be made on blanks to be furnished by the secretary of state upon request, and shall be made in such manner as he may direct; and provided further, that no motor vehicle shall be registered for less than the annual

fee because of its having been purchased on or after September 1st until such manufacturer's or dealer's report shall have been filed as herein provided."

In order that a motor vehicle may be registered at one-half of the regular annual registration fee, it must appear that (a) such motor vehicle shall have been licensed for four successive years under the laws of the state of Iowa, and that there shall have been paid at least four registration fees as provided by statute; or (b) that the motor vehicle shall have been in use for a period not less than four years prior to August 1st of the registration period for which registration is about to be made. This contemplates that the machine must have been in actual use for a period of at least four years, but no particular amount of use need be shown further than the actual good faith use of the machine for the period named. Or (c) it must be shown that the car has been purchased on or after August 1st of the year in which registration is about to be made.

If a motor vehicle is purchased after August 1st, report of the purchase must be made by the manufacturer, dealer or person from whom purchased and may be made upon blanks furnished by the secretary of state.

Under this branch of the case the only difficult question that presents itself is whether or not a car previously owned by a resident of another state, and upon which there has been the regular fee paid in such other state, is on and after August 1st brought into this state by the owner who becomes a resident of this state on and after August 1st, is entitled to registration at one-half the regular fee.

Undoubtedly the legislature did not intend to exact more from a person coming from another state and acquiring citizenship in this state on and after August 1st, and who had previously paid the full annual registration fee in such other state, than is exacted of a person who makes an original purchase of a car in this state on or after August 1st.

The word "purchase" is a very comprehensive term. Our supreme court in the case of *Porter v. Green*, 4 Iowa (Clark) 571, held that the word "purchaser" included a mortgagee.

Webster quotes Blackstone as holding that the word "purchase" means "To acquire by any means except by descent or by inheritance;" and also gives the definition of "The act of seeking and acquiring property" and "That which is obtained, got

or acquired in any manner honestly or dishonestly; property, possession, acquisition."

In this broad sense then a car brought into the state on and after August 1st to be permanently kept in this state is an acquisition in this state on and after August 1st, or a taking possession after said time. The test, however, seems to be the acquiring or acquisition, and not the actual use of the car after such time.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

November 10, 1913.

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

FOREIGN CORPORATIONS.—A foreign corporation which has been transacting business in this state continuously from and prior to Sept. 1, 1886, is exempt from the payment of the corporation fee and from the penalties prescribed by the Arney bill.

SIR: I am in receipt of your communication of the 1st ultimo advising that the United Gas Improvement Company, a Pennsylvania corporation, which company, as I understand, holds the capital stock of certain gas companies doing business in the state of Iowa, has tendered for filing and recording a certified copy of its articles of incorporation, together with an application resolution and statement, and asks for a permit to be issued to said corporation as required by section 1637 of the code as amended.

You state that in said application the amount of the paid-up capital stock is given, and likewise the amount of capital used in the state of Iowa, and request an opinion as to whether or not this company is liable for the fees prescribed by section 1637 of the code; or in the event that it is held it is not liable for the fee, as to whether or not it is liable for the penalty prescribed in section 1639 of the code.

The solution of this question depends entirely upon the scope and purpose of chapter 136, acts of the thirty-fifth general assembly, commonly known as the Arney bill. This act made sec-

tion 1641-b, supplement to the code, 1907, as amended by chapter 76, acts of the thirty-fourth general assembly, and section 1641-c, supplement to the code, 1907, and section 1637 of the Code, as amended, applicable to all foreign corporations, and expressly provided that the act in question should also include holding companies.

Until, therefore, the act in question was passed, the United Gas Improvement Company was not doing business within the state of Iowa within the meaning of section 1637 of the Code, and was therefore not subject to the penalty prescribed in section 1639 of the code. Immediately, however, upon the passage of the acts and by reason of its provisions the said United Gas Improvement Company would be construed to be a corporation doing business in Iowa, but the business being transacted by the said United Gas Improvement Company at the time of the passage of chapter 136, acts of the thirty-fifth general assembly, was precisely of the same nature and character as was being transacted by said company continuously from and prior to September 1, 1886. This being true, the said company is not subject to the corporation fee prescribed in section 1637 of the code, it being obvious that chapter 136, acts of the thirty-fifth general assembly, was not designed to have a retroactive effect, but rather for the purpose of placing domestic and foreign corporations doing business within the state of Iowa upon an equal footing.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

December 20, 1913.

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

FISH AND GAME WARDEN.—There is no law authorizing the state fish and game warden to collect a half cent a pound for fish caught and sold from particular lakes. However, there is no legal objection to the warden acting in a private capacity as treasurer for those desiring to donate to a fund for the improvement of lakes.

SIR: I am in receipt of your communication of the 23d instant directing my attention to sections 2546, 170-d and 2900-

a19, supplement to the code, 1907, and requesting an opinion as to whether it is legal for the fish and game warden to receive from persons surrounding certain lakes of the state a half cent a pound for all fish caught in said lakes and sold, the proceeds to be used by said fish and game warden for the improvement of the lake in question.

You further request that if this may lawfully be done (a) is the fish and game warden to be governed by the provisions of section 170-d of the supplement to the code, 1907, and must he account to the state for the moneys thus received pursuant to the provisions of said act; (b) can he make improvements of the lakes without the approval of or in opposition to the wishes of the executive council.

Undoubtedly if this money is collected pursuant to statutory provisions, it must be accounted for under section 170-d, supplement to the code, 1907. It is further true that the executive council has authority to determine what improvements shall be made on the meandered lakes and lake beds of the state. There is, however, no authority for any one to pay the state fish and game warden a half cent a pound for all fish sold which are caught in a particular lake. As I understand this matter, this is a voluntary contribution or donation upon the part of these men who fish, who desire to contribute that much in order that the lakes may be improved.

I see nothing in the law to prevent the state fish and game warden from acting in a private capacity as treasurer for these men and from also using the fund for the improvement of the lake, provided that the improvement of the lake meets with the approval or sanction of the executive council; and provided further that the permit issued by the fish and game warden under the provisions of section 2546, supplement to the code, 1907, is not limited to those who voluntarily make contributions, and further, that such permit is not issued as a consideration for the money paid.

The fish and game warden under no circumstances is authorized to accept either directly or indirectly any consideration for an official duty, and if he acts in a private capacity for individuals it must not in any way govern his official action, nor must he discriminate in issuing permits to those who pay the half cent per pound for fish caught and sold, or deny to any person a permit who refuses to pay the half cent per pound; provided

that other considerations make it proper to issue a permit to the person in question.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

December 29, 1913.

HON. GEORGE W. CLARKE,
Governor of Iowa.

CORPORATIONS.—There is nothing to prevent a gas company or stockholder therein from owning stock in another gas company nor to prevent the exchange of stock of one such company for that of another.

GENTLEMEN: I am in receipt of your communication of the 5th instant enclosing the application of the Iowa Gas & Electric Company asking for authority to issue stock under the provisions of section 1641-b of the supplement to the code, 1907, a part of the property being the stock of the Mt. Pleasant Gas Light Company, and requesting to be advised as to whether this is in contravention of the law in restraint of trade or invalid for any other reason.

Briefly stated, I understand the question to be whether or not a corporation known as the Iowa Gas & Electric Company located at Washington, Iowa, may exchange its stock for other stock in the Mt. Pleasant Gas Light Company, a corporation organized under the laws of Iowa, located at Mt. Pleasant, Iowa, it being represented that these two corporations are engaged in the manufacture of gas, and are not so located as to be in competition with each other.

I find nothing in the statutes which would prevent one gas company, or stockholder in a gas company, from owning stock in another gas company, or prevent the exchange of stock, the one for the other, assuming of course that the result of this would not amount to a restraint of trade, and assuming further that in such exchange the provisions of section 1641-b, supplement to the code, 1907, are fully complied with.

From the facts presented to me I see nothing to warrant the conclusion that the exchange proposed is in restraint of trade or otherwise against public policy, and so hold.

See the case of *Traer v. Prospective Company*, 124 Iowa, 107, and cases cited.

Opinion of the attorney general under date of March 6, 1909, Attorney General's Report, 1910, page 54.

I return herewith the application.

Yours very truly,

GEORGE COSSON,
Attorney General of Iowa.

January 20, 1914.

HONORABLE EXECUTIVE COUNCIL,
Statehouse.

APPROPRIATIONS.—The appropriation provided for by joint resolution No. 7, acts of the thirty-fourth general assembly, for an addition to Margaret Hall is not limited to the reconstruction and enlargement of the old building known as Margaret Hall but may be used for the construction of a new woman's building or dormitory serving a like purpose.

GENTLEMEN: I am in receipt of your communication of the 17th instant requesting to be advised as to whether the appropriation of \$55,000, referred to in senate joint resolution No. 7, acts of the thirty-fourth general assembly, for "an addition to Margaret Hall", must be used for the reconstruction and enlargement of old Margaret Hall, or whether it may be used for the construction of an additional dormitory for women to be known as new Margaret Hall, or some suitable name, but to be separate and apart from old Margaret Hall.

The appropriation in question is for "an addition to Margaret Hall at a cost of not to exceed \$55,000." Necessarily the solution of the question depends upon the particular facts in the case which were known or supposed to have been known to the members of the general assembly at the time of the appropriation in question, together with the proper construction of the statute making the appropriation in view of the facts as then existing.

It is a matter of common knowledge that there is a dormitory for women at the state college of agriculture and mechanic arts under the supervision of the college, and that many private rooming places for women may be found near the college and in the city of Ames.

It is stated by the president of the college and members of the state board of education that the housing facilities for women, which are under the supervision of the college, consist of one building known as Margaret Hall, and another building located some distance therefrom known as Margaret Hall Annex, and that the term "Margaret Hall" in addition to conveying the idea of a specific building of a certain architecture located upon a certain block and lot, conveys also the idea of a woman's building or dormitory under the supervision of the college.

As stated by one member of the board: "The words 'Margaret Hall' have come to mean the place where women students are comfortably housed, rather than designating the actual building," and in this connection it is suggested that there are now two buildings under the supervision of the college at some distance apart known as Margaret Hall and Margaret Hall Annex; and it may be further suggested that when parents over the state send their daughters to the college they are concerned in knowing that proper housing facilities are obtainable exclusively for women, and that those dormitories or rooming places will be under the supervision of the college.

It is also pointed out that the old building known as Margaret Hall was constructed a number of years ago; is not fire proof; that it has an elaborate, expensive style of architecture not in keeping with the times or the necessities of the case, and that both economy and safety, aside from architectural, esthetic, and other considerations, including convenience, militate against the expenditure of \$55,000 for the enlarging of the old building.

Bearing in mind the facts as above set forth, I am of the opinion that the appropriation of \$55,000, above referred to, is not limited to the reconstruction and enlargement of the old building known as Margaret Hall, but may properly be used for the construction of a new woman's building or dormitory serving a like purpose to be located on the campus at a place where it will best serve the purposes for which it is designed, considering the present location of other permanent buildings.

It is well known that in interpreting a statute, the purposes to be accomplished and the reasons for the enactment may be considered, and that the general spirit and purpose of an act will prevail over a literal interpretation of specific words, but aside from this, it may well be said that the term "Margaret

Hall" had come to have a meaning with the general assembly which prevailed among the members of the college faculty and persons throughout the state, namely: a place or dormitory for women located upon the campus and under the supervision of the college.

The appropriation may therefore be lawfully expended in harmony with the ideas herein set forth.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

January 22, 1914.

TO THE FINANCE COMMITTEE OF THE
STATE BOARD OF EDUCATION.

LAKE BEDS—LEASING OF BY EXECUTIVE COUNCIL.—Executive council may lease lake beds under chapter 260, acts of thirty-fifth general assembly, until otherwise disposed of and not exceeding a period of twenty years.

SIR: I am in receipt of your communication of the 23d ultimo in which you submit the following questions:

"Has the executive council any authority or power to determine that a meandered lake or lake bed within the state shall be maintained or drained or improved or sold except by proceeding as provided in chapter 2-B of the supplement to the code?

"Has the executive council any authority to lease a meandered lake or lake bed under the provisions of chapter 260 of the acts of the thirty-fifth general assembly before it has proceeded as provided in said chapter 2-B, of which said act is amendatory, to determine as to whether it should be drained or improved?

"Is a contract to drain, extending the right to drain under the contract over a period of six years, and then upon the completion of the drainage and the expiration of the six years, agreeing to lease for a period of twenty years, made before proceeding as provided in said chapter 2-B of any validity?

"Is such a contract, in view of all of the provisions of the law relating to the subject, in any event valid?

"If such a contract were held to be valid would it in any way prevent the executive council from subsequently determining that the lake bed should be maintained as the property of the state or sold, or otherwise disposed of—special attention being called to the phrase 'otherwise disposed of' in the act of the thirty-fifth general assembly?

"In view of said phrase would the legislature have power to provide, notwithstanding said contract, for a different disposition of the lake or lake bed?

"Does or does not the phrase 'until otherwise disposed of' mean that it may only be leased 'in the discretion' of the council pending or during the carrying out of the provisions of the statute authorizing the preservation, drainage or sale of the lake or lake bed?

"Can the phrase 'until otherwise disposed of' be made to extend over a period of twenty-six years or is it limited only to the time that may be required to dispose of the lake or lake bed in the method and for the purpose provided by the law?

"Can a lake bed be leased at all except after a proceeding has been instituted looking to the disposition of it as provided by the law and if so can it be for a longer period than until such disposition is made?"

I shall not answer the questions in the order stated, nor shall I answer all of the questions submitted by you at this time. Some of the questions are difficult of solution and it has become elementary that grave questions of a doubtful nature should not be passed upon unless absolutely necessary to a solution of the case. I shall therefore limit my reply to two or three fundamental questions which I believe will be determinative of the controversy growing out of the leasing of a certain lake for the period of twenty years, the lease to commence six years in the future, and the lessee to be permitted in the meantime to make extensive improvements upon said lake.

Chapter 260, acts of the thirty-fifth general assembly, which is amendatory of section 2900-a23, supplement to the code, 1907, provides as follows:

"Any land owned by the state of Iowa within the high water lines of any non-navigable stream or lake and also any lands within the bed of any lake bed authorized to be drained under the provisions of this chapter may be leased by the

executive council in its discretion, *until otherwise disposed of*, the rental to be paid into the general funds of the state."

It seems perfectly obvious that this section conveys no authority to the executive council to make a contract with reference to the meandered, non-navigable lakes of the state for a definite period of twenty or twenty-six years, but that such lease of any meandered, non-navigable lake or lake bed within the state must be made subject to disposition at any time by the general assembly, or in the language of the statute, "*until otherwise disposed of*."

Surely it was not the intention of the general assembly in the passage of chapter 260, acts of the thirty-fifth general assembly, to give the executive council the extraordinary power of withdrawing from the public all of the meandered, non-navigable lakes and lake beds within the state by leasing the same to private parties to be drained and used for agricultural or other private purposes, such leases to be for a definite period of years and beyond the future control and disposition of even the general assembly itself, and I so hold.

It would seem to follow as a necessary corollary that if the executive council is without authority to make a lease except and until otherwise disposed of by the legislature, that it is also without authority to make a lease except and until otherwise disposed of by itself; in other words, that the purpose of that part of the statute which authorizes the executive council to lease any lake or lake bed *until otherwise disposed of* is to prevent the permanent disposition of the lakes of the state in the form of leases by the executive council, but that such leases, if any, are to be made subject to and until otherwise disposed of either by the legislature or the executive council.

As to this last point I reserve an opinion as it may not be necessary to a solution of the case, but content myself at this time with holding that the words found in chapter 260, acts of the thirty-fifth general assembly, which provide that "any non-navigable lake or lake beds may be leased by the executive council in its discretion *until otherwise disposed of*" convey no authority to the executive council to make a lease which would prevent the legislature from at any time making disposition of the lake or lake bed in question.

Section 24 of article 1 of the constitution provides that "No lease or grant of agricultural lands, reserving any rent or service of any kind, shall be valid for a longer period than twenty years."

Independently of the provisions of chapter 260, acts of the thirty-fifth general assembly, and regardless of the interpretation to be placed thereon, it is clear that the executive council is without authority to lease a lake bed to be used for agricultural purposes reserving any rent for a period beyond twenty years. This being true, it follows that the executive council could not grant a lease in one instrument for a period of twenty years, and in another instrument convey to the lessee any rights covering an additional period of time, which are not enjoyed by any citizen of the state of Iowa by reason of his citizenship. To state it differently: if the separate instrument to the lessee for the period of six years additional to and not a part of the twenty years covered in the lease, conveys to the lessee any exclusive rights or privileges not enjoyed by any other citizen of the state by reason of his citizenship, then it amounts to a lease for an additional period of time, and is therefore invalid being in contravention of the constitution of the state of Iowa.

As to whether the executive council may in any event make a lease for a period of twenty years, which is not to commence until long after the term of each member of the executive council shall expire, is extremely doubtful. On this point, however, I reserve an opinion in the hope that the two fundamental propositions heretofore decided will work a solution of the controversy. If they do not, I shall be glad to take up such additional questions as you may submit as may be necessary to a determination of all the points necessarily involved in a solution of the question, and for the future guidance of the council.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

January 22, 1914.

HONORABLE GEORGE W. CLARKE,
Governor of Iowa.

TRUST COMPANIES.—Cannot invest trust funds or deposits in real estate. Practice of investing its capital in real estate transactions should be discouraged.

SIR: Pursuant to the oral request of Mr. George Pennell, chief bank examiner, as to the right of trust companies to engage in

real estate, after careful consideration I have to advise that no trust company should be permitted to invest any of its trust funds or any of its deposits in dealing in real estate.

As to the right of a trust company to invest any of its capital in real estate transactions, I reserve my opinion at this time further than to say that since by chapter 152, acts of the thirty-fifth general assembly, additional powers have been conferred upon trust companies until they may now do many of the things formerly belonging exclusively to banks, that there is much reason for saying that they should be subject to the same restrictions and limitations as state and savings banks, and therefore the practice should be discouraged so far as possible until the matter can be definitely submitted and passed upon by the next general assembly.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

February 16, 1914.

HON. JOHN L. BLEAKLY,
Auditor of State.

BOARD OF CONTROL.—Where patient is paroled to friend to be delivered without expense board may return patient if dangerous at expense of institution and recover from person to whom paroled unless returned before limit of parole.

GENTLEMEN: I am in receipt of your communication of the 6th instant in which you request an opinion as to whether the power of the superintendent of the state hospital for the inebriates in the matter of paroling and releasing inmates is both absolute and exclusive, or whether the board of control may exercise authority if found to be advisable.

This question is not easy of solution. Section 2310-a19, supplement to the code, 1907, provides that any patient whom the superintendent believes to be cured may be paroled conditioned on said patient signing a written pledge agreeing to refrain from the use of all intoxicating liquors as a beverage, and from the use of morphine and cocaine or other narcotic drugs during the term of his commitment and shall avoid frequenting places and the association of people tending to lead him back to his old habits of inebriety.

This section was repealed and re-enacted in chapter 185, acts of the thirty-third general assembly, but no modification was made in the re-enactment as to this part of the section.

Considered independently, it would follow that the superintendent had the absolute and exclusive power of determining when a parole should be granted to an inmate assuming of course that the superintendent acted in good faith. This being true, we are led to the inquiry as to whether other parts of the chapter relating to the state hospital for inebriates, and other provisions of the law relating to the power and authority of the board of control, modify the section in question.

Section 2727-a8, supplement to the code, 1907, provides:

"The board of control shall have *full power to manage, control, and govern*, subject only to the limitations contained in this act, the soldiers' home; the state hospitals for insane; the school for the deaf; the institution for the feeble-minded; the soldiers' orphans' home; the industrial home for the blind, the industrial school, in both departments; and the state penitentiaries." etc.

Section 2727-a9 of said supplement provides that the powers possessed by the governor and executive council, with reference to the management and control of the state penitentiaries, shall, on July 1, 1898, and without further process of law, cease to exist in the governor and executive council, and shall become vested in the board of control; and the said board is on July 1, 1898, and without further process of law, authorized and directed to assume and exercise all the powers heretofore vested in or exercised by the several boards of trustees, the governor or the executive council with reference to the several institutions of the state herein named.

Section 2727-a24 of said supplement makes it the duty of the board to appoint a superintendent, warden or other chief executive officer of each institution under the control of the board of control, fixes the tenure of office and provides that the superintendent, warden or other chief executive officer of any of the institutions named may be removed by the board for misconduct, neglect of duty, incompetency or other proper cause showing inability or refusal to perform the duties of the office, and that "the officers of the several institutions shall have the qualifications and perform the duties now imposed and required of them by the statute, except as the same are modified or abrogated in this act. *In case there is*

an alleged or seeming conflict between the powers of the superintendents or other executive officers and the board of control, the determination of such question by the board shall be final."

Section 2310-a8, included in chapter 2-A, relating to the state inebriate hospital, provides in part that the board of control of state institutions shall have the same power and control over said hospital as is now given it with reference to the several institutions mentioned in chapter 118, acts of the twenty-seventh general assembly, and all amendments thereto. (Chapter 11-B, supplement to the code, 1907).

If the board of control is given the same power and control over the state hospital for inebriates as it is expressly granted over other institutions under its control, as set forth in the sections previously cited, it follows that the board of control is the ultimate authority on all questions of government in the institutions subject to the control of said board. This conclusion is supported by section 2310-a17 of the code supplement which provides that the superintendent of said inebriate hospital, *subject to the approval of the board of control*, shall prepare rules and regulations for the government of said hospital and its inmates; and by section 2310-a29 which provides that "Whenever the physical condition of any patient shall become such that in the judgment of the superintendent further confinement will prove injurious to the health of said patient, *the state board of control may parole him* under proper conditions and restrictions for such period of time as it may deem advisable."

It is elementary that in construing a statute it must be considered as a whole, and that the meaning found in particular paragraphs or sentences abstractly considered must be modified by the general context of the statute.

The supreme court of the United States in the case of *Union Pacific Railroad Company vs. Snow*, 231 U. S. 204, said that a literal interpretation of a statute would not be enforced if to do so it would give it a consequence the statute did not intend.

To the same effect see *Sohn vs. Waterson*, 84 U. S. 596; *Union Pacific R. R. Co. vs. Laramie Stock Yards*, 231, U. S. 190, at page 200;

Following this rule of construction so recently reaffirmed by the supreme court of the United States, a construction which is generally adopted by our court and other courts, the section relating to the power of the superintendent with reference to parole should

not be given a literal, abstract interpretation, but must be considered in connection with the entire chapter relating to the inebriate hospital, and all of the provisions relating to the board of control, and when it is considered that in express terms the board of control with other institutions is to be the ultimate authority in case of conflict with or between the governing officers or subordinates of these institutions, and when it is further considered by express terms the board of control is given all of the power in the matter of governing the inebriate hospital possessed in the governing of other institutions, and when it is further considered that ultimate authority must be lodged somewhere, and that the general spirit and purpose, as well as the wording, gives to the board of control the ultimate authority in the governing of all of the institutions under its control, as well as placing upon said board the responsibility, the conclusion is inevitable that the board of control in the matter of paroling inmates of the inebriate hospital is clothed with final authority.

It is also clear, however, that the recommendations of the superintendent should have very great weight, if not controlling, in ordinary cases because of the peculiar opportunities possessed by the superintendent of knowing each individual inmate, but if, after thorough investigation and after careful consideration of the recommendations of the superintendent, the board decides that a different order should be made, I am of the opinion that it is both the right and the duty to make such order.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

February 17, 1914.

HONORABLE BOARD OF CONTROL OF STATE INSTITUTIONS.

ENTOMOLOGIST.—Paid upon a per diem basis but assistant is paid a reasonable compensation from money appropriated for such purpose.

SIR: I am in receipt of your communication of the 20th ultimo directing my attention to section 2575-a47 which authorizes the entomologist of the state experiment station to appoint "such qualified assistants as may be necessary, fix a reasonable compensation for their labor and pay the same"; and section 2575-a51

which provides that "the state entomologist shall be allowed and paid for his services while engaged in this work, all his necessary traveling expenses and the sum of five dollars per day."

Reference should also be made to chapter 210, acts of the thirty-fifth general assembly, which provides that "There is hereby appropriated out of any moneys not otherwise appropriated, the sum of two thousand dollars annually, or so much thereof as may be necessary, for carrying out the provisions of this act."

You request to be advised as to whether the compensation of the assistant must be on a per diem basis inasmuch as section 2575-a51 fixes the compensation of the state entomologist on a per diem basis.

The question should be answered in the negative. The state entomologist must be paid upon a per diem basis, but the compensation of the assistant is subject only to the limitation that such compensation fixed shall be "a reasonable compensation" and the compensation of the assistant and the entomologist shall not exceed the amount of money appropriated by the legislature for such purposes.

Legislation is common where a per diem salary is fixed for heads of departments and a compensation by the month may be paid to deputies, assistants, stenographers and other subordinates and employees.

Of course the entomologist ought not to employ any one during any period of time unless he has services to perform, but the fact that an assistant is not employed during the full time of twelve months would not prevent his being paid upon a monthly basis, nor would the fact that he was paid upon a monthly basis require him to be paid for a full month's services if he only performed services during a part of a month; in that event, a proportional compensation should be paid for the services actually rendered.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

March 16, 1914.

HON. JOHN L. BLEAKLY,
Auditor of State.

BOARD OF PAROLE.—For reasons set forth, recommended that action be deferred at present as to the vasectomy act.

GENTLEMEN: On the 17th of July, 1913, your board submitted the following questions to the department of justice with a request for an official opinion thereon:

1st. "Do the prisoners confined in the prisons named above whose crime was committed before the taking effect of the act referred to, come under the provisions thereof?"

2d. "Does the act include persons convicted of misdemeanors confined in jails and minor prisons of the state?"

On the 21st of October, 1913, an official opinion was given in which it was held that the act did not include misdemeanants or persons confined in county and city jails. In discussing the first proposition it was said:

"The first question is not free from difficulty. In this question is involved (a) the intention of the legislature; that is to say, whether or not the legislature intended the act to apply to persons confined or convicted prior to the taking effect of the act; and (b) if the legislature did so intend, is the act constitutional?"

In discussing the question I there said that "Assuming that the legislature intended the act to apply to persons convicted or sentenced prior to the taking effect of said act, the same would be unconstitutional as being *ex post facto* if it may be considered as a means of punishment or even if it contained directly an element of punishment"; and that "It is a cardinal principle of construction that every act should be so construed as to relieve it of grave constitutional questions if possible"; and that "This being true, and it also being uncertain as to whether it was the intention of the general assembly to make the act apply to persons convicted of crime prior to the taking effect of the act, I am of the opinion that the act should be so construed to apply only to those persons who have been convicted of crime subsequent to the taking effect of said act."

The precise question now presented by the complaint filed by George B. Stewart on behalf of Rudolph Davis seems not to have been passed upon in that opinion, viz: Was it the intention of the legislature that both convictions should be subsequent to the taking effect of the act?

It will be noticed that the language used by the general assembly is general in its nature, and after a careful consideration of the act, I am of the opinion that the act should be so construed as to require that both convictions of a felony must be subsequent to the passage of the act. This being true, and there now being no person confined in the penitentiary who has been twice convicted of felony since the passage of chapter 187, acts of the thirty-fifth general assembly, it follows that the order made by the board of parole designating Rudolph Davis and others should be cancelled and that no prisoner should be designated by the commission named upon whom the operation should be performed who has not been twice convicted of a felony subsequent to the passage of the act. Since the act does not make it clear whether both convictions should be had in the state of Iowa, and as it is well known that what is a felony in one state may be a misdemeanor in another state, and vice versa, and since the thirty-sixth general assembly will convene on the second Monday in January, 1915, I suggest that no further action be taken under this particular section of the act until the general assembly has an opportunity to make the provision in question more specific.

This opinion is limited to the construction to be placed upon the single phrase under consideration, viz: a prisoner "who has been twice convicted of a felony."

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

April 1, 1914.

HONORABLE BOARD OF PAROLE.

COMMISSIONER OF LABOR.—Entitled to two clerks in addition to deputy at a salary of \$1000 each per year.

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 (\$1800) per annum and shall be allowed a deputy at a salary of fifteen hundred dollars (\$1500) 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 dollars (\$1000) 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 \$1000.”

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 \$1000 each per year.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

April 14, 1914.

HON. A. L. URICK,
Labor Commissioner.

BOARD OF CONTROL.—Can build highways and bridges on lands of the state institutions or lands adjacent thereto.

GENTLEMEN: I am in receipt of your communication of the 11th instant directing my attention to chapter 124, acts of the thirty-fifth general assembly, amendatory of chapter 93, acts of the thirty-third general assembly, and submitting the following questions:

“Has the board of control authority, under this statute and the statute which it amends, to order at state expense grading and making of a highway, including constructing bridges or culverts on a highway located on state lands which has recently been opened for public travel?

“Has the board of control authority, under this statute and the statute which it amends, to order at state expense repairing and improving a highway where the state owns the land on one side of the road, the land on the other side being owned by private parties?”

As pointed out in your letter, section 1 of chapter 124, acts of the thirty-fifth general assembly, provides in part:

“That all roads and highways within and adjacent to lands belonging to the state, including those under the supervision of the state board of education, shall constitute a separate road district under the control and supervision of the supervisor appointed by the board of control of state institutions with all the powers, duties and responsibilities imposed upon road supervisors” etc.

And that:

“All cost of maintaining, repairing, renewing and improving the roads within the road district containing state lands,

except county bridges, after the expenditure of the road poll tax, either in money collected or in labor, shall be paid out of any general funds in the hands of the state treasurer, not otherwise appropriated, upon warrants drawn by the state auditor after certificate of amount due shall have been filed in his office by the board of control."

It follows from that part of the section just quoted that the board of control has authority to establish a road district on any lands at any of the state institutions under the control of the board of control or the board of education, or any lands adjacent to lands belonging to the state at any of such institutions, and to do the necessary grading and all other work necessary in constructing the highway, including the building of bridges and culverts.

Your jurisdiction not only includes the roads and highways within the lands belonging to the state, but also roads and highways within and *adjacent* to lands belonging to the state; therefore your second question must be answered in the affirmative.

It will be noticed that section 1 does not authorize the expenditure of money to construct county bridges. Wherever, however, a bridge or culvert is necessary to the establishment of a road which is to be maintained and controlled by the state pursuant to the provisions of chapter 124, acts of the thirty-fifth general assembly, it would not constitute a county bridge or culvert. It follows of course that wherever a bridge was to be established upon a regular constituted highway under the control and jurisdiction of the county that your board would not be authorized to expend money for a bridge of this nature for the reason that it would be a county bridge.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

June 13, 1914.

HONORABLE BOARD OF CONTROL OF STATE INSTITUTIONS.

GOVERNOR.—The insurance commissioner, having been appointed and his bond approved, the auditor may, if he desires, transfer all of the books, etc., and be relieved from all responsibility. Until then the insurance commissioner may have access to such books, records, etc., during office hours.

SIR: I am in receipt of your communication of the 23d instant advising that you have appointed Emory H. English "Commissioner of Insurance" under the provisions of chapter 146, acts of the thirty-fifth general assembly, and requesting an opinion as to the proper interpretation of said act in the following particulars:

- (a) When does the term of office of the commissioner begin?
- (b) When does the act take effect?
- (c) What are the duties of the commissioner of insurance between the first day of July and the second secular day of January, 1915?

For the sake of brevity the questions will be considered jointly. Section 1 of said act provides in part:

"That there is hereby created and established a department to be known as the 'Insurance Department of Iowa'. The chief officer of said department shall be styled 'Commissioner of Insurance', and shall be appointed by the governor on or before the first day of July, 1914; said officer to serve until February 1, 1915."

Section 4 provides that: "and all powers now vested in and all duties imposed upon the auditor of this state relating in any way to insurance matters, *shall, from and after the taking effect of this act, be vested in and made incumbent upon the commissioner of insurance herein provided for.*"

Section 5 provides:

"All books, records, files, documents, reports, and securities and all papers of every kind and character relating to the business of insurance and now enjoined and required by law to be delivered to or to be filed or be deposited with the auditor of state *shall, from and after the taking effect of this act, be delivered to and filed or deposited with the said commissioner of insurance.*"

Section 6 provides:

"All fees and charges of every character whatsoever which are now required by law to be paid to the auditor of state by insurance companies and associations *shall from and after the taking effect of this act be payable to the insurance commissioner whose duty it shall be to account for and pay over the same to the treasurer of state at the time and in the manner as now provided for by law for the auditor of state.*"

The act was approved April 23, 1913, and under the constitution would become effective on July 4, 1913, except as otherwise provided in the act.

Section 1 of the act originally contained a provision that the term of office of the commissioner of insurance would commence on the second secular day in January, 1915. This provision was however eliminated by an amendment. It follows that it was done for the purpose of fixing a different time at which the term of office of the commissioner of insurance would commence.

It is not necessary to consider the question as to whether or not the commissioner could have assumed the duties of his office prior to the first day of July, 1914, because the appointment was not made in time for the commissioner to assume his duties prior to the first day of July, 1914, and any question as to what could be done before said time would be wholly academic.

I therefore hold in the language of the act that the commissioner of insurance "shall have general control, supervision and direction of all insurance business transacted in the state of Iowa and shall be charged with the execution of the laws of this state relating to insurance and shall have all powers now vested in and all duties imposed upon the auditor of this state relating in any way to insurance matters," from and after the first day of July, 1914.

As before stated, under the constitution the act would become effective on the 4th day of July, 1913, but until an insurance commissioner was actually appointed, the act would have no practical effect. The insurance commissioner being now appointed and having filed a bond, the act becomes in full force and effect from and after the first day of July, 1914, save and except as otherwise provided in the act itself.

Section 2 of the act provides that under said section the auditor of state cannot be required to turn over to the insurance commissioner any desks, chairs, filing cases and other furniture or books, papers, records and securities or other property now in the office of the auditor of state relating to or connected with the business of insurance until the second secular day in January, 1915.

The insurance commissioner now having been duly appointed and his bond having been approved by the executive council and duly filed in the office of the secretary of state, the auditor of state may if he desires immediately transfer all of the books, papers and securities specified in section 2 of the act to the insurance commissioner, and upon such transfer and taking of a receipt from said

insurance commissioner, the auditor of state will then be relieved and exonerated of all further liability in connection therewith.

Until the auditor of state does so transfer to the commissioner all books, papers, records and securities as specified in section 2, the insurance commissioner may have access to such books, records, papers and securities at any time during office hours wherever it is found that reference to the same may be necessary in connection with the transaction of the business in the office of said insurance commissioner.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

June 29, 1914.

HON. GEORGE W. CLARKE,
Governor of Iowa.

BOARD OF PAROLE.—In view of the decision of Judges Smith, Pollock and McPherson, the enforcement of chapter 187, thirty-fifth general assembly, would be stopped by injunction; hence, suggest action be deferred except where consent is given.

GENTLEMEN: I am in receipt of your communication of the 18th instant directing attention to the opinion filed in the case of *Davis vs. Berry, et al*, in the United States district court for the southern district of Iowa by Judges Smith, Pollock and McPherson, in which it was held that certain parts of chapter 187, acts of the thirty-fifth general assembly of Iowa, were unconstitutional, and in view of said opinion submitting the following questions:

First. "Does the opinion and holding in that case legally interfere with the administration of the provisions of chapter 187 of the acts of the thirty-fifth general assembly of Iowa, in cases of prisoners confined in the state other than those of the class who have been twice convicted of a felony?"

Second. "Is there legal reason because of the opinion and holding in the case above referred to, why the provisions of the act referred to should not be administered in cases of the inmates of the state hospital?"

Strictly speaking, the opinion in question does not cover any one included within the provisions of said act except "convicts who have been twice convicted of a felony." As suggested, however, in your second question, the nature of the opinion is such as to show the hostility of the court to the act in question, and in view of the opinion filed with the decree, it seems very probable that if the law was again attacked as applied to others not included in the suit heretofore referred to, entitled *Davis vs. Berry, et al*, that the court would again grant an injunction and suspend the operation of the act.

I suggest therefore that it would be better to defer action under the act, except with the consent of the persons in question, if not under guardianship or other disability, and if under guardianship or disability, with the consent of their guardian.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

August 29, 1914.

HONORABLE BOARD OF PAROLE.

SECRETARY OF STATE.—No inspection fee charged when, in fact, no inspection is made.

DEAR SIR: Pursuant to your oral request for an opinion concerning the validity of the fees charged as an inspection fee upon gasoline, I have to advise that a conference was held in the office of the governor in which the governor, the secretary of state, the chief oil inspector and the attorney general were present. In said conference it appeared from the chief oil inspector that the statutory fee was being charged for the inspection of gasoline, whereas as a matter of fact, no actual inspection of gasoline was being made except in very rare instances.

In a recent case in Maryland, *Foot & Company vs. Maryland*, 232 U. S. 494, the supreme court of the United States held:

"Effect must be given by the courts to the provisions of the constitution; and where it does appear that the amount of inspection fees are disproportionate to the inspection service rendered or include something beyond inspection, the tax must be declared void as obstructing the freedom of interstate commerce.

"A state statute imposing an inspection tax, the proceeds of which are to be and actually are used partly for inspection and partly for other purposes such as policing state territory, is necessarily void as imposing a burden on interstate commerce in excess of the expenses absolutely necessary for inspection, and so held as to the Maryland Oyster Inspection Tax of 1910.

"The question of constitutionality of an inspection law depends not only upon whether the excess proceeds of the tax may be used for other purposes, but whether they actually are so used; and it is the duty of the courts to determine whether the tax is excessive and the excess is so used so as to protect citizens against payment of fees not authorized by the constitution. *Turner vs. Maryland*, 107 U. S. 38, distinguished, and *Brimmer vs. Rebman*, 138 U. S. 83, followed."

It appeared from the reports filed by the chief oil inspector with the governor that the fees were greatly in excess of the cost of inspection. Following the decision of the supreme court of the United States above referred to, it was suggested by the attorney general that no inspection fee should be charged for inspecting gasoline when there was in fact no inspection; that whenever special circumstances or special complaints required an inspection of gasoline to be made, some form of inspection should be made and then a fee could be charged, and that the custom of charging the fee where inspection was not made should be discontinued.

This suggestion was concurred in by both the governor and the secretary of state as being in harmony with the ruling of the supreme court of the United States. Accordingly the chief oil inspector directed his men to discontinue the practice of charging inspection fee on gasoline where no inspection was made, and the fees now collected by the oil inspector approximate the actual cost of inspection.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

December 17, 1914.

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

SCHEDULE G.

SENATORS—STATE—TERM OF OFFICE.—Hold until successors are elected and qualified.

ELECTION CONTEST—WITHHOLDING CERTIFICATE IN CASE OF.—Chapter 7 of code does not apply to member of general assembly.

January 3, 1913.

HON. C. G. SAUNDERS,
Council Bluffs, Iowa.

DEAR SENATOR: I am in receipt of your communication of the 28th ultimo requesting an opinion as to whether or not a senator holds over until his successor is duly elected and qualified.

While no specific provision is found with reference to senators in our constitution, section 3 of article 3 expressly provides that "The terms of representatives shall commence on the first day of January next after their election, and continue two years, and until their successors are elected and qualified," and in view of the provisions of section 5, I take it that the same condition obtains with reference to senators of the general assembly. I am therefore of the opinion that the same rule prevails with reference to both senators and representatives, viz: that they hold until their successors are elected and qualified.

After carefully considering the provisions of chapter 7 of the code relating to contest of elections, I am of the opinion that section 1219 relating to the withholding of certificates does not apply to members of the general assembly. Undoubtedly it did not apply as the law originally stood, and I think a reading of the whole chapter will clearly indicate that sections 1208 to 1223 inclusive, have no reference to members of the general assembly but only to county officers. I have not, however, attempted to impose my will upon boards of supervisors and local officers, and regardless of what actually should be done in the granting of certificate in the event of a contest, nevertheless if no certificate is actually granted and no successor actually qualifies, I am of the opinion that you would continue in office until a certificate is given by the proper election officers, or until the general assembly recognizes some one as duly elected.

Yours very truly,

GEORGE COSSON,
Attorney General of Iowa.

TAXATION—ASSESSMENT OF BANK STOCK.—Requirement that bank furnish list of stockholders and method of assessing upon failure to furnish proper lists.

January 18, 1913.

MR. W. E. BENSON, *Assessor*,
Gladbrook, Iowa.

DEAR SIR: Yours of the 17th instant addressed to the attorney general has been referred to me for reply.

You call attention to the fact that you are the assessor and that heretofore certain banks in your county have failed and refused to furnish a list of the stockholders as required by law, and ask to be advised as to the proper method of procedure to be followed by you in the matter.

I recently had some conversation with your county attorney with reference to this matter and advised him that the proper thing for the assessor to do in such cases was to demand a list and that if it was not furnished the assessor might, if he saw fit, bring a mandamus proceeding to compel the furnishing of such list; or the assessor might assess the shares of stock according to the last previous list of which he has knowledge or information. Of course where he has actual notice that a certain stockholder named on the previous list has disposed of his stock to other parties, then he should assess to those parties but in the absence of the proper list he would be justified in assessing to the last known holders of the stock. Then under another section of the statute, the bank becomes liable for the entire tax and is required to pay it and collect from the several stockholders. Hence, it would not be absolutely essential that the stock should have been assessed to the true owners.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

SENATORS—STATE—WHEN APPOINTMENT MAY BE MADE.
January 18, 1913.

HON. CLAYTON B. HUTCHINS,
Representative from Kossuth County,
Statehouse.

DEAR SIR: You call attention to the provisions of section 34, of article III of the constitution of Iowa, relative to the apportion-

ment of senators in the general assembly which reads as follows:

"The number of senators shall, at the next session following each period of making such enumeration, and the next session following each United States census, be fixed by law, and apportioned among the several counties according to the number of inhabitants in each."

and you request the opinion of this department on the following questions:—

First, Whether the action of the legislature required by this section may be taken at a session other than the *next* session following the making of such enumeration; or must it be made at the first session following the completion of the state or national census.

Second, Whether or not the action taken at the last session of the legislature, which consisted merely in re-establishing the existing senatorial districts without reference to any change in the population as shown by the last national census, would deprive this or subsequent legislatures of making such apportionment until the next session following the next state or national census. Or whether this or any subsequent legislature may make such an apportionment.

In my judgment, the power of the legislature to make such an apportionment is not dependent upon this section, but such power is sovereign in its nature and does not need to depend upon the constitutional provision, and that the provision of this section to which you call attention, instead of being a grant of power is more properly a directory admonition requiring the apportionment to be made at given times not for the purpose of making such times the only ones at which the apportionment might be made but for the purpose of preventing the matter being overlooked for too long a period of time. Hence, I am of the opinion that unless the action of the legislature at the last session was sufficient to exhaust this power until after the taking of another census, that the apportionment required by this section might be made at this or any subsequent session of the legislature. And I am also of the opinion that the action of the last legislature was not a sufficient exercise of this power that it could be said to exhaust the power and, therefore the reapportionment provided for might properly be made at this session of the legislature.

In support of this position I call your attention to the case of *Perrin vs. Benson*, 49 Iowa, 325, wherein it was held that a statute requiring the board of supervisors to levy certain school taxes in the year 1875 was sufficiently complied with by making the levy required one year later.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

INTOXICATING LIQUORS—CONSENT PETITION—CANVASSING BY BOARD
—NAMES ON PETITION OF PERSONS DEAD OR WHO HAVE REMOVED FROM COUNTY SINCE SIGNING—WITHDRAWALS AFTER CANVASS HAVE COMMENCED.

February 5, 1913.

MR. JOHN B. HAMMOND,
c/o Waterloo Business Men's Temperance Ass'n,
Waterloo, Iowa.

DEAR SIR: Your "night letter" addressed to the attorney general has been referred to me for reply.

Your first question is whether or not on the hearing before the board of supervisors touching the sufficiency of a saloon consent petition evidence may be heard by said board showing that some, whose names appear on the petition, are dead or have removed from the county.

This question, in my judgment, should be answered in the affirmative. See

Porter vs. Butterfield, 116 Iowa, at 733;
Hammond vs. Waldron, 133 N. W. at 664;
Code section 4669.

It is true that the board would have no right to hear evidence, the purpose of which was to show that the names of the electors who voted at the election were other or different from those appearing on the poll books.

Wilson vs. Bostedt, 135 Iowa, at 451.

Your second question is whether or not withdrawals from the petition may be made after the date set by the board for the canvass of the same and prior to the time the name sought to be withdrawn has been reached for canvass by the board.

This question should be answered in the affirmative. See

Green vs. Smith, 111 Iowa, at 186,
wherein the supreme court states,—

“It is clear that it was the legislative intent that no bar should arise under this law until the statement of consent was *adjudged* sufficient, and that no possible right can *vest* until this matter has been determined. * * * Nor does the law say that the board shall determine the sufficiency of the statement as it was *when filed*. The board has only to deal with it as it comes to it.”

And *Gjerset vs. Drexel*, 136 N. W., at 538, wherein it is said by the supreme court “of the above signers, thirty-two signed and filed withdrawals *before the canvass* by the board of supervisors.”

Your third question is, whether or not names on the petition should be considered where the party has died or removed from the jurisdiction since attaching his signature to the petition.

This question is more difficult of solution than either of the others. It was held in the case of *Gjerset vs. Drexel*, *supra*, that the names of all such should be counted for the purpose of arriving at the numerical basis upon which to compute the required percentage of names, but that case did not touch the question here presented except in so far as it quotes from the provisions of code section 2449 with reference to the question of the clause “residing in such county.” If this clause refers to the time when the petition is filed then, of course, all such names should be counted. If, on the other hand it refers to the time when the petition is canvassed then they should not be counted. In view of the holding of our supreme court that the withdrawal may be made at any time before the actual canvass of the name sought to be withdrawn is made it would seem that the death of a party should operate as a withdrawal of his name from the petition for he would no longer be interested in the question of whether or not saloons were to exist in the territory. And while it is true that the party who removes from the territory possibly would still have the right preserved to him of filing his withdrawal, yet of necessity he ceases to have any further interest in the question as to whether or not saloons should exist in the territory, and there is no good reason why his name should remain

effective upon the petition where his removal from the county is permanent.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

TAXATION—ASSESSMENT OF SHARES IN NATIONAL BANKS.—Value not to be determined by adding borrowed money to amount of capital—True rule laid down.

February 6, 1913.

MR. G. H. RICHARDSON,
c/o First National Bank,
Belmond, Iowa.

DEAR SIR: Yours of the 5th inst. addressed to the attorney general has been referred to me for reply.

Your question is whether or not in determining the value of shares of stock in national banks the borrowed capital that it may have on hand should be taken into account by the assessor, and if so, whether or not deductions may be made on account of bills payable.

Under chapter 63 of the acts of the thirty-fourth general assembly, the bank stock is to be assessed to the individual stockholder, and as the bank and not the stockholder has the money borrowed, it should not be added to the capital of the bank in order to determine the value of the share of stock. In other words, the assessor has nothing to do with the amount of money which the bank may have borrowed nor the amount which it may owe except as these amounts may aid in determining the actual value of the shares of stock. The amount of money borrowed should not be added arbitrarily to the amount of capital, surplus and undivided earnings nor the bills payable deducted therefrom; but the assessor would have the right to take into account these matters in arriving at the real value of the shares of stock.

The true rule under the new law is to find the value of the share of stock held by each stockholder, which share of stock in reality only represents a share in the capital stock, surplus and undivided earnings; then a deduction should be made not for the value of the real estate owned by the bank, but for the

amount of capital actually invested therein and a proportionate share of this deduction on account of real estate should be taken from each share of stock, or rather from the value of the same, as found to be before the deduction was made.

Your enclosures are hereby returned.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

INTOXICATING LIQUORS—CONSENT PETITION.—Withdrawals after canvass of petition has been commenced and before final adjudication by the board of supervisors.

February 7, 1913.

COUNTY ATTORNEY W. P. HOXIE,
Waterloo, Iowa.

DEAR SIR: I received your letter of the 5th instant Thursday the 6th, and yesterday evening I again went over the cases you cited very carefully with Mr. Robbins and Mr. Kelley.

I think the Anderson case you rely upon is not authority for the proposition that no withdrawals can be filed after the canvass commences, because the proposition under discussion there was a withdrawal of a withdrawal, and the supreme court has clearly pointed out that there is a distinction between the principles governing a withdrawal and the principles governing a withdrawal of a withdrawal.

Without again citing the cases, the reasoning of the court, as I interpret the cases, is this: the statute clearly prescribes how and when signatures to a petition may be obtained and they must be obtained thirty days before the petition is filed for canvass. The court has also held that a withdrawal properly executed and properly filed in the office of the county auditor operates in and of itself to withdraw a man's name from a petition and needs no affirmative action or finding on the part of the supervisors to give it validity, although of course in the canvassing of the petition it must be considered by said board, but it operates like a remonstrance which is filed under the provision of section 2451, supplement to the code, 1907; this being true, after a withdrawal is once filed, no withdrawal of a withdrawal or a revocation of a withdrawal may be filed thereafter,

or after the canvass of the petition commences, because to permit this to be done would be permitting the reinstatement of a name after the canvass commenced, and clearly in violation of the statutory provisions relating to the obtaining of signatures to a consent petition.

No such reason or principle obtains, however, in determining when withdrawals may be allowed, but as said in *Green vs. Smith*, 111 Iowa, on page 186:

"It is clear that it was the legislative intent that no bar should arise under this law until the statement of consent was adjudged sufficient, and that no possible right can vest until this matter has been determined. * * * Nor does the law say that the board shall determine the sufficiency of the statement as it was when filed."

This distinction was clearly recognized by our supreme court in the case of *Scott vs. Naacke*, 144 Iowa, on page 167. The court said:

"The appellees' contention that additional petitions should be considered under the rule as to withdrawals announced in *Green vs. Smith*, 111 Iowa, 183, is not sound. The statute itself says what steps shall be taken as to the petition, while nothing is therein said as to the manner of withdrawing names therefrom. In that case we considered the latter question only and the statement in the opinion that the board of supervisors, has only to deal with the statement of consent as it comes to it, *applies only to the matter then under consideration*. The trial court allowed the withdrawals, and did not err in so doing. The statute does not prescribe any particular form therefor, while it does require certain formalities in the statement of general consent."

An examination of the abstract in the Smith case shows that "It was stipulated in open court by and between the parties that before final action by the board on the said petition seventy persons filed applications asking to have their names not counted upon said consent petition and the whole case was argued upon that theory." See page 249 of the bound volume of abstracts and arguments, January term, 1900.

I concur with Mr. Robbins, then, in the opinion that withdrawals are permitted until an adjudication is made by the board, and that the argument in opposition to this goes to the question of

convenience rather than to the underlying principle involved, and that all of the cases which seemingly announce a different rule are announced in connection with the withdrawals of withdrawals or a revocation of withdrawals, or in connection with the removal of county seats or other statutory provisions not identical with the statutes now under consideration.

As to the question as to whether or not a person must be a resident at the time the petition is canvassed, rather than at the time of signing the general consent petition, is in my opinion a much more difficult question. It may be that inasmuch as the conditions of signing are made statutory, the court will hold that all that is required is that the person is a good faith resident at the time of signing the petition. As the court however has said in the Smith case, and other cases following the line of reasoning there, that the board may consider the petition as it is at the time of canvass rather than at the time of filing, and as the very theory of requiring signatures is to ascertain how many people in a community are in favor of the operation of a mullet saloon, on principle and logic there is much reason for saying that a man must be consenting at the time the canvass is made, and if a person has left the country permanently, or has died, he cannot be considered to be consenting or opposing anything. He is as if he were not. On this point, however, I express no opinion at this time.

I am of the opinion that where the board has evidence that either a signature on a consent petition or a signature on a withdrawal is forgery that the board may disregard the same.

Yours very truly,

GEORGE COSSON,
Attorney General of Iowa.

PHYSICIANS AND SURGEONS—RECIPROCITY BETWEEN STATES.—Reciprocity statute does not apply to osteopaths.

February 13, 1913.

DR. S. S. STILL,
300 Century Building,
Des Moines.

DEAR SIR: Your inquiry of February 10th is as to whether or not the provisions of what is called the reciprocity law among

physicians apply to persons engaged in the practice of osteopathy. The reciprocity statute referred to is section 2582-a, supplement to the code, 1907. We find that the law governing the practice of medicine is contained in chapter 17 of the code, while the law governing the practice of osteopathy is found in chapter 17-A of the code. Section 2582 prescribes the examination and other requirements necessary to be taken to secure a certificate for the practice of medicine and in this section is found the reciprocity clause referred to. The law which prescribes the steps necessary to be taken by osteopaths for admission to practice is found in section 2583-a, which section contains no reciprocity clause.

I do not believe that the provisions of 2582 could be read into or made to apply to the provisions of 2583-a. In the first place, they are found in separate and distinct sections and were enacted by different sessions of the general assembly; and again, they appear in entirely different chapters of the statute and apparently have no relation, the one to the other. It is my conclusion, therefore, that the reciprocity clause referred to in your letter does not apply to osteopathic physicians and that the only way which an osteopath may obtain a license to practice in the state of Iowa is by taking the examination as prescribed in section 2583-a of the supplement to the code, 1907.

E. J. KELLY,
Special Counsel.

BOARD OF SUPERVISORS—ALLOWANCE FOR COMMITTEE WORK IN CERTAIN CASES.—Charging for use of automobile owned by a member of the board illegal.

February 20, 1913.

DANIEL F. STECK,
County Attorney,
Ottumwa, Iowa.

DEAR SIR: Yours of the 17th inst. addressed to the attorney general has been referred to me for reply.

Your questions are as follows:

“I. Our board of supervisors in 1911 abolished the practice of letting county bridge work on contracts by the year. They purchased their own concrete mixers, hired their own men by

the day, each gang under a foreman, personally bought all material and supervised all work, charging for the time thus put in as committee work. Complaint has been made to me that they by such facts violated section 468-a of the 1907 supplement, on the theory that they were contracting for and performing work for the county for which they were receiving pay as supervising foremen.

"II. One member of our board of supervisors during the summer and fall of 1912 was the owner of an automobile; previous boards and this one before that time had been hiring teams and automobiles to carry them to supervise and inspect county work and property at the expense of the county at an average expense of about seven hundred dollars (\$700.00) per year. During last summer and fall the board used this member's machine at an agreed price of three and fifty one-hundredths (\$3.50) dollars per day, much less than it could have been secured elsewhere; at the end of the year he put in a claim for three hundred and fifty (\$350.00) dollars which was allowed by the other two members and paid."

With reference to your first question, will say that I can see no legal objection to the supervisor being paid the amount allowed per day for committee work for time employed in supervising the building of the county bridges. While in a sense the supervisor may be said to be working for the county, yet he is not employed by the county to do such work but does it by virtue of his office, and he should only receive the compensation fixed by code supplement section 469 as amended by chapter 24, acts of the thirty-fourth general assembly. The per diem for committee work being fixed at four dollars (\$4) per day by section 4 of the acts last referred to, and assuming that no more than four dollars (\$4) per day for the time actually employed has been allowed, I should say there was nothing illegal in connection with the transaction.

With reference to your second question, it would seem that the amount allowed by the board to one member of the board for the use of his automobile in conveying himself and the other member of the board to and from the places where they were required to be is clearly illegal under the holding of our supreme court in the case of *State vs. York*, 131 Iowa, 635. In that case our court, in construing the same section as applied to a case where a township trustee had furnished for the use of the township a team and driver for use on township road work, said:

"This we think does, in plain unambiguous terms, prohibit the act with the doing of which defendants are charged. It is true, the indictment alleges that the labor was furnished under a contract with the road superintendent, but it is also alleged that the labor was so furnished for the township, and that defendant received pay therefor from the township. The road supervisor is the officer through whom, under the direction of the trustees, the labor and money provided for the construction and repair of the roads are expended, and is the person by and through whom the labor for such purpose is employed. See code, title 8, chapter 2, and amendments thereto. The trustees are vested with authority to appoint the road superintendent and fix his compensation. Code, section 1523. They also fix the wages or compensation to be allowed for labor done on the road, and provide for the purchase of tools, supplies, and machinery for their township. Code, section 1528. And it is under their authority and direction that the taxes collected for road purposes are to be equitably and judiciously expended. Code, section 1533. It is obviously a matter of wise public policy that these trustees, who are thus expressly charged with the responsibility of appropriating and expending public funds, and of fixing the price which shall be paid for labor and supplies furnished their township, shall not be exposed to the temptation to use their official position to their own private advantage, and to that end the legislature has undertaken to prohibit them from having any direct interest in such contract. The wisdom of this is doubly apparent when we note that, in the cases at bar, the alleged contracts for the use of the township were made by the trustees with an officer appointed by them, subject to removal by them, and whose compensation is fixed by them."

I can see no difference in principle between that case and the case mentioned in your second question. It is immaterial that the allowance made in the particular case was reasonable in amount. What the law seeks to do is to prevent members of the board and township trustees from having any opportunity to overcharge the county or township in any matter where they are directly interested.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

SCHOOLS—FREE TEXT BOOKS.—Petition for submitting proposition to voters necessary.

February 25, 1913.

MR. THOMAS H. ANGELL,
Lyons, Iowa.

MY DEAR SIR: Your letter of the 21st instant addressed to the attorney general has been referred to me for reply.

Section 2836 of the code provides as follows: "Whenever a petition, signed by one-third or more of the legal voters to be determined by the school board of any school corporation, shall be filed with the secretary * * * he shall cause notice of such proposition to be given," etc.

The only way by which the school district is authorized by law to use the public money for supplying text books is when the voters of the corporation so order as provided by law and the only legal way that the question of free text books can be submitted to the voters is the way prescribed in section 2836 above quoted. The school board would have no jurisdiction to submit the question to the voters unless the petition therein referred to shall have been filed and signed by the requisite number of voters.

You ask whether or not if the board is willing it could submit the question without the petition or by petition of less than one-third of the voters. The board has no power to do anything except that which is provided in the statute or reasonably implied and the statute especially provides that before such question can be submitted this petition must be filed, hence unless the required petition is filed, the board would be authorized to do nothing in regard to free text books.

Very truly yours,

E. J. KELLY,
Special Counsel.

TAXATION—EXEMPTION FROM.—Team of rural mail carrier exempt.

February 26, 1913.

MR. W. C. JOHNSON,
Randolph, Iowa.

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

Your question is whether the team of a mail carrier is exempt from taxation, the same as a drayman or a teamster. The statute covering this question reads as follows:

"The farming utensils of any person who makes his livelihood by farming, the team, wagons and harness of the teamster or drayman who makes his living by their use in hauling for others * *"

"In common speech a teamster is one who drives a team; but in the sense of the statute every one who drives a team is not necessarily a teamster, nor is he necessarily not a teamster when he does not drive a team continually. In the sense of the statute one is a teamster who is engaged with his own team or teams in the business of teaming; that is to say, in the business of hauling freight for other parties for a consideration, by which he habitually supports himself and family, if he has one. While he need not, perhaps, drive his team in person, yet he must be personally engaged in the business of teaming habitually and for the purpose of making a living by that business." *Edgecomb vs. His Creditors*, 7 Pac. 533, 534, 19 Nev. 149.

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

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

MORTGAGES.—Securing later advances may be enforced.

February 28, 1913.

HON. JOHN L. BLEAKLY,
Auditor of State.

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

You call attention to the fact that certain banks are including in their farm mortgages the following clause:

"It is hereby understood and agreed that this mortgage shall stand as security not only for the above mentioned note,

but for any other note or notes or overdrafts or any other evidence of debt now owing, or hereafter owing, by either of us, to said bank, the intention being to secure the bank against all our indebtedness."

And you inquire whether or not a bank may legally secure overdrafts or other indebtedness not yet contracted in this manner. Your question resolves itself into the question as to whether or not a mortgage securing after advances may be enforced.

"Future Advances. 1. Validity—A. In General. A mortgage may be made as well to secure future advances or loans of money to be made by the mortgagee to the mortgagor as for a present debt or liability, and if executed in good faith it will be a valid security. It may also be made to cover the value of goods thereafter to be sold to the mortgagor, or for the payment of future accruing accounts between the parties, and is equally valid, although the advances are to be made in building materials in lieu of money. Nor is it essential that the mortgagee should be absolutely bound to make the contemplated advances; between the original parties at least the mortgage will be a valid security, although the making of the advances was left to his option or discretion. And the validity of the mortgage is not necessarily impaired by the fact that it does not show upon its face the real character of the transaction, although it recites an existing debt as its consideration, it may be shown that it was intended to cover future advances, and the mortgagee can recover the amount actually advanced up to the time of enforcing the security. The question of good faith is always open to inquiry, but the mere fact that the mortgage was given to secure future advances, while it recites a present debt, or that it was given for a larger amount than was loaned at the time, and with a view of covering future loans, is not conclusive of fraud." 27 Cyc. 1069-1070.

"A mortgage expressly providing that it shall secure future indebtedness of the mortgagor of any kind will protect the mortgagee for advancements made, or liabilities incurred, on different accounts or of a different nature from those specially mentioned in the mortgage. But if the security of the mortgage is limited to advancements of a particular kind, as, for future endorsements or acceptances, it will be strictly

confined to obligations of the sort mentioned. Where it is given for future 'advances' generally, it is a question of construction whether the claim sought to be collected comes fairly within its terms." 27 Cyc. pp. 1071-72.

"A mortgage may be given not only as security for future advances to a specified amount but also as a general security for a general balance of accounts between the parties or for balances which may become due from time to time from the mortgagor." 27 Cyc. 1073.

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

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

HOTELS—FIRE ESCAPES—STORY DEFINED.

February 28, 1913.

LAFAYETTE HIGGINS,
Hotel Inspector.

DEAR SIR: Yours of the 24th instant addressed to the attorney general has been referred to me for reply.

Your question is whether or not a two and one-half story building should be treated as a three-story building under the provisions of the hotel inspection law and the law concerning fire escapes.

In my judgment this question should be answered in the affirmative. Webster defines a story as being a set of rooms on the same floor or level. A floor or the space between two floors. In the case of *Cleverly v. Mosely*, 148 Mass. 280, it was held that the basement of a building should be counted as a story according to the definition of lexicographers and the common understanding of the word.

"A story of a building is a set of rooms on the same floor or level, a vertical, physical division of the house."

36 Cyc. 1331.

Hence, if there are rooms above the second story, whether they are half-story rooms or less, they should still be counted as a story within the meaning of this law.

As per your request, the letter of your deputy is hereby returned.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

TAXATION—ASSESSMENT AGAINST REAL ESTATE TO AID IN CONSTRUCTION OF RAILROAD.—Tax should be spread against land and not as personal tax.

March 4, 1913.

SAM C. SMITH, Attorney,
Winterset, Iowa.

DEAR SIR: Yours of the 25th ultimo, addressed to the attorney general, has been referred to me for reply.

You call attention to the fact that on September 30, 1911, a special election was held in one of the townships in your county and a 5% tax voted in aid of a certain railroad company, and that the certificate of the township clerk showing the result of the vote was filed in the office of the auditor on October 5, 1911, and filed and recorded in the office of the county recorder on January 6, 1912; and that A, who on January 1, 1911, owned certain real estate in this township sold and conveyed the same on March 1, 1912, to B. And you further state,—

“the county auditor in spreading the tax in aid of the railroad, assessed it against the land in the name of B, making the tax appear as the personal debt or obligation of B.

“My contention is that the tax should have been levied against A, that is the tax on the land, and that he is in the first instance liable for the payment of the same, and that there is no personal liability against B for the payment of the amount of taxes assessed on the land in question.

“I believe the tax list as made out by the auditor should be changed and the assessment made against the land owner on Jan. 1st, 1911, and not against the present owner, or against one who owned the land Jan. 1st, 1912 and did not own it Jan. 1st, 1911.

“I would like very much to have your opinion on the question.”

I agree with you that this tax is not the personal debt or obligation of B. However, I am unable to subscribe to the remainder of your contention. I think you are in error in assuming that the tax is the personal debt of anyone, either A or B. Our supreme court has determined that unpaid taxes do not constitute a debt which may be deducted from moneys and credits being assessed. (See *Bailies vs. State*, 127 Iowa, 124; also 13 Cyc. p. 395.)

In my judgment the tax against the particular piece of land should be spread against that land at the time it is spread without reference to who may be the owner at that time, and the question of whether or not the tax was a lien on the land at the time B purchased from A in such a way as that B could recover from A the amount thereof would depend upon the terms of their contract to purchase. In other words, the officer whose duty it is to collect the tax can only collect the same by proceeding against the land. He can proceed against neither A nor B on the theory that it is a “personal debt or obligation” of either.

I note your statement that some question is liable to arise as to the validity of the tax levied in the year 1912 based upon a violation or assessment of 1911, but upon this I express no opinion as you say you are not interested in it at this time.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

CITIES—UNDER COMMISSION PLAN.—Commissions supersede board of waterworks trustees.

March 4, 1913.

JAQUES & JAQUES, Attorneys,
Ottumwa, Iowa.

GENTLEMEN: Yours of the 26th ultimo addressed to the attorney general has been referred to me for reply.

Your question is whether or not when a city such as the city of Ottumwa becomes a city under the commission plan of government the waterworks trustees provided for by code supplement section 747-a are superseded by the members of the council.

This department has so construed code supplement section 1056-a25, as amended, as to require the answering of your inquiry

in the affirmative. The express provision is that the council shall have and possess, and its members shall exercise all legislative and judicial powers and duties now had, possessed and exercised by the "mayor, city council, board of police and fire commissioners, board of waterworks trustees," etc.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

DISCRIMINATION—UNFAIR—CHAPTER 222, ACTS OF THE THIRTY-THIRD GENERAL ASSEMBLY DISCUSSED—EVIDENCE NECESSARY TO CONVICT.—What may be done to meet competitor without violating the statute.

March 6, 1913.

J. J. JOSLIN, *Sec'y*,
Hartley Creamery Co.,
Hartley, Iowa.

DEAR SIR: Your letter of the 7th ultimo addressed to the attorney general, together with the enclosed letter of County Attorney R. J. Locke, has been referred to me for reply.

The statute defining the crime of unfair discrimination is found in chapter 222 of the acts of the thirty-third general assembly, which reads as follows:

"Any person, firm, company, association or corporation, foreign or domestic, doing business in the state of Iowa and engaged in the business of buying milk, cream or butter fat for the purpose of manufacture, or of buying poultry, eggs or grain for the purpose of sale or storage, that shall for the purpose of creating a monopoly or destroying the business of a competitor discriminate between different sections, localities, communities, cities or towns of this state by purchasing such commodity or commodities at a higher price or rate in one section, locality, community, city or town than is paid for the same commodity by said person, firm, company, association or corporation in another section, locality, community, city or town, after making due allowance for the difference, if any, in the grade or quality, and in the actual cost of transportation from the point of purchase to the point of manufacture, sale or storage, shall be deemed guilty of unfair dis-

crimination which is hereby prohibited and declared to be unlawful but prices made to meet competition in such locality shall not be in violation of this act;"

It will be observed that in order to procure a conviction of this crime it would be incumbent upon the state to prove beyond a reasonable doubt

First, that the defendant was a firm, company, association or corporation doing business in the state of Iowa and engaged in the business of buying milk, cream or butter fat *for the purpose of manufacture.*

Second, that such defendant formed the purpose of creating a monopoly or destroying the business of a competitor.

Third, that pursuant of such purpose the defendant discriminated between different sections, localities, communities, cities or towns by purchasing milk, cream or butter fat at a higher price in one locality than was paid for the same commodity by the defendant company in another section or locality, after making due allowance for the difference, if any, in the grade or quality, and in the actual cost of transportation from point of purchase to point of manufacture.

Fourth that said higher price paid at one point was not made or paid for the purpose of meeting competition in such locality.

In my judgment, it is immaterial whether the competitor whose business is sought to be destroyed buys only at a receiving station in the same town or locality or from the farmers along routes established through the county for the purpose of gathering up such milk, cream or butter fat. The points of purchase referred to in the act are those at which the defendant rather than the competitor makes its purchases. While I would not wish to be understood as saying that a conviction could not be sustained by proof that the defendant paid 1c per pound more in the locality where the competitor whose business is sought to be destroyed was located, yet this slight difference alone would not be sufficient evidence of the unlawful purpose with which the discrimination is required to be made in order to render the defendant guilty of the offense. If, in addition to the difference in price, the state will be able to show any statement of the defendant company or its officers or agents showing that their purpose in paying the higher price was to drive out the competitor or destroy his business, the evidence would be sufficient to warrant a conviction.

As to just how far one concern may go in meeting competition is a question upon which lawyers and judges differ, some contending that the one meeting competition must not pay a higher price than that paid by the competitor whose competition is being met; while others contend that they might lawfully go beyond this price and pay a higher price, in other words, make as well as meet competition, if it is not done for the unlawful purpose of destroying the business of the competitor or creating a monopoly.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

CITIES AND TOWNS—ELECTION OF CERTAIN OFFICERS BY COUNCIL—
TERM OF OFFICE OF CLERK AND ATTORNEY—ATTORNEY ELECTED
EACH YEAR—CLERK ELECTED BIENNIALY.

March 11, 1913.

MR. A. C. METTZEN,
Avoca, Iowa.

DEAR SIR: I am in receipt of your letter of the 10th instant requesting an opinion as to whether it will be necessary for you to elect a city attorney at the April meeting of your council.

The term of a city or town solicitor is not fixed by statute except in cities of over 4,000 inhabitants, where such officer is elected by the people. Paragraph 10 of section 668 of the supplement to the code, 1907, authorizes a city or town council to fix by ordinance the term of service of the officers elected by it where their terms are not fixed by statute, and under this section the term cannot exceed one year in towns.

The ordinance quoted by you conforms to the statute above cited and it will be necessary for you to elect an attorney under its provisions.

With respect to the election of a city clerk it is my opinion that section 651 of the supplement to the code, 1907, fixes his term of service at two years. This section reads in part as follows:

“In all cities and towns, the council, at its first meeting after the biennial election, shall appoint a clerk.”

You will readily see that no other time is fixed for the election of a clerk except at the first meeting after the biennial election and, therefore, it follows that the election is for two years. It may seem at the first glance that paragraph 10 of section 668, which I have above cited with reference to the appointment of city attorney, might conflict with this view, but that section only authorizes a council to fix by ordinance the terms of service of the officials elected by it where their terms are not prescribed by law. The term of office of the city clerk being fixed under section 651 cannot be changed by ordinance.

Yours truly,

JOHN FLETCHER,
Assistant Attorney General.

SCHOOLS—TERM “NEAREST HIGH SCHOOL” AS USED IN CHAPTER 146
ACTS OF THE THIRTY-FOURTH GENERAL ASSEMBLY INTERPRETED.
—Held to mean distance between the school house and the
high school and not between pupil's residence and high school.

March 12, 1913.

MISS CARRIE E. LUDLOW,
Winterset, Iowa.

DEAR MISS LUDLOW: Yours of the 10th instant addressed to the attorney general has been referred to me for reply.

You call attention to the provision of section 1 of chapter 146 of the acts of the thirty-fourth general assembly which reads as follows:

“Any person of school age, who is a resident of a school corporation not offering a four-year high school course, and who has completed the course of study offered in such school corporation shall be permitted to attend any high school that will receive him, provided the average cost of tuition allowed shall not exceed the average cost of tuition in the nearest high school, under the conditions and provisions of section two (2) of this act.”

And you inquire what is meant by the term “the nearest high school” as used in said section, whether it means the high school nearest the home of the pupil or nearest his school corporation.

The question is one not entirely free from doubt and I have been unable to find any authorities which would throw any light upon the legislative intent. It will be observed that the statute does not require the pupil to attend the nearest high school, but the nearest high school is used simply as a standard by which to fix the maximum tuition for which his home district may be rendered liable to the school corporation which does receive him.

Any given school corporation is, as a rule, surrounded by half a dozen or more school corporations each of which would be equally near the given school corporation as each is adjacent to it. So that it would seem to me it was not the intent to measure the distance between school corporations and that the legislature either meant to have the distance measured from the residence of the pupil to the high school building furnishing a four-years' course nearest such residence, or to have the distance measured between the school building of a pupil's school corporation and the building of the nearest high school furnishing the four-years' high school course.

Let us suppose there is a given school corporation in which there is a high school building but which does not furnish a four-years' high school course with a half dozen high school pupils residing therein, each attending a separate high school in an adjoining school corporation. If the distance is to be measured from the residence or homes of the respective pupils to the high school building nearest such home, we would probably have as many different standards of maximum tuition as we would have high school pupils attending such school. And we might, for example, have the same school corporation paying one district for the tuition of A \$1.00 per month; another for the tuition of B \$2.00 per month; another for the tuition of C \$3.00 per month; another for the tuition of D \$4.00 per month, etc., notwithstanding the fact that all of the high school pupils named resided in and are to be schooled at the expense of the same district. Whereas, if the distance is to be measured from the school building in the school corporation in which the high school pupils reside to the building in which the nearest high school furnishing the four-years' course is located we would have but a single high school rate for the tuition of all in such school district.

Hence, I am of the opinion that the distance should be measured neither from the residence of the pupil nor from the boundary of

his school corporation, but from the building in such school corporation to the high school furnishing such four-years' course.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

NEWSPAPERS—COMPENSATION FOR PUBLISHING LAWS OF GENERAL ASSEMBLY.—Rate the same whether paid by state or individuals.

March 15, 1913.

REGISTER & LEADER,
Des Moines, Iowa.

GENTLEMEN: Your letter of the 14th instant addressed to the attorney general, in reference to rate for legal publications, has been referred to me for reply.

The statute which regulates the compensation for publishing of laws, bearing a publication clause, enacted by the general assembly, is code section 47 and reads as follows:

“The compensation for the publication of laws which are ordered by the general assembly to take effect by publication, unless otherwise fixed, shall be audited and paid by the state, and shall be one-third the rates of legal advertisements allowed by law.”

The statute regulating the compensation for the publication of legal notices is section 1293 of the supplement to the code 1907, and reads in part as follows:

“The compensation *when not otherwise fixed* for the publication in a newspaper of any notice,” etc.

The latter section seems to indicate that the rate on certain notices has been regulated and controlled by particular statutes. Code section 47 provides what the rate shall be for publication of such statutes, and we are of the opinion that that section of the code would govern and that the fact that the notice was paid for by private parties, rather than by the state, could make no difference in the rate of charge.

Very truly yours,

E. J. KELLY,
Special Counsel.

CORPORATIONS—LIMITATIONS OF INDEBTEDNESS.—Indebtedness cannot exceed two-thirds of "paid up" capital stock.

March 19, 1913.

GENTLEMEN: Yours of the 17th instant addressed to the attorney general has been referred to me for reply.

Your question is as follows:

"The executive council desires to be advised as to whether the limitation placed in code section 1611, as to the debt which a corporation can legally create or assume applies to the amount of stock actually paid up or does it apply to the amount of stock which the company might be authorized to issue under its articles if the total issue were outstanding. For instance, if a company present to the council an application in which it shows by appraisements that it has real estate in the value of \$45,400.00 upon which it has incumbrance in the amount of \$23,500.00 and asks for an issue of stock in the amount of \$21,900.00 which is to be the entire stock outstanding, should the council grant this under the law or should the council limit the indebtedness it might assume on account of the property to two-thirds of the amount of stock authorized to be issued."

The code section to which you refer provides:

"Such articles must fix the highest amount of indebtedness or liability to which the corporation is at any one time to be subject, which in no case * * * shall exceed *two-thirds of its capital stock*."

Code supplement section 1641-b, prescribing the duties of the executive council with reference to the fixing of values of property received in exchange for corporate stock to be issued, reads as follows:

"If it is proposed to pay for said capital stock in property or in any other thing than money, the corporation proposing the same must, before issuing capital stock in any form, apply to the executive council of the state of Iowa for leave so to do. Such application shall state the amount of capital stock proposed to be issued for a consideration other than money, and set forth specifically the property or other thing to be received in payment for such stock. Thereupon, it shall be the duty of the executive council to make investiga-

tion, under such rules as it may prescribe, and to ascertain the real value of the property or other thing which the corporation is to receive for the stock; and shall enter its finding, fixing the value at which the corporation may receive the same in payment for capital stock; and no corporation shall issue capital stock for the said property or thing in a greater amount than the value so fixed and determined by the executive council."

In my judgment, the words quoted from code section 1611, "two-thirds of its capital stock", should be construed to mean paid up stock and not merely stock which might thereafter be issued. The indebtedness should bear some relation to the financial responsibility of the concern and this in turn will be governed by the amount of its paid up capital stock, whereas its authorized capital would have no bearing thereon whatever. If the corporation taking over the encumbered property assumes and agrees to pay the encumbrance thereon, then such encumbrance becomes its debt, as much so as if it had originally contracted the same. If, on the other hand, the corporation taking over the property merely takes the property *subject to* the encumbrance, without assuming and agreeing to pay the same, then the encumbrance would not be the debt of the corporation; but in such case the value of the property as fixed by the executive council should be the value less the encumbrance, and the amount of stock to be issued for the property should be fixed accordingly; and in the case which you suppose, if the property valued at \$45,400 might be taken over subject to the encumbrance of \$23,500 without this encumbrance becoming the debt of the corporation by its having to assume the same, then it would be within the law to permit stock to be issued for the full value of the equity in the property, to wit: \$21,900. If, on the other hand, the corporation is required to assume the \$23,500 of indebtedness consisting of the encumbrance upon the property, then in addition to the paid up stock, which would be issued for its equity in this property purchase of \$21,900, it would be required to have an additional paid up capital stock in the sum of \$13,350, or a total paid up capital of \$35,250, of which sum the \$23,500 indebtedness assumed would be two-thirds.

If, as stated in the latter part of your letter, the encumbrance to be assumed is reduced to \$18,160 and the council found the ac-

tual value of the property to be \$45,400, then it might be accepted and a paid up capital stock issued in the sum of \$27,240.

Respectfully submitted,

C. A. ROBBINS,
Assistant Attorney General.

HONORABLE EXECUTIVE COUNCIL,
Statehouse.

REGISTRATION OF ANIMALS—RENEWAL OF CERTIFICATES BY BOARD OF AGRICULTURE.—When animal was registered before chapter 100, acts of the thirty-fourth general assembly was enacted, a re-registration is unnecessary.

March 24, 1913.

MR. A. R. COREY, *Sec'y*,
Department of Agriculture.

DEAR SIR: Yours of even date addressed to the attorney general has been referred to me for reply.

You call attention to the provisions of sections 1 and 4 of chapter 100 of the acts of the thirty-fourth general assembly and to a particular breeders' association which was recognized in this state prior to the enactment of this law but which is no longer thus recognized, and your question briefly stated is whether or not you would have the right to refuse to renew the state certificate of an animal registered from such association at a time when it was recognized.

While the two sections referred to are somewhat at variance, I am inclined to think the matter would be controlled by section 4, which reads as follows:

"Where certificates of registration have heretofore been issued by the state board of agriculture, an additional certificate of registration shall not be required."

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

FIRE ESCAPES—NECESSITY FOR ON CERTAIN BUILDINGS.—Boarding houses and lodging houses distinguished.

March 31, 1913.

W. H. MEEKER, *Chairman*,
College Safety Committee,
Ames, Iowa.

DEAR SIR: Your letters of the 17th and 28th instant addressed to the attorney general have been referred to me for investigation and reply.

You enclose what you designate as "a copy of the ordinance on fire escapes". However, the enclosure shows upon its face that it is a resolution instead of an ordinance, and hence in my judgment it is of no legal force or effect whatever. This is perhaps not very material in view of the fact that the state law contains the same provisions.

Your questions as stated by you are as follows:

"1. A family of three persons consisting of man, wife and maid occupies a two story house with attic. This family has six student roomers. Total number occupying the house is nine. Four of the student roomers have their sleeping rooms in the attic of the house. Can we compel the owner or lessee of this house to install fire escapes as provided under section 3 for classifications 2 under section 2?

"2. A woman without family rents a three story house. She employs two servants and takes a club of fifteen students to room and board. Total number occupying the house is eighteen. A part of the students have their sleeping rooms on the third floor. Can we under the law compel the owner or lessee of this house to equip it with fire escapes as provided by section 3 for buildings in the second classification under section 2?"

These questions call for an interpretation of code supplement section 4999-a7, and especially paragraphs first and second thereof, which are as follows:

"First. Hotels, office buildings or *lodging rooms* of three or more stories in height.

"Second. Tenements or *boarding houses*, of three or more stories in height, occupied by one or more families, or aggregating twenty (20) persons or more;"

It will be observed that *three story lodging houses* are subject to the law, while *three story boarding houses* are not unless occupied by two or more families or twenty or more persons.

"A *lodging house* is as the term implies a house containing furnished apartments which are let out by the week or month without meals or with breakfasts simply."

Cromwell vs. Daly, 2 Daly 15, (N. Y.);

5 Words & Phrases, p. 4227.

"A *boarding house* is a place where a guest is under an express contract for *food and lodging* at a certain rate for a certain period of time."

Willard vs. Reinhardt, (N. Y.) 2 E. D. Smith, 148;

1 Words & Phrases, p. 815.

While you do not so state, I assume from your statement that the student roomers mentioned in your first question do not take their board in the same house; if not the place would be a lodging house and it would be subject to the law and required to be equipped with fire escapes under subdivision "First" of the law above quoted.

If they take their meals in the building, then the house like the house mentioned in question 2 would be a *boarding house* and would fall under subdivision "Second", and would not be required to be equipped with fire escapes, unless two or more *families*, or in the aggregate twenty persons or more occupy the same. Hence your first question should be answered in the affirmative and your second in the negative.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

LAKE BEDS.—Lease of for term of years not permissible.

April 1, 1913.

HONORABLE EXECUTIVE COUNCIL,
Statehouse.

GENTLEMEN: Your letter of the 31st ult., addressed to the attorney general, has been referred to me for reply.

Your question is whether or not the executive council would have power to lease lake beds or other lands owned by the state

for a term of fifty years under the power conferred by section 5 of chapter 186 of the acts of the thirtieth general assembly.

This section reads as follows:

"Whenever the executive council shall determine that any lake or lake bed within the state should be drained, improved, demised or sold, it shall have the right, either before or after such lake or lake bed is drained, *to sell and convey by deed or patent* the land lying within the meander lines of such lake or lake bed and which belongs to the state; and express authority is hereby given to the executive council to make such sale or sales for and in behalf of the state, and to execute and deliver to the purchaser of such land the necessary deed or patent to insure to him title thereto, which deed or patent shall be executed by the governor in behalf of the state, and have the seal of the state attached thereto. But no sale of any of the lands composing any of the lake beds of the state shall be made by the executive council until a complete survey thereof has been made and the same subdivided to correspond with the government subdivisions of public land."

The question presented is, whether or not a power to lease is included within the power to sell.

Where a will authorized executors to sell certain property in their discretion, they were not thereby authorized to lease the property. *Slocum vs. Slocum*, (N. Y.) 4 Edw. Ch. 613, 618.

A lease for twenty years of a part of the premises held by the lessor as a lessee for life is not a breach of the covenants of such lessee not to sell, dispose of or assign his estate in the demised premises. Nothing short of an assignment of his whole estate would amount to such a sale.

John vs. Harrison, (N. Y.) 17 Johns., 66.

The constitution of the state of Wisconsin making provision for the sale of all school and university lands and requiring that they shall be sold and the purchase money paid at the time of the sale, contemplates a transaction where the *fee* to the land passes out of the estate and becomes absolutely vested in the purchaser.

Smith vs. Mariner, 55 Wis., 551.

A power to sell does not as a rule authorize a lease.

31 Cyc., 1081, and cases there cited from the supreme courts of Connecticut, New York, Ohio, England and the United States.

But circumstances may justify a departure from the words of the power.

Hedges vs. Ricker, 5 Johnson, Ch. (N. Y.), 163.

I see nothing in the body of the act that would justify a departure from the general rule that a lease is not to be deemed included within a sale. The language of the act undoubtedly would indicate that no lease was intended for it is stated that the council shall have the right to sell and convey "by deed or patent", rather than by any lease. Furthermore, it is provided in section 4 of the same chapter, "if the executive council shall determine that such lake or lake bed ought not to be drained, demised or sold, the same *shall be kept* and maintained as the property of the state for the benefit of the general public."

In view of the language of this act, and in the light of the authorities aboved cited, your inquiry must be answered in the negative. The legislature, no doubt, would have power to confer the right to lease but, in my judgment, it has not done so by the legislation above referred to.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

AUTOMOBILES—TAXATION OF.—Dealers must list for taxation all cars not bearing an individual license.

April 8, 1913.

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

DEAR SIR: Yours of the 7th instant addressed to the attorney general has been referred to me for reply.

Your question is whether or not an automobile dealer is exempt from taxation or registration fees on automobiles where he has a dealer's number only. Our interpretation of this statute has been to the effect that the dealer's number was a separate license and under one and the same dealer's number he might operate on the highway while demonstrating any number of cars for which he has procured duplicate number plates. In addition to this, the dealer would be required to pay the tax on the auto-

mobiles the same as other vehicles unless he procured the registration of each individual car. By procuring the registration of each individual car he may then, upon a sale of the car being made, transfer the registration license to the purchaser upon the payment of a one dollar fee, and in this way he would not be required to list the property with the local assessor for taxation.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

COUNTY ATTORNEY—APPEARANCE IN CRIMINAL PROSECUTIONS.—

What sufficient to entitle him to per cent of fine collected.

April 10, 1913.

MR. SAM C. SMITH,
Winterset, Iowa.

DEAR SIR: Your letter of the 5th instant addressed to the attorney general has been referred to me for reply.

Your question is to what extent a county attorney must appear in a criminal prosecution in order to be entitled to a percentage of the fine collected under the provisions of code supplement section 308. The language important to be considered in determining the question reads as follows:

"In addition to the salary above provided, he shall receive the fees as now allowed to attorneys for suits upon written instruments where judgment is obtained, for all fines collected where he *appears* for the state."

An appearance does not mean the mere corporal presence of the defendant or his agent at the place of trial, but where some act is performed, such as filing of an answer or demurrer, it amounts to an appearance.

McCoy vs. Bell, 20 Pac., 595.

Where in a suit pending in justice court neither party was personally present within one hour of the time fixed but plaintiff sent a written request to the justice to continue the case to a later hour, upon which the justice acted, this amounted to an appearance.

Wagner vs. Kellogg, 52 N. W., 1017.

Hence, in my judgment, based upon the authorities cited, a county attorney would be entitled to the percentage in all cases where the fine was imposed and collected during his term of office where he in any way directed the prosecution, whether he appeared personally before the justice or not.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

CONTAGIOUS DISEASE—REMOVAL FROM ONE PLACE TO ANOTHER OF
PERSONS AFFLICTED WITH.—Jurisdiction of offense discussed.

April 25, 1913.

FRANK HOLLINGSWORTH,
County Attorney,
Boone, Iowa.

DEAR SIR: I have this afternoon attempted to find authorities on the question of jurisdiction in the smallpox cases referred to by you in our talk this morning. I do not find any cases directly in point on the question, but it does seem to me that the jurisdiction must be in Boone county.

Section 5157 of the code with respect to jurisdiction of offenses reads as follows,—

“When a public offense is committed partly in one county and partly in another, or when the acts or effects constituting or requisite to the consummation of the offense occur in two or more counties, jurisdiction is in either county, except as otherwise provided by law.”

The section under which you return an indictment (2575-a6 code supplement) punishes for the removal of persons having a contagious disease “from one city, town or township to another city, town or township”, etc. Under this statute a crime would not be committed when a person afflicted with a contagious disease was placed upon a train at Perry, Iowa, but would only be committed when the person was conveyed into another city, town or township; and if the town or township to which the person was removed was situated in another county the offense would not be consummated until the afflicted person reached such town,

and venue of the offense would be in the county where the town was situated to which he was removed. In other words, something more must be done under the statute to constitute an offense than the mere attempt to remove. There must be a removal from one town to another. Consequently there is no offense committed until the removal is completed and then the crime is consummated.

After the act of removal has been fully carried out then an indictment will lie, in my judgment, in either county; either in the county where the removal started or where it was consummated.

It seems to me that the cases on the pollution of streams are applicable to this case and the leading cases are

State vs. Glucose Sugar Refining Co., 117 Iowa, 524;

State vs. Spayde, 110 Iowa, 726;

State vs. Smith, 82 Iowa, 423.

In that class of cases the court holds that where the acts of defilement of a river are committed in one county, and the injury results to residents of another, the prosecution may be brought in either county and very properly brought in the county where the injury results. The purpose of the statute under consideration is to prevent the spread of contagious diseases. If patients residing in Perry, afflicted with smallpox are permitted to be transported to Boone the injury results to Boone county, the locality to which the diseased has been transported.

Under a statute similar to ours it has been held that on a trial for enticing away a laborer from his employer, the legal jurisdiction is not necessarily the county in which the defendant made the contract of hire with the laborer, but where the acts necessary to the consummation of the offense occur in two counties the jurisdiction is in either.

See also,

Prestwood vs. State, 87 Ala., 147; 6 So. 392;

Hawk vs. State, 148 Ind. 238, and

State vs. Dvoracek, 140 Iowa, 266.

As I have above stated I cannot find any cases directly in point, but in view of the wording of the statute the acts constituting the offense and requisite to its consummation were not completed until the person afflicted with the contagious disease was landed in Boone, and no offense was committed until such time, and the

venue would properly be in either county under section 5157 above cited.

Yours truly,

JOHN FLETCHER,
Assistant Attorney General.

MACHINERY—DANGEROUS—OPERATION BY MINORS.—Held that the state labor commissioner has the authority to enforce the provisions of the statute as against a manual training school.

May 12, 1913.

A. L. URICK,

Commissioner of Labor.

DEAR SIR: In reply to your oral request for the opinion of this department on the question of whether or not you are authorized to enforce the provision of law against the operation of dangerous machinery by minors when such machinery is located in a manual training school, will say that code supplement section 4999-a2 provides:

"It shall be the duty of the owner, agent, superintendent, or other person having charge of any manufacturing or other establishment where machinery is used to furnish a supply, or cause to be furnished, a supply (Here follows description of certain safety devices). No person under sixteen years of age and no female under eighteen years of age shall be permitted or directed to clean the machinery while in motion. Children under sixteen years of age shall not be permitted to operate or assist in operating dangerous machinery of any kind."

The word "establishment" is synonymous with the word "institution".

Trustees Academy of Richmond vs. Bohler, 80 Ga., 159;
Webster's Dictionary under the word "institution".

Code supplement section 4999-a5 provides:

"It shall be the duty of the commissioner of the bureau of labor for the state and the mayor and chief of police of every city or town to enforce the provisions of foregoing sections."

Inasmuch as no exception is provided in favor of manual training schools, and inasmuch as such a school would be an institution or establishment, I am inclined to think your power would extend to manual training schools as well as to other establishments.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

INTOXICATING LIQUORS—FIVE MILE LIMIT LAW.—Does not apply to schools to which state aid is given to equip for normal training.

May 22, 1913.

MR. S. M. ANDREWS,
Oelwein, Iowa.

DEAR SIR: Yours of the 7th instant addressed to the attorney general has been referred to me for reply.

Your question is whether or not the five mile limit law, or House File No. 169 of the acts of the thirty-fifth general assembly, would operate to prevent saloons being conducted in the city of Oelwein where an independent school district receives state aid for the maintenance of a normal training school.

The provision of the law reads as follows:

"Nor within a distance of five miles from any normal school, college or university situated within the limits of any city or town and under the control of the state board of education."

By section 1 of chapter 170 of the acts of the thirty-third general assembly, as amended by section 2 of chapter 141 of the acts of the thirty-fourth general assembly, creating the state board of education, it is provided:

"The state university, the college of agriculture and mechanic arts, including the agricultural experiment station, the normal school at Cedar Falls, and the college for the blind at Vinton, shall be governed by a state board of education consisting of nine members," etc.

Hence it follows that the normal training school to which you refer not being under the control of the state board of education, the city of Oelwein in which such training school is located would not be one which would fall within the class described in house file 169.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

CONSTABLES—FEES OF—IN SERVING MORE THAN ONE WARRANT OR
OTHER PROCESS ON SAME TRIP.

June 14, 1913.

N. D. SHINN, County Attorney,
Knoxville, Iowa.

DEAR SIR: You requested my opinion over the telephone this morning as to the mileage that should be allowed a constable where he serves several warrants against different persons on the same trip.

This question has not been directly determined by our supreme court but the following cases may be of assistance to you in determining the matter to your own satisfaction,—

Redfield vs. Shelby County, 64 Iowa, 11;

Barnes vs. Marion County, 54 Iowa, 482;

Bringolf vs. Polk County, 41 Iowa, 554.

In *Redfield vs. Shelby County* it was held that where a sheriff made but one trip in serving seven subpoenas in that many different cases on one witness he was entitled to mileage for only one trip. In *Barnes vs. Marion County* a sheriff conveyed a prisoner and two witnesses from the penitentiary to the place of trial on a single trip and the court held that he was entitled to mileage the same as he would be for one person only. And in *Bringolf vs. Polk County* several prisoners were produced by the sheriff as witnesses under the same order, and the court held that he was entitled to a single allowance of mileage.

These cases, of course, are not directly in point on the question presented by you but they show the trend of the courts along similar lines.

Cases of other jurisdictions that bear more closely upon the question presented by you are as follows,—

Grundysen vs. Polk Co., 57 Minn. 212;

Logan Co. vs. Doan, 51 N. W. (Neb.) 598;

The matter of *Hempstead*, 36 N. Y. Ap. Div., 321, or 160 N. Y., 685;

Jordan vs. Coates, 7 New Brunswick, 107.

The case of *Grundysen vs. Polk Co.*, *supra*, (found in 58 N. W., 864) you will find directly in point in my judgment, and in that

case they hold that where a constable has different writs for different persons and in independent proceedings and serves them all at the same time that he is entitled to mileage the same as if he was serving but the one writ.

Trusting that the authorities cited may be of service to you, I am,

Yours truly,

JOHN FLETCHER,
Assistant Attorney General.

SCHOOLS.—Contributions of school funds to ecclesiastical schools prohibited.

June 24, 1913.

A. M. DEYOE,

Superintendent of Public Instruction.

DEAR SIR: Yesterday you called attention to the fact that in certain school districts of the state of Iowa schools are not maintained but in lieu thereof Catholic schools are conducted and a contribution made by the school authorities toward their support.

Code section 593 provides:

“Public money shall not be appropriated, given or loaned by the corporate authorities of any *county or township* to or in favor of any institution, school, association or object which is under *ecclesiastical or sectarian* management or control.”

You will observe that this prohibition does not apply specifically to the authorities of school corporations but to the authorities of counties and townships, yet there is no method by which public funds may be disbursed for school purposes except through the officers of school corporations. Hence, in my judgment, this section should be construed as though the words “of any county or township” were omitted. In other words, it shall be construed as applying to all corporate authorities having charge of the disbursement of public moneys for school purposes.

The word “ecclesiastical” refers to something belonging to or set apart for the church as distinguished from civil or secular matters.

Wharton and Black's Law Dictionary;
Words and Phrases, Vol. 3, page 2314.

An orphans' asylum under the control of Sisters of Charity in which religious instruction is given in the Catholic faith is "sectarian" regardless of the fact that Protestant children may also be present who are not so taught.

State vs. Halleck, 16 Nev., 373 at page 385.

In my judgment, there is no question but that such a school would be an ecclesiastical or sectarian school and that the appropriation of public moneys for the support of such school is illegal.

A good way in which to test the matter out would be to bring a suit upon the bond of some retiring school treasurer on account of his failure to properly account for the funds thus wrongfully expended.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

LICENSE TO HUNT—ISSUANCE TO FOREIGNERS.—Not necessary for licensee to be citizen.

July 8, 1913.

J. C. ROBINSON, County Attorney,
Mason City, Iowa.

DEAR SIR: Yours of the 7th instant addressed to the attorney general has been referred to me for reply.

Your question is whether or not the county auditor may lawfully refuse to issue hunters' licenses to foreigners or others residing within the state who are not citizens of this state or of the United States and who do not speak the English language.

In my judgment this question should be answered in the negative. There is nothing in chapter 154 of the acts of the thirty-third general assembly in any way indicating that the licensee must be a citizen of the United States or of this state or that he must be able to speak the English language. In fact section 6 of the act specially authorizes the issuance of licenses to non-residents. The fact that they shoot game or birds out of season or shoot upon the public highway or disturb by such shooting the stock of farmers, each of these matters would constitute a public offense for which they might be punished under the sections of the statute with which you no doubt are familiar but would not furnish a ground

for refusing them a license. The license, however, may be revoked under section 10 of the law where the licensee is found hunting on enclosed or cultivated lands of another without permission.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

SCHOOLS—NORMAL TRAINING—QUALIFICATIONS AND COURSE OF STUDY REQUIRED.—Duty of state superintendent with reference thereto.

July 11, 1913.

HON. J. F. WEBBER,
Ottumwa, Iowa.

DEAR SENATOR: Yours of the 1st instant addressed to the attorney general has been referred to me for reply.

You call attention to the high school training law enacted by the thirty-fourth and amended by the thirty-fifth general assembly, and you call attention to the following provision:

"For the purpose of increasing the facilities for training teachers for the rural schools by requiring a review of such common branches as may be deemed essential by the superintendent of public instruction, and for instruction in elementary pedagogy and the art of teaching elementary agriculture and home economics provision is hereby made for normal courses of study and training in the eleventh and twelfth grades in such accredited four-year high schools as the superintendent of public instruction may designate."

and you call attention to the list of things necessary to be taught in the high school in order to have such a normal training department as specified on page 12 of the circular issued September 2, 1912, by the superintendent of public instruction, and you say that the question has been raised that most of the things set out in this list are not what might be termed "common branches" and you ask for the view of this department as to what extent the superintendent of public instruction may go under the term "common branches" as used in this act.

A careful reading of the section referred to shows that the purpose of the normal training is to require a review of such common branches as may be deemed essential by the superintendent of public instruction. The list of things required to be taught in the high school in order to make it eligible to a normal training course is not common branches nor is it required to be. The list there provided for is arbitrarily fixed by the state superintendent as fixing a standard of high school from which he may select those in which a normal training course may be instituted and, in my judgment, it is not contemplated that the things specified on page 12 were intended to be a part of the normal training course but that it should be left to the other branches and to other things specified in section 2 of the act.

I am enclosing a circular, No. 6, issued by the department of public instruction in which on page 11 you will find the law under consideration as amended by the thirty-fifth general assembly.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

TRUST COMPANIES—BANKS—RIGHT TO ACT AS TRUSTEES, ASSIGNEES, ADMINISTRATORS, ETC.—Chapter 152, acts of the thirty-fifth general assembly interpreted.

July 12, 1913.

HON. JOHN L. BLEAKLY,
Auditor of State.

DEAR SIR: Yours of the 20th ultimo, has been referred to me for reply.

Your questions have reference to chapter 152 of the acts of the thirty-fifth general assembly conferring upon trust companies, state and savings banks additional powers and are as follows:

"1. Define powers of a trust company under section 1, paragraph 4."

To execute trust and powers conferred upon them by individuals or corporations by deed, will or other instrument or by the order of any court, and to receive, take and hold any property or estate, real or personal which may be the subject of any such trust, and

to manage and dispose of such property or estate in accordance with the terms of such trust or power.

Your second question is,—

"Under section 1, paragraph 6, after the court has ordered the trustee or officer to deposit the money with a bank or trust company and the trustee's bond has been reduced, does the bank or trust company have to give bond?"

There is no provision exempting banks and loan and trust companies from giving bond when acting as trustee or other fiduciary capacity. Furthermore, it is provided in the latter part of section 4 that such bank or trust company when acting as guardian, administrator, executor, trustee, etc., shall execute a bond for the faithful performance of the trust confided in it in like sum and like penalty as is required of individuals. However, in my judgment, this provision would not apply to a case where the funds were deposited under order of the court for *safe keeping* as provided in paragraph 6 of section 1, for in such case the identical funds so deposited should be detained and returned in obedience to the order of the court, and such funds should not be commingled with the general funds of the concern receiving the deposit.

Your third question is:

"Under section 1, paragraph 7, is a trust company or bank allowed to deal in bonds and mortgages other than those secured by first mortgage on Iowa land worth twice the amount loaned thereon? See section 1870."

This question should be answered in the affirmative. Paragraph 7 of section 1 enumerating the additional powers provides:

"To issue drafts upon depositors and to purchase, invest in and sell promissory notes, bills of exchange, bonds, mortgages and other securities"

and must have been intended to enlarge upon the limitation imposed by section 1870 which limits the mortgages to Iowa land worth twice the amount loaned, etc.

Your fourth question is:

"Under section 3, do I understand that a trust company or bank must keep the funds of each estate separate?"

This question should be answered in the negative. All that is required is that the trust funds received under the additional

powers conferred by this act should be kept separate from the other funds belonging to such institution.

Your sixth question is:

"There seems to be a difference of opinion in regard to the meaning of section 6, some maintaining that a bank must have the word 'trust' in their name. How is this?"

My construction of section 6 is that a trust company must have embodied in its name the word "trust"; a state bank the word "state", and a savings bank the word "savings", and that no partnership, individual or unincorporated association shall be permitted to make use of the word "trust" in its name and that it is not required that a bank include in its name the word "trust".

Your seventh question is:

"Section 7 is almost identical with section 1855-a. How much indebtedness can a bank incur under this section? Section 1855-a. Does this mean that they may borrow any amount they see fit for expenses for deposits and to pay depositor, say from 100% to 300% of their capital and then borrow an additional 100% to pay other liabilities?"

If section 7 were the only provision on this subject then this inquiry would have to be answered in the affirmative. However, section 10 of the new law makes applicable to loan and trust companies section 1848 which limits indebtedness for money deposited to twenty times the aggregate amount of its paid-up capital and surplus. In my judgment this limitation would still apply but in computing this limitation special deposits made under sub-division 6 of section 1 of the act or other funds specially deposited should not be taken into account.

Your eighth question is:

"How many shares of stock (section 1847) does it take to constitute a quorum and how many shares to elect?"

A majority in interest of the shares of stock is required to constitute a quorum, a majority from those not indebted to the bank is required to elect.

Your ninth question is:

"What kind of deposits can a trust company receive under section 1848. Can they do a general banking business?"

In my judgment a trust company is limited to the receipt of deposits made to it in a fiduciary capacity under the powers conferred under this chapter to deposits payable on demand. It is doubtful whether a trust company may do a general banking business under the powers heretofore conferred upon them by this chapter, and in my judgment they are limited so far as the banking business is concerned to a savings bank business.

Your tenth question is:

"Under section 1853 can they issue preferred stock. This department has always ruled that they could not under the banking laws. If they are allowed to issue preferred stock, it will get us into all kinds of trouble."

This question should be answered in the negative.

Your eleventh question is:

"Can a trust company under this new law do a general real estate business, plat additions and sell lots on the installment plan? Can they run an abstract department, insurance department, in fact, can they do anything but a banking business?"

In my judgment a trust company may lawfully do every thing enumerated in this question except operate an insurance department. That is to say it would not have the power to write insurance. However, in my judgment, it might act as the agent of some other concern authorized to write insurance and hence such trust companies are not confined to a banking business.

Your twelfth question is:

"Can a general corporation, previously incorporated as a trust company under the old law, exercise the powers granted under this act without a reorganization so as to come expressly under its provisions? In other words, retain what general powers it may have under its old articles of incorporation and simply add, by an amendment, the new powers under this act, or must a surrender of certain general powers it may already possess be made?"

In my judgment it is not necessary that a trust company organized under the old law should reorganize in order to obtain the powers conferred by this chapter, but all that would be required is an amendment to its articles of incorporation taking

unto itself these additional powers and that it would not be required to liquidate the old concern and organize the company anew.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

CONCEALED WEAPONS.—Permits to carry issued by sheriff only to persons residing outside of incorporated cities and towns.

July 17, 1913.

C. F. P. FROOM, *Chief of Police,*
Council Bluffs, Iowa.

DEAR SIR: Yours of the 12th instant addressed to the attorney general has been referred to me for reply.

You inquire whether or not under section 3 of the new statute regulating the sale and use of concealed weapons the sheriff is authorized to issue permits to persons residing within the corporate limits of your city.

This question should be answered in the negative. Such permits may only be issued by the chief of police in cities of the first and second class except special charter cities and cities under the commission form of government. The mayor in incorporated towns may issue such permits and the sheriff is confined to the issuing of permits to persons residing in the country and in unincorporated villages.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

ROADS AND HIGHWAYS—SUPERVISOR OF ROADS ADJACENT TO STATE LANDS—APPOINTMENT TO BE MADE BY BOARD OF CONTROL.

July 25, 1913.

MR. R. A. PEARSON,
Ames, Iowa.

DEAR SIR: I am in receipt of your communication of the 24th instant directing my attention to chapter 124, acts of the thirty-

fifth general assembly, with reference to the appointment of supervisors of roads and highways within and adjacent to the lands belonging to the state, including the lands under the control of the state board of education, and requesting an opinion as to whether or not the appointment of a supervisor as provided in said act is to be made by the state board of education at the institutions under the control of the state board of education, or whether the same must be made by the board of control.

An examination of section 1509 of the code and chapter 93, acts of the thirty-third general assembly, amendatory thereof, makes it clear that it was the original intention to have the road district under the control of the board in charge of the particular institution. Evidently, however, the legislature in chapter 124, acts of the thirty-fifth general assembly, overlooked this fact, because it is therein specifically provided that the supervisor shall be appointed by the board of control of state institutions, and that the board of control shall certify the names of such persons who fail to perform labor to the county auditor, and that the certificate of amount due for work performed shall be filed in the office of the auditor of state by the board of control.

I am therefore of the opinion that while the original intention was to leave the control of the highways at each state institution under the jurisdiction of the board having control of that institution, yet in view of the specific provisions of chapter 124, acts of the thirty-fifth general assembly, the appointment will have to be made by the board of control. The board of control, however, should act through the board of education at all institutions under the control of the board of education; otherwise great confusion will arise.

I feel sure that as soon as the matter is called to the attention of the general assembly, the evident oversight will be corrected.

Yours very truly,

GEORGE COSSON,
Attorney General of Iowa.

CITIES AND TOWNS—ORDINANCES.—Do not have power to enact ordinances regulating the keeping of bees.

July 25, 1913.

FRANK G. PIERCE,
Marshalltown, Iowa.

DEAR SIR: Replying to yours of the 19th instant in which you ask for the opinion of this department on the question as to whether or not a city or town would have authority to enact an ordinance regulating the keeping of bees or restraining them from running at large, I have to advise that code section 706 covering in part the powers of cities states:

“They shall have power to restrain and regulate the running at large of cattle, horses, swine, sheep and *other animals or fowl*, within the limits of the corporation and to authorize the distraining, impounding and sale of the same for the penalty incurred and the cost of the proceeding.”

While there can be no question but what bees are animals within the broad sense of that term, yet in my judgment they were not intended to be included within this statutory provision, but rather the term “other animals” should be construed to refer to domestic animals similar to cattle, horses, swine, sheep, etc. That it was not intended to cover all animals is clearly evident for in the very next section the legislature confers upon cities and towns the power “to regulate, restrain, license or prohibit the running at large of dogs within their limits”, and there is no question but that a dog is an animal within the broad sense of the term, and if the words “other animals” had been intended in the broad sense, dogs would have been included within its meaning and the second section relating to dogs would have been entirely unnecessary.

It has been held that the owner of bees is not liable in damages for injury which they may do.

Earl vs. Van Alstine, 8 Barb. (N. Y.) 630.

However, it has also been held that “the keeping of bees in a locality where they are a source of annoyance to others may be a nuisance and that where the defendant maintained a large number of hives of bees kept in an open lot immediately adjoining the plaintiff's dwelling house, and at certain seasons they were a source of constant annoyance and discomfort to plaintiff and his

family, greatly impairing the comfort and enjoyment of the property, and the bees could be removed, without material injury, to a locality where neighbors would not be disturbed by them, it was a proper case for a permanent injunction.”

29 Cyc., p. 1166;

Olmstead vs. Rich, 6 N. Y. Suppl. 826.

From these authorities it would seem that while the keeping of bees even in large numbers would not amount to a nuisance *per se* yet on account of the particular locality in which they are kept they may become such, and when this is the case, it is for the person injured to avail himself of the remedy of injunction to abate the private nuisance and that in no event would the matter amount to a public nuisance which could be made punishable as a crime.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

RAILWAYS—MUST MAINTAIN SANITARY CLOSETS AT DEPOTS—INTERPRETATION OF LAW RELATING TO.

August 13, 1913.

MR. LAFAYETTE HIGGINS,
Des Moines, Iowa.

DEAR SIR: Pursuant to your oral request for further interpretation of chapter 175, acts of the thirty-fifth general assembly, relating to sanitary closets at stations upon the various lines of railway within the state of Iowa, I have to advise that after a careful consideration of the entire act, and especially section 1 of said act, I am of the opinion that the law seeks to furnish proper sanitary conditions and also the necessary facilities and equipment in keeping with the amount of business.

A different rule seems to prevail with reference to depots in cities and towns not provided with sewerage system, and those provided with a sewerage system. Those provided with a sewerage system must be connected therewith if it can be reasonably accomplished. In all cities and towns without a sewerage system there must be maintained proper closets or toilets for both males and females which must be kept in a sanitary condition.

They should be reasonably accessible to the station; they should not be located so that passengers, and especially women with small children, would incur the hazard of crossing tracks, either main line tracks or switching tracks.

Regardless of the size of the station or town the toilets should be kept sanitary, but aside from this the equipment and facilities should have some correspondence to the population of the place and the general amount of passenger traffic in the city or town. The law should receive such an interpretation as will protect the traveling public and yet not do violence to the language used or by a strained interpretation place unnecessary burdens upon the transportation companies.

Yours very truly,

GEORGE COSSON,
Attorney General of Iowa.

CITIES AND TOWNS—MAYOR.—Right to vote in case of tie.

August 18, 1913.

JOSEPH R. FRAILEY, Attorney,
Ft. Madison, Iowa.

DEAR SIR: Your letter of the 31st ultimo addressed to the attorney general has been referred to me for reply.

Your question is whether or not in filling a vacancy in the membership of a city council where the votes of the regular members of the council result in a tie, the mayor has the right to cast the deciding vote.

Code supplement section 1272 provides:

"Vacancies * * * in the office of councilman or mayor of any city and all other elective city offices the council may appoint any qualified elector to fill such vacancy."

Subdivision 9 of code supplement section 668 provides:

"In selecting persons to fill vacancies in offices not filled by election by the council (which would be elective offices) it shall vote by ballot and the person receiving the majority of the votes of the whole number of members shall be declared elected to fill such vacancy."

Prior to the acts of the thirty-second general assembly subdivision 5 of section 658 code and supplement provided with reference to mayors as follows:

"In towns he shall be a member of the council and presiding officer thereof with the same right to vote as a councilman."

However, said section was amended by chapter 26 of the acts of the thirty-second general assembly and subdivision 5 thereof was repealed and the following enacted in lieu thereof:

"He shall be the presiding officer of the council with the right to vote only in case of a tie."

I am of the opinion that the purpose of this case was to meet the decision of our supreme court in the case of *Griffin vs. Messenger*, 114 Iowa, 99, to which you refer, and the effect was to render the mayor no longer a member of the city council. Notwithstanding this, however, I am of the opinion that the mayor would have the right to vote in all cases of tie even though he is not a member of the council. In some matters where a tie vote results, the election is determined by lot, and it seems to me that while the legislature did not so provide in terms, the mayor should have the right to cast the deciding vote in all cases of tie notwithstanding the language of subdivision 9, code supplement section 668.

Hence I am of the opinion that the selection made in the case referred to in your letter was legal.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

HOG CHOLERA SERUM—SALE BY JOBBERS—PERMIT MUST BE OBTAINED.

August 18, 1913.

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

DEAR SIR: Replying to yours of the 16th instant addressed to the attorney general in which you call attention to the fact that jobbers are wishing to know whether or not it will be necessary

for them to secure permits to sell hog cholera serum, I have to advise:

Section 4 of chapter 227, acts of the thirty-fifth general assembly, provides in part as follows:

"Any person, firm, company or corporation before selling or offering for sale, within this state any hog cholera serum shall first make application to the director of the laboratory herein created for permission to sell the same in the state. Said application shall give the name of said person, firm, company or corporation with its place of business."

It will be observed that no distinction is made in the law between those selling at retail or at wholesale, and in my judgment a permit is required to be obtained by wholesalers or jobbers as well as by retailers.

You also inquire whether or not a telegram would be sufficient written permit to sell virus where it specifies the time and place where the virus is to be used. In my judgment this question should be answered in the affirmative.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

HOG CHOLERA SERUM—SALE AND DISTRIBUTION OF BY PERSONS
WITHIN AND WITHOUT THE STATE.

August 22, 1913.

DR. KNOWLES,
Sioux City, Iowa.

DEAR SIR: In yours of the 22d instant addressed to the attorney general you refer to section 6, chapter 227, acts of the thirty-fifth general assembly, providing for the procurement, distribution and use of virulent blood or virus from cholera infected hogs, and you propound the following questions:

"Is it legal for hog cholera virus to be given away with hog cholera serum, which is sold by drug stores and manufacturers of hog cholera serum?"

"And in this connection, I would like to ask whether or not there is any distinction between the serum whose factories or laboratories are located without the state and those located within?"

In my judgment your first question should be answered in the negative, unless the person so giving away or distributing such blood or virus shall have a permit in writing from the director of the laboratory and shall distribute the same under such regulations as the director may issue, which permit shall specify the time and place, when and where said virus may be used. Section 6 authorizes the director of the laboratory to procure and distribute at approximate cost virulent blood or virus and prohibits the sale or distribution of the same by others without the permit above referred to. Said section also prohibits the use of such virus or virulent blood by any person not having received special instruction with reference to the use of the same, which instruction shall be satisfactory to the director of said laboratory, and the person so using shall also have a permit which may be cancelled by the director for cause. Veterinary members of the animal health commission and representatives of the United States bureau of animal industry may distribute or use such virulent blood or virus, but are required to report to the director of the laboratory in such a manner as he may require.

In answer to your second question will say that in my judgment there is no distinction to be made in favor of a non-resident concern distributing serum and virus and they would not have the right to distribute the same without securing the same permit as a like concern would be required to have in distributing within this state.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

RAILROAD COMMISSION—APPROPRIATION FOR INVESTIGATION AND PROSECUTION OF CASES BEFORE INTERSTATE COMMERCE COMMISSION.—Held that fund may be used in both interstate and intrastate cases.

August 22, 1913.

HON. JOHN L. BLEAKLY, *Auditor of State,*
Des Moines, Iowa.

DEAR SIR: Yours of the 31st ultimo addressed to the attorney general has been referred to me for reply.

Your question is as follows:

"I respectfully request your written opinion in the case of chapter 334 laws of the thirty-fifth general assembly and whether the appropriation of \$40,000 made therein would be considered to cover expense incurred both in preparing and submitting cases to the interstate commerce commission and to investigate and prepare cases affecting Iowa intrastate rates, in view of the fact that the constitution provides that every act shall embrace but one subject which subject shall be expressed in the title."

The title of the act in question reads as follows:

"AN ACT making an appropriation to enable the state *railroad commission* to investigate and prosecute *interstate cases* before the interstate commerce commission."

The act itself reads as follows:

"There is hereby appropriated out of the funds in the state treasury, not otherwise appropriated, the sum of forty thousand dollars (\$40,000.00), or so much thereof as may be necessary, the same to be expended by the state railroad commission, in preparing and submitting cases to the *interstate commerce commission* involving *interstate rates* and services, affecting Iowa and to investigate and prepare cases affecting Iowa *intrastate rates* and services."

Section 29 of Article 3 of the constitution of the state of Iowa provides as follows:

"Every act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

The supreme court of the state has passed several times upon the sufficiency of title to statutory enactments and in general has held that the title itself does not need to contain any detailed statement of all the provisions of the statute. It is sufficient if the general object of the statute is indicated and the object sought is not otherwise repugnant to legislative authority, not inconsistent with the objects mentioned in the title.

In the case of *Santo, et al. vs. The State of Iowa*, 2 Iowa, 209, the court said, after referring to the object of the statute under consideration, because it was repugnant to the constitution and provision above quoted:

"According to this argument, the provisions for the punishment of drunkenness, prohibiting the sale, declaring certain things nuisances, the appointment of agents, etc., each distinct idea or step,—is severally a new object. We cannot concur in the objection. The act is entirely free from it. Were the argument valid, an act could hardly extend beyond one period—certainly not beyond one session. Each step toward the main object, must be provided for by a separate enactment. Half the acts in the statute books, embrace several ideas or steps in the progress of their provisions toward the attainment of the main object. The object may be a broader or narrower one, but if it be a bona fide object for legislative attainment, and the several steps embraced in it, are fairly conducive to that end or object, it is still a unit. Under what other view, could a school or revenue act be framed or upheld. Does not each of these present a unity of object? Must they be divided into as many separate acts, as there are provisions to carry out the main end? Such is not the design of the constitution. This act presents a fair unity of object."

In the case of *The State of Iowa vs. County Judge*, 2 Iowa, 282, in construing this same provision of the constitution with reference to a particular statute, the court said:

"It is important to bear in mind that to declare an act unconstitutional and void, is the exercise of the highest power of the court, and is not to be resorted to, unless it become necessary. Although the power is to be exercised when the case demands it, yet the courts will not favor it, nor use it, unless in a clear and decided case. And it is the duty of the courts to give such a construction to an act, if possible, as will avoid this necessity, and uphold the law."

In the later case of *Beaner v. Lucas*, 138 Iowa, 215, it was held that

"If all the provisions of the act have one general object which is fairly expressed in the title, it is a compliance with the constitution, and a statute authorizing the city to purchase

ground, erect public buildings thereon and to levy a special tax for that purpose comprehends the issuance of bonds in anticipation of the tax which latter provision is germane to the main purpose of the act and not of such a separate and independent character as to require separate mention in the title."

Examining the statute in the light of these authorities it would appear that the main purpose of the act is the appropriation of moneys to enable the railroad commission to perform certain duties with reference to rates. This being true, even though the title restricts the appropriation to interstate cases, intrastate rates are so connected therewith as not to require separate mention in the title.

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

Respectfully submitted,

C. A. ROBBINS,
Assistant Attorney General.

COLLEGE FOR BLIND—APPROPRIATION FOR SUPERINTENDENT'S COTTAGE.—Use of in equipping part of main building for superintendent's home.

August 26, 1913.

MR. W. R. BOYD,
Cedar Rapids, Iowa.

DEAR SIR: I am in receipt of your communication of the 16th instant directing my attention to section 5, chapter 197, acts of the thirty-fourth general assembly appropriating the sum of \$4000 for a cottage for the superintendent of the college for the blind. You advise that bids were let upon two different occasions and each time the amount exceeded the sum of the appropriation; that it is now proposed to use the balance of the fund to remodel and enlarge the college building.

I take it that the purpose of the appropriation was to provide a permanent residence for the superintendent of the college for the blind. If a part of the main building can be used as a residence and is entirely suitable for the purpose and will be of the same permanent nature as the proposed cottage, I am of the opinion that the substance of the law will be complied with and that the

amount of the appropriation may be used for such purpose. Unless, however, the changing of the main building will furnish a permanent residence equally as suitable for the occasion as the proposed cottage, then I am of the opinion that the amount could not be expended for said purpose. Necessarily the board of education must be the judge of this act in the first instance.

Yours very truly,

GEORGE COSSON,
Attorney General of Iowa.

SCHOOLS—NORMAL TRAINING.—Extending privilege of normal training to schools not receiving state aid discussed.

September 2, 1913.

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

DEAR SIR: Yours of the 1st instant has been referred to me for reply.

You call attention to the provisions of code supplement section 2634-d1 and to the fact that the appropriation provided for by code supplement section 2634-d6 is limited and you propound the following questions:

1st. We would like to know if there is anything in the normal training law that would prevent the department from extending the privileges of the normal course to high schools without we have aid to give them?

2nd. Would it be possible, on condition that the school would waive all rights to aid, for the department to designate a school and allow the students enrolled to pursue the course and write the examinations the same as if the school were to receive the \$750.00 state aid?

In my judgment your first question should be answered in the negative and your second should be answered in the affirmative. I am of the opinion, however, that the school officers would not have authority to waive the right of their district to state aid. However, in my judgment your department would have the right to classify the schools in such a way as to designate which should be entitled to state aid even though there should be no distinction between the courses of study in the schools receiving state aid and in those which do not receive it.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

HOTELS—FIRE ESCAPES ON—CLASS OF BUILDING REQUIRING FIRE ESCAPES.—General interpretation of law.

September 5, 1913.

LAFAYETTE HIGGINS, Hotel Inspector,
Statehouse.

DEAR SIR: Yours of the 4th instant addressed to the attorney general has been referred to me for reply.

You call attention to the fire escape law enacted by the thirtieth general assembly, also to the provisions of code supplement section 4999-8 respecting hotels, also to sections 2 and 8 of chapter 168 of the acts of the thirty-third general assembly, and propound the following questions:

“Does the hotel law place the enforcement of the fire escape law in the hands of the inspector of hotels, regardless of city or other local authority under which hotels may have been erected or equipped?”

In my judgment this question should be answered in the affirmative. Section 10 of chapter 168 of the acts of the thirty-third general assembly provides in part as follows:

“It shall be the duty of the inspector and his deputies to see that all of the provisions of this act are enforced and complied with, and for such purpose such inspector or deputy shall personally inspect once each year every hotel in the state coming *within the provisions of this act.*”

And as there is no omission or exception in favor of hotels which are or heretofore have been inspected by the city authorities, the hotel inspection law should be held to apply to all.

Your second question is:

“What is the interpretation of that part of section 4999-8 which reads: ‘provided, however, that where such buildings shall be occupied by more than twenty (20) persons the said building shall, as a substitute for *one ladder*, be provided with one stairway of steel or wrought iron construction with above described platforms, accessible from each story,’ etc.

My judgment is that the above quoted portion of code supplement section 4999-8 means that where the superficial feet of area covered by the hotel building are such as to require one or more ladders and in addition thereto persons to the number of twenty or

more occupy rooms in the third story or above, the steel or wrought iron stairway provided for is required. It is possible that the same rule should apply where twenty or more persons occupy rooms on the second floor or above for while no ladders or fire escapes are required in a two-story hotel building, yet where a third or more stories are added, the risk to the occupants of the second story might be thereby increased.

Your third question is:

“Do the words ‘as a substitute for *one ladder*’ mean that if only one ladder would be required on a building of 2,500 feet superficial area that instead of the ladder a stairway would be required, or does it mean where more than one ladder would be required one of these shall have a stairway substituted, where the persons exceed twenty in number?”

This question has been substantially answered in the answer to the previous question. Where the area covered by the building is such as to require one ladder, a steel stairway is not required unless twenty or more persons occupy the building as explained in the previous question. But where twenty or more do occupy the building, then the steel stairway is required even though the area is such as to require one ladder. But where the area is such as to require two or more ladders the steel stairway is only required as a substitute for one of such ladders, and this only where twenty or more persons occupy the building as above explained.

Your fourth question is:

“Do the words ‘more than twenty (20) persons’ mean more than twenty persons on one floor, or in the third story, or in the third story and all above it, or in all of the building used for hotel purposes?”

In my judgment in computing the number of persons those should be counted occupying rooms on the third story and all stories above it, and as explained above, it is possibly true that there should be included all such persons occupying the second story and all stories above.

Your fifth question is:

“How shall the number twenty (20) be determined, by count of guest rooms, by count of hotel people employed, or by both methods?”

In my judgment the number of persons occupying a room should be ascertained by counting guests as well as employees of the hotel who may be lodged in the rooms required to be counted as above explained. It would not do to count the rooms only for more than one guest or employee might be quartered in the same room and thereby the provision concerning twenty or more persons defeated.

Your sixth question is:

"Would the inspector of hotels have any right to pass any hotel well equipped with ladders, but no stairway, provided the hotel was apparently reasonably safe for transient guests, and provided such hotel had apparently been equipped in good faith, before the hotel law was passed?"

In my judgment this question should be answered in the negative. The legislature has undertaken to prescribe the manner in which hotels should be equipped and has failed to provide that the inspector might pass something different as an equivalent thereof.

Respectfully submitted,

C. A. ROBBINS,
Assistant Attorney General.

SCHOOLS—FREE TEXT BOOKS—AMOUNT TO BE CHARGED PUPILS.—

Must not exceed average cost per pupil for number furnished.

September 5, 1913.

HON. GEORGE WILSON,
Assistant County Attorney,
Des Moines, Iowa.

DEAR SIR: In yours of this date you call for the opinion of this department upon that portion of chapter 239 of the acts of the thirty-fifth general assembly relating to the amount of tuition which may be required to be paid by non-resident students, which reads as follows:

"Provided the maximum fee collected from any district for each pupil shall not exceed the sum of three and one-half dollars (\$3.50) per month except in high schools where free text books are provided by the district such additional amount made (may) be charged as will cover the cost of the text books furnished to such pupil."

As I understand it the free text books furnished are used by more students than the one to whom they are first assigned. In other words, they are required to be accounted for by each student to whom furnished and are kept in use as long as they are in usable condition. In view of this fact I am of the opinion that no student should be charged with the entire cost of text books furnished to him in addition to the tuition above mentioned, but he should only be charged with the average cost per pupil of furnishing text books to pupils of his class, or grade.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

INSURANCE—INVESTMENT OF FUNDS TO SECURE POLICYHOLDERS—
CLASS OF SECURITIES THAT MAY BE HELD—MUST BE FIRST
LIENS UPON REAL ESTATE.—Savings bonds secured by first
mortgage not permissible.

September 10, 1913.

HON. JOHN L. BLEAKLY,
Auditor of State.

DEAR SIR: I have at hand your request for an opinion as to whether the savings bonds issued by the Waterloo Loan & Trust Company of Waterloo, Iowa, known as Series F, sample of which you enclose, are such security as an insurance society operating under the laws of this state may invest the funds in that are held by it for the purpose of fulfilling its policy contracts.

Section 1806, code supplement, in so far as it pertains to the question at hand, reads,—

"The funds required by law to be deposited with the auditor of state by any company or association contemplated in the two chapters preceding, and the funds or accumulations of any such company or association organized under the laws of this state held in trust for the purpose of fulfilling any contract in its policies or certificates, shall be invested in the following described securities and no other:

"1. The bonds of the United States;

"2. The bonds of this state or of any other state when such bonds are at or above par;

"3. Bonds or other evidences of indebtedness of any county, city, town or school district within the state or any other state, drainage district bonds of this state, improvement certificates issued by any municipal corporation of this state such certificates being a first lien upon real estate within the corporate limits of the municipality issuing the same, where such bonds or other evidences of indebtedness are issued by authority of and according to law and bearing interest, and are approved by the executive council;

"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, or two and one-half times such amount including the improvements thereon, if such improvements are constructed of brick or stone;" etc.

If the bond you enclose can be considered as belonging to the class of securities which may be accepted by insurance companies under the provision of this section it would fall within the class enumerated in the 4th paragraph, and it will be noted that this paragraph provides that only "bonds, mortgages and other interest bearing securities being *first* liens upon real estate" may be accepted.

A mortgage on real estate is itself personal property transferable at any time by the holder thereof. The statute contemplates that the bond, mortgage or other security which an insurance company may accept shall be a first lien upon a specific piece of real estate, while the mortgages which the trust company in this case places in the hands of trustees in escrow to secure the payment of the bond may be changed at any time to suit the convenience of the trust company, leaving with the trust company the power at any time to change the identity and consequently the amount and value of the security that it put up as collateral behind these bonds. It follows then that the evidence of indebtedness which an insurance company would have by holding these bonds would be nothing more than the personal obligation of the trust company with personal property as collateral and such collateral subject to change and the control and custody of it left in the hands of the person owing the obligation.

The statute contemplates that the lien which the holder of securities of the class that may be accepted by an insurance company

shall become absolute in the holder thereof and subject to no other condition than the payment of the indebtedness. While in this case the mortgages are to be held not by the insurance company or trustees appointed by it but by the persons who are obligated to the insurance company or a board of trustees created by them.

It cannot be said by any manner of reasoning that the bond you enclose is a first lien upon real estate and the depositing in trust of mortgages which are first liens upon real estate to secure the payment of the bonds does not change the character of the bond, and it follows from what I have said that I do not consider the bond as belonging to that class of securities which the statute provides insurance companies may hold for the purpose of fulfilling its obligations to policy-holders.

Yours truly,

JOHN FLETCHER,
Assistant Attorney General.

HIGHWAYS—TAKING GRAVEL FROM.—Road officers have right under chapter 164, acts of the thirty-fifth general assembly.

September 30, 1913.

A. J. LILLY, Drainage Engineer,
Britt, Iowa.

DEAR SIR: Your letter of the 3d instant, addressed to the attorney general, has been referred to me for reply.

Your question is whether or not officers have the right to take from the highway gravel or other road building material found therein over the objection of the adjacent property owner.

Our supreme court has held that the officer of a city had no right to quarry stone within the limits of a street for use in improving other streets although they might make reasonable use of material found in any street for the purpose of improving that street. (See *Overman vs. May*, 35 Iowa, 89, at 97.) Hence I am of the opinion that in the instant case while the road authorities would have the right to take all gravel necessary for the proper improvement of the highway adjacent to the land in question, provided the adjacent land is not deprived of its proper lateral support and provided further that the land owner's ways of ingress or egress are not injured or destroyed.

Under chapter 164 of the acts of the thirty-fifth general assembly you would have ample power to condemn the necessary tract of land for gravel.

Your notice is herewith returned.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

COUNTY OFFICERS—BOARD OF SUPERVISORS—CANNOT PAY BANKS
FOR THE COLLECTION OF TAXES—DEPUTY COUNTY OFFICERS—
MUST FURNISH BOND—COUNTY ATTORNEY—PER CENT OF
FINES—MUST BE PAID FROM GENERAL FUND.—TAXES—STAT-
UTE OF LIMITATIONS—DOES NOT RUN IF PROCEEDINGS ARE BY
DISTRESS WARRANT.—JUSTICE OF THE PEACE—MUST ACCOUNT
FOR MARRIAGE FEES IF HE IS ON SALARY BASIS—DEPUTY
AUDITOR—CHARGE FOR NOTARIAL WORK MUST BE ACCOUNTED
FOR.

October 1, 1913.

HON. JOHN L. BLEAKLY,
Auditor of State.

DEAR SIR: Your letter of the 18th ultimo, addressed to the attorney general, has been referred to me for reply.

You request the opinion of this department upon the following questions:

1. May the boards of supervisors allow bills to banks for collecting tax for county treasurer, as extra clerk hire to the treasurer?

In my judgment this question should be answered in the negative. The law contemplates that the work of the treasurer's office should be performed in that office and does not contemplate the payment of extra compensation or clerk hire except in the following cases:

Where no regular deputy has been appointed but on account of the pressure of business *in his office* the treasurer is compelled temporarily to employ an assistant;

And in counties of 30,000 population or over such clerk hire may be allowed in addition to the salary of the regular deputy as the board of supervisors may deem reasonable.

2. Are the deputy clerks of the district court and other deputy county officers required to give bond?

This question should be answered in the affirmative. Code section 1182, as amended by chapter 113, acts of the thirty-fifth general assembly, exempts from giving bonds the governor, lieutenant governor, members of the general assembly, judges of courts, township trustees, aldermen and councilmen of cities and towns; and the following section requires all other *civil officers* to give bonds except as otherwise specially provided. Code section 1186 provides, "deputies of state, county, city and town offices who are required to give bond shall give bond in such amounts as may be fixed by the governor, board of supervisors or the council as the case may be."

3. Should the county attorney's per cent of fines be deducted from the fines or paid out of the general county fund?

This percentage to be paid the county attorney should be paid from the general fund and not from the proceeds of the fines collected. The constitution requires the clear proceeds of the fines collected to be turned into the school fund. See constitution of Iowa, section 4 of subdivision 2 of article IX, and *Woodward v. Gregg*, 3 G. Green, 287 where the exact question was passed upon by our supreme court and the conclusion reached being against the right of deducting the attorney's fees from the funds collected.

4. Does the statute of limitations run against the county in the collection of tax more than five years delinquent?

This question should be answered in the negative with the qualification however that where the state or county brings a suit in court to recover a judgment for the amount of delinquent taxes, then the statute of limitations would apply in the same manner as though the suit were brought by an individual; but where instead of bringing such suit the treasurer or other tax collecting officer proceeds to sell property liable for the tax under a distress warrant then the statute of limitations does not apply. See 37 Cyc. at page 1304 and *State v. Webber*, Judge, 37 N. W. 949.

5. Are marriage fees of justices of the peace to be taken into consideration with fees set out in section 4597?

This department has heretofore passed upon this question and held that inasmuch as the right of a justice of the peace to exact a fee for the performance of the marriage ceremony depends upon

the existence of his official position that the fee is therefore received by him in his official capacity and must be accounted for in the same manner as other fees received by him where he is on a salary basis. See code section 3152 fixing the amount of such fee, and code supplement section 4600-a requiring such fees to be accounted for.

6. Is a deputy county auditor having a notarial seal entitled to charge and retain a fee for affidavits connected with the application for hunter's license?

This question should be answered in the negative. The supreme court of Nebraska in a similar case held that a county officer who had the power to take acknowledgments and who was also a notary public was required to account to his county for fees earned in taking acknowledgments even though he took same in his capacity as a notary public rather than in his official capacity. *State ex rel Frontier County v. Kelley*, 46 N. W., 704.

Your 7th and 8th questions, propounded by Mr. Edward Collins, are as follows:

What fee, if any, is the county auditor required to charge for the issuing of a certificate to a legally authorized liquor dealer to show his right to receive shipments of intoxicating liquors from interstate carriers?

Can the county auditor lawfully refuse to issue such certificate to a legally authorized liquor dealer for any reason, if such dealer tender the fee demanded?

I know of no statute that requires the county auditor to furnish such a certificate as is herein referred to. Code section 2419 contemplates the furnishing of such a certificate by the clerk and doubtless he would have the right to charge a fee therefor. Hence it follows that the auditor is under no obligation to issue such a certificate.

Respectfully submitted,

C. A. ROBBINS,
Assistant Attorney General.

BANKS—TRUST COMPANIES—SAVINGS BANKS.—Name cannot be framed so as to indicate that one institution is both a trust company and a savings bank.

October 8, 1913.

HON. JOHN L. BLEAKLY,
Auditor of State.

DEAR SIR: Yours of the 9th of September, addressed to the attorney general, has been referred to me for reply.

You call attention to the fact that the American Savings Bank of Maquoketa, Iowa, is seeking to amend its articles of incorporation in order to avail itself of the additional powers conferred by chapter 152 of the acts of the thirty-fifth general assembly, and it is now proposed to name the institution the "American Savings Bank & Trust Company". You call attention to section 6 of the chapter above referred to which reads as follows:

"Any trust company, state or savings bank, which under this act and by its original or amended articles of incorporation shall be authorized to exercise any of the powers herein granted, shall have the word 'trust', 'state' or 'savings' incorporated in the name thereof; and no corporation herein-after organized without complying with the terms of this act, and no partnership, individual or unincorporated association, shall incorporate or embrace the word 'trust' in its name."

And you inquire whether or not it is permissible for a single concern to have a name that would indicate that it was both a savings bank and a trust company.

While the language of the section above quoted is not entirely clear, and while the letter of it might not prohibit one concern having two or more of the words mentioned in its name, yet the spirit of the statute requires that a trust company should have in its name the word "trust"; a state bank, the word "state", and a savings bank the word "savings" in order to distinguish the character of the institution. In other words, a savings bank, or state bank, which has some but not all of the powers of a trust company, should not carry in its name anything that might lead those dealing with it to believe that it was a trust company; and on the other hand a trust company which has some but not all of the powers of a bank, should not carry in its name words indicating

that it is a bank. Hence your inquiry should be answered in the negative.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

COUNTY OFFICERS—ALLOWANCE FOR DEPUTIES AND CLERK HIRE—
BOARD OF SUPERVISORS CANNOT ALLOW TO OFFICER BUT ONLY
TO PERSON EMPLOYED.—COUNTY ATTORNEY—COUNTY LIABLE
TO HIM FOR FEES IN NUISANCE CASES.—CLERK—FEE BOOK
MUST BE LEFT IN OFFICE AT EXPIRATION OF TERM.—BOARD OF
REVIEW—COMPENSATION.—Word “session” in section 669 code
interpreted.

October 29, 1913.

HON. JOHN L. BLEAKLY,
Auditor of State.

DEAR SIR: Your first question is:

“Has the board of supervisors a legal right to allow to a county officer direct a specified amount for compensation of deputy or other clerk hire, or must the amount be allowed direct to the person performing the service?”

This question should be answered in the negative except as to sheriffs. Under code supplement section 510-b the salary of the chief deputy is to be paid by the sheriff out of the compensation allowed him under section 510-a.

Prior to the enactment of chapter 43, acts of the thirty-fifth general assembly, the board of supervisors was authorized by code supplement section 479 to allow such additional compensation to the auditor as it deemed reasonable. However, by the last paragraph or subdivision of chapter 43 this additional compensation is now limited to the deputies and clerks and is no longer allowed direct to the auditor.

Your second question is:

“Has the board of supervisors a legal right to allow direct to the county auditor a certain amount in addition to his salary for drainage work, or may they simply allow the auditor extra help on this account?”

This matter is governed by chapter 121, acts of the thirty-third general assembly, the material portion of which reads as follows:

“Whenever a levee or drainage district or districts shall be petitioned for or established in any county, the board of supervisors shall furnish such *additional help*, as shall be just and reasonable, to be paid by the county.”

Hence, it follows that the pay should go to the help and not to the county auditor.

Your third question is:

“Under section 2930 of the code, is the county auditor required to transfer quit claim deeds or patents that do not convey real estate, but simply to cure some defect in the title?”

This question should be answered in the negative.

Your fourth question is:

“Is the county, under section 2406, code supplement, or any other section, liable to the county attorney for fees in successfully prosecuting injunction suits for nuisances?”

This question should be answered in the affirmative where the costs are not collectible from the defendant. See *Newman & Blake v. Des Moines County*, 85 Iowa, 89, holding that where the fee is taxed as part of the costs the county is liable therefor; and also, *Farr v. Seward*, 82 Iowa, 221, wherein it is held that the county attorney where he prosecutes the injunction suit is entitled to the fee in addition to his salary.

Your fifth question is:

“When the clerk of courts goes out of office, is he entitled to take his fee and cash books with him, or should he leave them in the office as a permanent record?”

In my judgment these books should be left in the office. Any book which the officer keeps in his official capacity whether required by the letter of the statute or not should, in my judgment, remain as part of the records of the office.

Your sixth question is:

“What is the meaning of the word session, as used in section 669 of the code, or can the council meet nine hours in one day and call it three sessions of three hours each?”

In view of the fact that it was the common practice throughout the state to hold these sessions of the board of equalization in the evening in my judgment the statute only contemplated a single session in any one day and that that session should be three hours in length in order to constitute a session for which \$1.00 might be paid. This statute, however, has been changed as to first class cities by chapter 56 of the thirty-fifth general assembly, which will hereafter govern as to such cities, the material portion of which reads as follows:

"Except when acting as members of the board of review, for which service they shall receive not more than two dollars a day for each day when acting as a board of review, to be paid out of the county treasury."

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

SCHOOLS—INSPECTOR OF NORMAL TRAINING—SALARY, HOW PAID—
NUMBER OF INSPECTORS TO BE APPOINTED.

October 29, 1913.

MR. A. M. DEYOE,
Superintendent Public Instruction.

DEAR SIR: Yours of the 10th instant, addressed to the attorney general, has been referred to me for reply.

You call attention to section 5, of chapter 131, acts of the thirty-fifth general assembly which reads as follows:

"In accordance with the foregoing provisions of this section, the superintendent of public instruction is authorized to appoint *an inspector of normal training* in high schools and private and denominational schools at a salary of not to exceed two thousand dollars (\$2,000.00) per year and necessary traveling expenses while in the discharge of his duties."

You also state:

"The thirty-fifth general assembly repealed certain sections of chapter 131, acts of the thirty-third general assembly by the enactments found in chapter 242 acts of the thirty-fifth general assembly. It will be observed that section 2 of chapter

131, section 4, section 8 and section 9 were repealed or amended, but no changes were made in section 5 of chapter 131, acts of the thirty-third general assembly. The thirty-fifth general assembly also enacted chapter 103 relating to the department of public instruction. Section 8 of this act provides for the payment of salaries of the state superintendent, his deputy, chief clerk and regular inspectors, and that all such salaries are to be paid monthly upon a warrant of the state auditor."

And you then propound the following question:

"Should the inspector of normal training in high schools be paid under chapter 131, acts of the thirty-fourth general assembly or under chapter 103, acts of the thirty-fifth general assembly?"

In my judgment the inspector of normal training should be paid under the chapter first mentioned, to-wit, chapter 131 of the acts of the thirty-fourth general assembly, as amended by section 3, chapter 242, acts of the thirty-fifth general assembly.

You also call attention to section 7 of chapter 103 of the acts of the thirty-fifth general assembly, and especially to that portion of the same which reads as follows:

"He shall also appoint a chief clerk and such regular inspectors of the public schools of the state, including rural graded and high schools, as he may deem necessary, not exceeding three."

and you then inquire:

"Is the superintendent of public instruction entitled under this act to appoint three regular inspectors in addition to the normal training inspector, who has charge of the normal training work only?"

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

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

BOARD OF CONTROL—EMPLOYMENT OF SUPERVISING ENGINEER.—
Statute is broad enough to permit such employment.

October 30, 1913.

BOARD OF CONTROL,
Statehouse.

GENTLEMEN: Your letter of the 21st instant addressed to the attorney general has been referred to me for reply.

In your letter you call attention to the fact that your board has the government and control of fourteen state institutions and that

“At each of these institutions there are heating plants, electric lighting plants, engines, boilers, wells and pumping outfits. At each of these institutions there is a local engineer in charge of the various electric lighting, heating plants, engines and boilers, etc. The board purchases each year about 100,000 tons of coal for the use of the different institutions.

“In our opinion it is necessary for the proper and economical management of these different heating, lighting and pumping plants, to have a supervising engineer to have general supervision and charge of the various heating, lighting and steam plants at the different institutions. This engineer would be employed by the board and devote his entire time in supervising the different engines, boilers, pumping outfits, heating and lighting plants. He would also have charge of the testing of the coals used at the different institutions which are now purchased in the British Thermal Unit Basis.”

You ask to be advised whether or not you are authorized under the law to employ such an officer or employee.

By code supplement section 2727-a3 it is provided:

“The board shall be provided by the proper authorities with suitably furnished offices at the seat of government, and shall employ a competent secretary who shall receive a salary not to exceed two thousand dollars (\$2,000) per annum, and may also hire a stenographer and such other employees as may be necessary.”

By code supplement section 2727-a4 an appropriation is provided from any funds in the state treasury not otherwise appropriated sufficient to pay the salaries and expenditures thereby authorized.

In my judgment the term “such other employees as may be necessary”, as found in the section above quoted, is sufficiently broad

to authorize the employment of a supervising engineer such as that referred to in your letter, and that his compensation might be paid from the appropriation mentioned in the last cited section. It follows therefore that your inquiry should be answered in the affirmative.

I am directed by the attorney general to say to you that it might be advisable to procure in advance the consent of the committee on retrenchment and reform to the employment of such an engineer.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

STALLIONS—LIEN FOR SERVICE.—Owner has lien if he complies with section 2341-a of code supplement.

December 3, 1913.

A. R. COREY,

Secretary, State Agricultural Dept.,
Statehouse.

DEAR SIR: Yours of the 3d ultimo addressed to the attorney general has been referred to me for reply.

You call attention to the provisions of chapter 135 of the acts of the thirty-third general assembly which give a lien to stallion keepers complying with certain sections of the code supplement; also to chapter 100 of the acts of the thirty-fourth general assembly repealing these sections of the code supplement and enacting substitutes therefor, and your question is:

“Would this act of the 34th general assembly invalidate the lien law for service fee, or is the act still valid and may it be used in the collection of stallion service fees by the owners of both pure bred and grade stallions, *whether or not they have complied with chapter 100, acts of the 34th general assembly, as amended by chapter 188, acts of the 35th general assembly.*”

In my judgment the law giving lien is still in force but that in order to have the lien the keeper would have to comply with the provisions substituted for code supplement section 2341-a and the following sections instead of complying with the provisions of the repealed sections.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

PRIMARY—PER CENT OF VOTE NECESSARY TO NOMINATE—HEAD OF TICKET.—Vote for governor is proper basis in determining sufficiency of vote.

January 3, 1914.

COUNTY ATTORNEY WM. H. WINEGAR,
Perry, Iowa.

DEAR SIR: I am in receipt of your communication of the 30th ultimo directing my attention to section 1087-a10 supplement to the code 1907, which provides that in computing the percentage of vote which each candidate must receive upon his nomination papers, "the percentage shall be the vote cast for the head of the ticket", and requesting an opinion as to whether a county officer should therefore receive two per cent of the vote cast for the electors in his county, the governor, or the county auditor who polled the largest vote on the county ticket.

This statute has generally been construed to mean the vote received for the electors for president during a presidential election, and other years the vote cast for governor. In order, however, that there may be no controversy about the matter, I would suggest that the candidates in question receive at least the percentage cast for governor during such election.

You will notice that section 1087-a3, supplement to the code, 1907, provides that the title "political party" shall mean "a party which at the last preceding election cast for its candidate for governor at least two per centum of the vote cast at said election" etc. You will also notice that chapter 59, acts of the thirty-fourth general assembly, uses the vote for governor in determining whether or not a candidate has been nominated whose name did not appear upon the official ballot, but who was voted for at the primary by a certain number of voters; hence, as I said before, if the vote for electors for president does not exceed the vote for governor, I would suggest that each candidate receive the necessary percentage of the vote cast for governor.

The county auditor would not under any construction be considered the head of the ticket.

Yours very truly,

GEORGE COSSON,
Attorney General of Iowa.

CORPORATIONS—MEETING OF STOCKHOLDERS—MUST BE HELD IN THE STATE WHERE INCORPORATED.—Board meetings may be held elsewhere unless prohibited by articles of incorporation.

January 13, 1914.

DES MOINES BRIDGE & IRON WORKS,
Curry Building,
Pittsburgh, Pa.

GENTLEMEN: Your letter of the 10th instant, addressed to Attorney General Cosson, has been referred to me for reply.

You state that you are an Iowa corporation having your principal place of business at Des Moines, and request to be advised as to whether you may legally hold your annual stockholders' meetings and meetings of the board of directors at your office in Pittsburgh.

Section 1612 of chapter 1 of title IX of the code of 1897, being a part of the chapter under which you are incorporated, in so far as it is material in answer to the question propounded by you reads as follows:

"If the corporation transacts business in this state, the articles shall fix its principal place of business, which must be in this state, and in charge of an agent of the corporation, at which place it shall keep its stock and transfer books and hold its meetings."

In view of this section I do not believe that you could legally hold a stockholders' meeting at any place outside of the state of Iowa, and am inclined to think that it would be necessary to hold your meetings at the place of business designated in your articles. The courts hold in general that unless the charter of the corporation or the statute under which it is organized expressly confers upon the corporation the power to hold its stockholders' meetings outside of the state they can meet only within the limits of the state for the purpose of electing directors and performing other constituent acts. This rule, however, applies only to stockholders' meetings.

The general rule as to conducting business by the board of directors of a corporation is that unless prohibited by the charter of the corporation or a state statute their meetings may be held without the limits of the state creating the corporation. I make this latter statement for the reason that oftentimes in construing the law there is a failure to distinguish between the meetings of the stockholders or members of the corporation held for constituent purposes and the

meetings of the board of directors convened for the purpose of transacting the business of the corporation.

Yours truly,

JOHN FLETCHER,
Assistant Attorney General.

SCHOOLS—TEACHERS.—Can collect pay where schools are closed on account of epidemic.

January 30, 1914.

E. RITCHISON,
Modale, Iowa.

DEAR SIR: Yours of the 29th instant, addressed to the attorney general, has been referred to me for reply.

Your question reads as follows:

“If the local board of health ordered the public schools closed on account of an epidemic of a contagious disease, can the teachers collect their wage as if they had taught during the period? On what section of the code of Iowa do you base your opinion?”

In my judgment this question should be answered in the affirmative. However, it is not based on any section of the Iowa code but is a matter of the construction of the contract with the teacher. The weight of authority seems to favor the proposition that a contagious disease or the destruction of the school building is not an act of God nor of the public enemy within the meaning of the school law and that where the teacher is ready and offers to continue his duties under his contract of employment no deduction can be made from his salary for the time that the school is closed by reason of such contagious disease. See,

35 Cyc, 1099, and cases there cited; also
McKay vs. Barnett, 50 L. R. A., 371.

I also call your attention, however, to the case of *School District of Sherman vs. Howard*, 98 N. W., 666, where the supreme court of Nebraska takes a different view where the school is closed by the local board of health.

What has been said is on the theory that the teacher's contract

is silent on this subject. On account of the peculiar wording of some contracts a different rule has been applied.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

IOWA STATE COLLEGE—ATHLETICS—PAYMENT OF ANNUAL FEE FOR ATHLETIC PRIVILEGES.—School has no right to exact a fee from all students to support athletics.

January 30, 1914.

MR. R. A. PEARSON,
Ames, Iowa.

DEAR MR. PRESIDENT: I am in receipt of your communication of the 26th instant in which you direct attention to the fact that Prof. Spinney on November 17, 1913, submitted to Mr. Robbins the question: “Have the college authorities the legal right to require each student to contribute to the support of athletics, forensics, or other student activities?”

You refer to the negative reply given by Mr. Robbins and a modification of this opinion in an interview at the time he was ill and confined to his home.

You also enclose the issue of the I. S. C. Student of Tuesday, January 13, 1914, where the matter is referred to at length as a news item and also discussed editorially.

At the time the first opinion was given Mr. Robbins conferred to some extent with me. Until, however, you discussed the matter with me over the 'phone I had not received all of the facts necessary to a correct conclusion, and I think this accounts for the conflicting opinions of Mr. Robbins. We were both clearly of the opinion that the board of education could require that every able-bodied student take some form of physical exercise under the supervision of some one connected with the college. It was never understood that this was already required by the college and that the question submitted had no direct relation to the health and physical development of the particular student, but rather a compulsory fee for the purpose of promoting athletics as a sport independently of the individual benefit received by a particular student.

After reading your letter carefully and giving full consideration to its desirability and the unanimity of the student body for a

rule of this character, and after considering all of the reasons advanced in the I. S. C. Student, I am nevertheless of the opinion that the college faculty and board of education are without authority to exact a fee for the promotion of athletics as a sport. The fact that a large majority of the students requests that such a rule be established will not confer power in the absence of authority in the premises.

As a practical matter it seems a little difficult to understand why if such a large number of students desires the payment of a fee in advance which entitles them to all the privileges for the college season, that this may not be arranged in a voluntary way much the same as a season ticket to a Chautauqua, fair or lecture course, a season ticket being much cheaper to the person who attends regularly than though separate admission was paid for each number on the program.

The same energy, college spirit and enthusiasm which seems to be manifested in order to secure a ruling by the faculty and board of education, ought to induce almost every student to voluntarily pay the fee to secure a ticket for the college year entitling the holder to all athletic contests; but regardless of the merit of these suggestions I am of the opinion, as above stated, that the faculty and board of education are without authority to make a rule to require each student to pay semester or annual fee for the promotion of athletics.

Nothing herein contained, however, should be construed to militate against the authority of the board of education and faculty to include in its course of study or curriculum a sufficient amount of physical exercise, whether in the form of military training, gymnasium work or work upon the athletic field, in order that the training and development of the body may be in keeping with the discipline of the mind.

Yours very truly,

GEORGE COSSON,
Attorney General of Iowa.

BOARD OF HEALTH—AUTHORITY TO BUILD DETENTION HOSPITAL.—

Board has authority under chapter 156, acts of the thirty-fifth general assembly to build such hospital.

January 31, 1914.

WM. T. OAKES, *County Attorney*,
Clinton, Iowa.

DEAR SIR: Your letter of the 19th instant, addressed to the attorney general, has been referred to me for investigation and reply.

Your question is whether or not the local board of health under the present law still has power to build a pest house or detention hospital.

In my judgment this question should be answered in the affirmative. Under code supplement section 2570-a no express provision conferring such power will be found. However, it is provided in said section:

“All bills for expenses incurred in carrying out the provisions of this section and in establishing, maintaining or raising a quarantine, including disinfection and the *building and furnishing* of any *pest house, detention or other hospital*, shall be filed with the clerk of the local board of health, which board shall examine the same and act thereon at its next regular meeting after same has been filed with the clerk, and shall certify the amount allowed by it thereon to the county auditor, and the board of supervisors shall act upon said bill as thus certified at its first regular meeting thereafter.”

Hence, the power to build and furnish a detention hospital, while not expressly conferred is nevertheless very clearly implied.

By chapter 156 of the acts of the thirty-third general assembly this section is repealed and a substitute enacted therefor, and while the language is changed in many particulars yet there has not been such a change in my judgment as expresses the intention of the legislature to withdraw the power to build. The language now reads:

“All bills and expenses incurred in carrying out the provisions of this section and establishing, maintaining and raising quarantine *and furnishing necessary detention hospitals* shall be filed with the clerk of the local board of health. This board at its next regular meeting, or special meeting called for that purpose shall examine and audit the same, and if found correct

approve and certify the same to the county board of supervisors for payment."

The very nature of the case and the fact that the board might not be able to rent or procure an existing building for use as a detention hospital is an additional reason why the power to build should be construed to be embraced within the power to furnish. In other words, the power to furnish should receive such a broad construction as would permit the board to rent, lease or build buildings for use as detention hospitals, and where it is necessary to build they should have the power to build buildings of either a temporary or permanent character as might seem best under the circumstances.

Our supreme court has held "the power to furnish" to confer the power to obtain and procure. See *Feidenheimer vs. County of Woodbury*, 76 Iowa, 379.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

SCHOOLS—ELECTION OF OFFICERS—TIME FOR FILING NOMINATIONS.
—General rule as to computing time is applicable.

March 5, 1914.

W. L. STERN,
Logan Iowa.

DEAR SIR: Your letter of the 4th instant requesting a construction of chapter 245, acts of the thirty-fifth general assembly with reference to the time for filing nominations for the office of school director has been referred to me for reply.

The statute with reference to the time for filing nominations 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."

As you doubtless know we have a statute which fixes the method of computing time. This is paragraph 23 of section 48 of the code of 1897, and reads as follows:

"In computing time, the first day shall be excluded and the last included, unless the last falls on Sunday, in which case the time prescribed shall be extended so as to include the whole of the following Monday."

Applying this rule in computing time under the law referred to, the last day for filing would be on Monday, March 2d. The word "previous" used in the statute is equivalent to and synonymous with "prior". You refer to the provision of the statute with reference to the service of original notices as being analogous with this section. You will observe that in our original notice statute the law requires notices to be served "in such time as to leave at least ten days *between* the day of service and the first day of the next term." Clearly under that section it was intended to exclude in computation of time both the day of service and the first day of the term, while in the statute under consideration there are not express words sufficient to take it out of the usual rule for computing time and this section comes within the general rule that where an act is to be done a specified number of days before a definite or required number of days is computed by excluding the first day and including the day on which the event is to occur, and this rule is applicable not only in civil matters, but in criminal matters as well. See the recent case of *State vs. Smith*, 144 N. W., 32; also *Coe vs. Buell*, 6 N. W., 621.

Yours truly,

JOHN FLETCHER,
Assistant Attorney General.

CITIES AND TOWNS—PAVING—TAXING COST TO ABUTTING PROPERTY.
—Property not more than half way to next street and not over 300 feet from improvement may be assessed.

March 9, 1914.

DANIEL H. FITZPATRICK,
Mason City, Iowa.

DEAR SIR: Yours of the 3d instant addressed to the attorney general has been referred to me for reply.

This department has not, thus far, been called upon to interpret chapter 76, acts of the thirty-fifth general assembly to which you refer. However, my understanding of the purpose and meaning of the statute was to enable the cost of the street improvement to be

taxed in proportion to the benefits received by the property, whether abutting upon such street or not, provided the property is not more than half way between the street improved and the next street, and not more than three hundred feet distant from such street, and if the improvement is upon an alley, not more than one hundred feet distant from such alley. The general purpose of the statute was to reach property which does not abut upon the street improved, provided it is not more than half way to the next street and not more than three hundred feet distant from the street improved.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

CITIES—SALARY OF OFFICERS.—Section 3 of chapter 102 acts of the thirty-fifth general assembly interpreted fixing salaries of mayors and councilmen.

March 10, 1914.

O. B. TOWNE,
Keokuk Industrial Ass'n,
Keokuk, Iowa.

DEAR SIR: I have yours of the 9th instant in which you call attention to the provisions of section 3, chapter 102 of the acts of the thirty-fifth general assembly as being the law inquired about in yours of the 3d instant. If you will examine the index you will find that this chapter is neither referred to under the title of "Cities and Towns", nor "Cities under Special Charter", nor "Cities under Commission Form of Government". The provision to which you refer reads as follows:

"For the mayor, not to exceed the sum of one hundred fifty dollars (\$150.00) per annum for each one thousand (1000) of population, or major portion thereof, in such city, and for each councilman in such city, not to exceed the sum of one hundred twenty dollars (\$120.00) per annum for each one thousand (1000) population, or major portion thereof; provided, however, that in such city no mayor shall receive a salary greater than the sum of twenty-five hundred dollars (\$2500.00) per annum, nor in such city shall a councilman receive as his annual salary an amount greater than two thou-

sand dollars (\$2000.00) per annum; and provided, further, that from and after the passage of this act, and during the first term of his office under the provisions of this act, the mayor and councilmen shall by ordinance fix their compensation as herein provided for their term of office; but thereafter the salary of any such officer shall not be increased or decreased during the term for which he shall have been elected or appointed."

In my judgment this provision authorizes the new council to fix for themselves and the mayor an annual salary based upon the population as follows: For the mayor not to exceed \$150 for each thousand of population or major fraction thereof of 501 or over; and for councilmen a salary of not to exceed \$120 for each thousand or major fraction thereof; in no event however should the salary of the mayor so fixed exceed \$2500 nor of the councilmen exceed \$2000 per annum. This ordinance should be enacted during the first term of office under this act and thereafter the salary of any such officer should not be increased or decreased during the term for which he is elected or appointed.

It will be noted that the amount of the salaries is to be left to the council within the maximum limits fixed in this section.

By the last national census Keokuk had a population of 14008 which would authorize a maximum annual salary to the mayor of \$2100 and to the councilmen the sum of \$1680.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

COUNTY ATTORNEY—ALLOWANCE FOR OFFICE RENT.—Board of supervisors may pay rent for office for county attorney when none is provided by county.

March 18, 1914.

B. B. BURNQUIST, *County Attorney,*
Fort Dodge, Iowa.

DEAR SIR: Yours of the 16th instant addressed to the attorney general has been referred to me for investigation and reply.

You call attention to the fact that Mr. Wall has advised the officers of your county that the board could not pay more than

\$1250 per year as salary to the county attorney. As I understand your letter you concede this to be the law, and your further inquiry is whether or not the board may in addition to the maximum salary provided by law allow the additional sum of \$25.00 per month, or \$300 per year for office rent and for the services of a stenographer. In your letter you say the law would certainly permit the board renting an office for its county attorney and he undoubtedly could collect anything that he had to pay out for work done by a stenographer.

The section of our statute covering the matter is code section 468 which reads as follows:

"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; but in no case shall any such officers, except the county attorney, be permitted to occupy an office also occupied by a practicing attorney. Nothing herein shall be construed to include the law books or library of the county attorney."

In my judgment this section furnishes ample authority for the board of supervisors to allow the county attorney, where it does not furnish him an office in the court house, a reasonable amount for office rent. But there is no authority found in this section for any allowance for services of a stenographer. As to whether or not there is any other provision whereby an allowance might be made for work done by a stenographer I have been unable to find anything bearing thereon except code supplement section 308 which provides:

"In addition to the salary above provided, he (the county attorney) shall receive the fees as now allowed to attorneys for suits upon written instruments where judgment is obtained, for all fines collected where he appears for the state, but not otherwise, and school fund mortgages foreclosed, and his necessary and actual expenses incurred in attending upon his official duties at a place other than his residence and the county seat, which shall be audited and allowed by the board of supervisors of the county."

Hence, it follows that in addition to the furnishing of an office, fuel, lights, blanks, books and stationery provided for in section 468 of the code, the only expenses the county attorney is entitled to recover are his necessary and actual expenses incurred in attending upon his official duties at a place other than his residence and the county seat. If the services of a stenographer were necessary and expense had actually been incurred for that purpose at a place other than the residence of the county attorney and other than the county seat of his county I am inclined to think that this section would authorize an allowance therefor but not otherwise.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

SUPERINTENDENT OF PUBLIC INSTRUCTION—LAW MAKING OFFICE
APPOINTIVE—CONSTITUTIONALITY OF LAW.—Chapter 107, acts
of the thirty-fifth general assembly held constitutional.

March 18, 1914.

R. M. MARVIN, *Attorney,*
Manchester, Iowa.

DEAR SIR: Yours of the 17th instant addressed to the attorney general has been referred to me for reply.

Your question briefly stated is whether chapter 107, acts of the thirty-fifth general assembly providing for the selection of a county superintendent, and chapter 103 of the thirty-fifth general assembly, providing for the appointment of superintendent of public instruction, are constitutional and you call attention to article 2 of section 7 which you say reads as follows:

"State, county and township officers shall be elected on Tuesday after the first Monday in November",

but which in fact reads as follows:

"The general election for state, district, county, and township officers shall be held on the Tuesday next after the first Monday in November."

In view of the fact that courts only hold acts of the legislature to be unconstitutional when the case can be determined on no

other ground, this department should be slow to assert that any act of the legislature is unconstitutional. However, I would suggest that the constitutional provision to which you refer was simply intended to fix the time of holding the election for state, county and township officers, and it is not equivalent to saying that all state, county and township officers shall be chosen by election. It simply means that such as are to be elected shall be elected at the time fixed. If the offices involved were offices created or provided for by the constitution, there might be some ground for your contention, but inasmuch as these offices were created by the legislature and not by any constitutional provision, the legislature might provide for their selection by appointment rather than election.

Hence, I am of the opinion that both chapters referred to are constitutional.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

HOG CHOLERA SERUM—FUND FOR HOW USED—PAYMENT OF INSPECTOR FROM SUCH FUND.—Person employed to report on results of use of serum may be paid from fund.

March 20, 1914.

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

DEAR SIR: Your letter of January 30th, together with copy of letter of President Pearson, dated January 26th, has been referred to me for reply.

Your question briefly stated is whether or not a veterinarian might be employed to look up and report on instances where the results of the use of hog cholera serum were unsatisfactory and to charge the expense of such employment to the serum fund provided for in section 3 of the act which provides in part as follows:

"Said moneys shall be kept by said treasurer in a separate fund to be known as the serum fund and he shall pay out from said fund as other college funds are expended but only for expenses directly connected with the maintaining of said laboratory and the manufacture, purchase and distribution of said serum."

In my judgment any investigation necessary to determine whether or not the serum was properly manufactured, would be an expense that might be paid from this fund and that under section 1, which authorizes the president of the college to appoint a director of said laboratory and *such assistants as are deemed necessary* to efficiently carry on said work and with the approval of said board fix the salary of said assistants, such veterinarian might be appointed and paid from said fund. If the appropriation provided for under section 11 of the act is sufficient he might also be paid from that source.

I am also of the opinion that an inspection of this sort might be made of the serum of other plants which it is the purpose of the director of the laboratory to purchase and distribute under the provisions of section 2 of the act, but the inspection of serum or the results of its administration, unless manufactured by or distributed through the state laboratory or under the supervision of its director, would not fall within the above rule and should not be paid for from the serum fund but might be paid from the appropriation provided for in section 11 of the act.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

FLOUR—SALE FOR USE WITHIN STATE.—Where flour is sold to baker for use in this state package must bear statement as to net weight.

March 23, 1914.

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

DEAR SIR: Replying to yours of the 21st instant, addressed to the attorney general, will say that in my judgment chapter 307 acts of the thirty-fifth general assembly, while to some extent overlapping chapter 180, acts of the thirty-fourth general assembly, would not operate to repeal the last mentioned chapter and both would continue in force.

Your second question is whether or not either of these laws would apply to sales of flour to a baker where the packages are

not to be re-sold. Chapter 180 of the acts of the thirty-fourth general assembly provides:

"Every barrel, bag, parcel or package of flour containing one pound or more, offered or exposed for sale in the state of Iowa, *if for use within this state*, shall have affixed thereto in a conspicuous place * * * a statement certifying the number of net pounds contained in the package."

Hence it follows that if the baker referred to is located within this state and the flour is sold to him for use in this state this provision would apply.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

NOTARY PUBLIC—ACKNOWLEDGMENT TAKEN OVER TELEPHONE.—
Legality discussed.

March 26, 1914.

F. W. LINDQUIST,
Gowrie, Iowa.

DEAR SIR: Yours of the 24th instant, addressed to the auditor of state, has been referred to this department for reply.

Your question briefly stated is whether or not a notary public may take acknowledgments of deeds, affidavits and other papers over the telephone.

Upon an investigation of this question I find that the adjudicated cases are extremely rare. The only cases that I have been able to find bearing directly upon the question are the following:

Webster vs. Hurst, 130 S. W., 842; (Tenn.); in which it was held under a statute which required the examination of a married woman separate and apart from her husband, that such examination could not be made over the telephone.

In the case of *Banning vs. Banning*, 80 Calif., 271; 22 Pac. 210, the validity of an acknowledgment to a deed was questioned on the ground that at the time the deed was acknowledged by the defendant who was a married woman, she was not visible, therefore not personally present before the notary at the time he took her acknowledgment over the telephone, she being three miles distant from him. In this case the court held that because the party did

not deny the execution of the deed and because of the fact that the certificate of the notary was in due form, that the acknowledgment could not be impeached except where fraud was alleged and established.

In the case of *Sullivan vs. First National Bank*, 37 Tex. Civ. Ap. 228; 83 S. W., 421, it was held that an oath to an affidavit which was required by statute to be administered in the mode most binding upon the conscience of the individual taking the same and made by the affiant in the personal presence of the officer could not be administered over the telephone although the officer recognized the voice of the affiant. In the course of the opinion the court said:

"The clerk could not possibly identify him as the one making the affidavit if the question should afterwards arise. In a prosecution for perjury, such testimony on the part of the clerk would not even raise an issue against the unknown affiant. So, we hold that not only is the personal presence of the affiant required, to the end that by appropriate form and ceremony his conscience may be bound, but that it is required * * * that the officer may see and know that the man who signs also swears. No modern business necessity requires the broadening of these rules. To allow the contention of appellant would be to open a broad door for fraud and imposition, and hold out to the perpetrators a tempting chance for immunity from discovery and identification."

In *Bernard vs. Schuler*, 110 N. W., 966, it is held that a notary public or other officer cannot legally and honestly certify to the acknowledgment of a party unless he personally knows or has satisfactory evidence of the fact that he is the identical person described in and who executed the instrument.

The supreme court of Missouri has held that a notary is liable for damages sustained by an innocent party by reason of his false service whether he was enjoined or not. *State vs. Ryland*, 163 Mo. 280; 63 S. W., 819.

Our statute prescribing the form of acknowledgment in ordinary cases is code section 2948, and requires the certificate to set forth, first, the title of the court or person before whom the acknowledgment was made; second, that the person making the acknowledgment was known to the officer taking the acknowledgment to be the identical person whose name is affixed to the deed as grantor, or that such identity was proven by at least one credible witness,

naming him; and third, that such person acknowledged the execution of the instrument to be his voluntary act and deed. Where the acknowledgment is on behalf of a corporation it is required to be sworn to by certain officers thereof. See code section 2959. The last mentioned case would fall within the rule of the Texas case above cited and clearly could not be taken over the telephone, nor could the affidavit of an individual be taken over the telephone, and while it is not a principle to be encouraged I am of the opinion that where an officer taking the acknowledgment is sufficiently acquainted with the voice of the person whose acknowledgment is being taken and positively identifies him thereby and is also acquainted with his handwriting or signature, and also fully makes known to the party whose acknowledgment is being taken the entire contents of the instrument sought to be acknowledged that such acknowledgment would be held sufficient, but if one of these elements is lacking same would be insufficient.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

BOARD OF SUPERVISORS—COMPENSATION—WHEN ACTING AS DRAINAGE BOARD—FEES FOR SUCH SERVICES TO BE PAID FROM DRAINAGE FUND.

March 28, 1914.

HON. JOHN L. BLEAKLY,
Auditor of State.

DEAR SIR: Replying to your letter of the 26th instant will say that code supplement section 469 fixing the compensation of members of the board of supervisors limits the number of days that the board is entitled to receive compensation for session work to

- 30 days in counties of 10,000 or less population;
- 45 days in counties of between 10,000 and 23,000 population;
- 55 days in counties of between 23,000 and 40,000 population;
- 65 days in counties of between 40,000 and 60,000 population;
- 75 days in counties of between 60,000 and 80,000 population;
- 90 days in counties of between 80,000 and 90,000 population;
- 100 days in counties of more than 90,000 population.

Said section further provides:

"The time spent by the board of supervisors as a ditch or drainage board and in considering drainage matters whether as a single board or jointly with one or more other boards, shall not be counted in computing the number of days which any board has been in session, but the members of the board shall be entitled to compensation at the same rate for the time spent in ditch and drainage matters in addition to the compensation allowed as hereinbefore set forth, but in no case shall said board be allowed more than fifty days additional time in one year for time spent in drainage matters. If on the same day the board acts both as a county board and also for the purpose of considering drainage matters, the board shall be paid for one day only, and from the general fund or drainage fund as the board may order."

I am of the opinion that the quoted provision should be construed to require the payment for services of the members of the board in drainage matters from the drainage fund, for if it were to be paid from the general fund, there would be no occasion for many of the provisions found in this section, and while it is not specifically provided that the additional days spent in drainage matters not exceeding fifty days in any one year shall be paid from the drainage fund, yet the fact that the board is expressly authorized to order payment for a single day in which both county and drainage matters have been considered from the drainage fund would clearly indicate that days entirely spent in drainage matters should be paid for from the drainage fund.

I am enclosing copies of this opinion in order that Mr. Wall may furnish Mr. Luke and others interested a copy thereof.

Yours very truly,

C. A. ROBBINS,
Assistant Attorney General.

SHERIFF—FEES, MILEAGE AND EXPENSE OF SERVING SUBPOENAS AND OTHER PROCESSES.

March 28, 1914.

CHAS. J. LEWIS, *County Attorney,*
Mt. Ayr, Iowa.

DEAR SIR: Yours of the 25th instant addressed to the attorney general has been referred to me for reply.

Your first question is:

"Under section 511 of the supplement to the code, 1907, or under any other provision of the statutes of Iowa is the sheriff entitled to charge and receive any mileage in serving a warrant of arrest?"

In my judgment subdivision 12 of this section which reads "Mileage in all cases required by law going and returning, 5c per mile", is applicable, and that the sheriff would be entitled to such mileage, but where the same is charged he would not be entitled to expense of transportation under subdivision 3 of code supplement section 511 to which you refer.

Your second question is:

"What fees is the sheriff entitled to charge and receive in the serving of grand jury subpoenas? Is he entitled to charge and receive his expenses in serving grand jury subpoenas, such expenses as livery hire, hotel expenses and like expenses?"

This is covered by subdivision 4 of the same section which provides: "For serving and returning a subpoena, for each person served, 20c", to which should be added mileage as provided in subdivision 12 above quoted, the basis being the actual number of miles traveled going and returning in serving such subpoena. Hotel expense, livery hire or other like expense should not be added to the mileage thus charged.

Your third question is:

"In section 510-a of said supplement, line 17, what expenses are to be covered by the words, 'the expenses necessarily incurred and actually paid while engaged in the performance of official duties in serving criminal process'? What is included within the words, 'criminal process' as here used? Is grand jury subpoena included as 'criminal process,' as here used?"

In my judgment the term "criminal process" as here used refers to that process by which jurisdiction is acquired of the defendant, such as a warrant of arrest, possibly also to search warrants served in a criminal proceeding, but does not apply to nor include a grand jury subpoena.

Your fourth question is:

"Is twenty cents for each person served and mileage (five cents going and returning, each way) all that the sheriff is entitled to in serving grand jury subpoenas?"

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

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

TAXATION—SOLDIER'S EXEMPTION.—Amount exempt to be based on actual value and not taxable value.

March 31, 1914.

MR. R. R. STUART,
Hampton, Iowa.

DEAR SIR: I am in receipt of your communication of the 30th instant advising that Mr. Reeves, a member of the thirty-fifth general assembly, states that it was the intention of the legislature to amend the act of the thirty-fourth general assembly making the twelve hundred dollar exemption mean an exemption of taxable value and not actual value of the property exempted to soldiers, sailors and the widows of such soldiers and sailors.

Possibly the author of the bill so intended but surely the language does not warrant the statement that the legislature intended this.

Chapter 115, acts of the thirty-fifth general assembly, amends chapter 62, acts of the thirty-fourth general assembly, so that as amended it reads as follows:

"The property not to exceed twelve hundred dollars in actual value, of any honorably discharged Union soldier or sailor of the Mexican war or of the war of rebellion or of the widow remaining unmarried of such soldier or sailor. It shall be the duty of every assessor annually to make a list of such soldiers, sailors, widows and to return such list to the county auditor, upon forms to be furnished by such auditor for that purpose; but the failure on the part of any assessor so to do shall not affect the validity of any exemption.

"All soldiers, sailors or widows thereof referred to herein shall receive a reduction of twelve hundred dollars, the same to be made from the homestead of such soldier or widow, if he or she shall own a homestead of the value of such exemption, otherwise out of such property as shall be designated and owned by the soldier, sailor or widow. Such designation to be made either to the assessor or by writing filed with the county auditor on or before July 1st, each year."

As so amended the act is very clear. The beginning of the section as amended says: "The property not to exceed twelve hundred dollars *in actual value*" etc. The twelve hundred dollars referred to in the amended portion refers to the twelve hundred dollars above stated, viz: twelve hundred dollars in actual value.

The purpose of the amendment was not as suggested by Mr. Reeves to enlarge the exemption from twelve hundred dollars to forty-eight hundred dollars of actual value by accomplishing this in an indirect manner by substituting actual value for taxable value but to make clear from what property the twelve hundred dollar exemption should be taken. Such an amendment was absolutely imperative for this reason: an old soldier might have real estate, bank stock and moneys and credits. Moneys and credits, as you know, are assessed now at a flat rate of five mills on the dollar. Bank stock is assessed at eighty per cent of the actual value and real property in cities and towns of the value of one thousand dollars to four thousand dollars is often assessed at its full value or 100%; whereas farm land is assessed even after the increase at from 40 to 50% of its actual value.

It was therefore a matter of very great consequence to know whether the exemption was to be taken from moneys and credits, from real estate located in the city, farm lands or bank stock. Some old soldiers are fortunate enough to have all those various kinds of property.

It was to clear up this difficulty that the amendment was passed, hence the law as amended allows an exemption of twelve hundred dollars of the actual value of the property held by the soldier or widow of such soldier, such exemption to be made from the homestead, if the soldier or widow owns a homestead of the value of such exemption; otherwise out of such property as shall be designated and owned by the soldier, sailor or widow.

Yours very truly,

GEORGE COSSON,
Attorney General of Iowa.

CITIES AND TOWNS—DEPOSIT OF DAILY BALANCES BY TREASURER.—

Chapter 55 acts of the thirty-fifth general assembly requiring deposits not applicable to towns.

April 29, 1914.

F. E. SKOLA, *Town Clerk,*
Kalona, Iowa.

DEAR SIR: Replying to yours of the 27th instant will say that your question, which reads as follows:

"Does the law compel the treasurer to deposit the public funds belonging to the town with some bank at the rate of 2% on 90% of the daily balances?"
should be answered in the negative.

The law requiring city officials to deposit public funds at interest is found in chapter 55, acts of the thirty-fifth general assembly, and applies to cities of the first and second class, cities under special charter and cities under the commission form of government, but not to incorporated towns.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

CITIES—UNDER COMMISSION PLAN—COMPENSATION OF COMMISSIONERS WHEN ACTING AS BOARD OF REVIEW.—Are entitled to compensation provided in section 669 of code.

May 8, 1914.

HARRY S. STANBERRY,
Mason City, Iowa.

DEAR SIR: Your favor of the 7th instant has been referred to me for reply.

Your inquiry is, "Are commissioners elected under the commission form, when acting as members of a board of review, entitled to extra compensation above what they receive as commissioners?"

Section 669 code supplement, 1907, after referring to cities of the first class, says:

"And in *all other* cities and towns * * * members shall be paid in *addition* to the foregoing as members of the board of review an amount not exceeding \$1.00 for each session of not

less than three hours, and the compensation for services as members of the board of review shall be paid out of the county treasury."

This compensation, you will notice, is paid from the county and not the city treasury. There seems to be nothing in the acts or amendments pertaining to commission governed cities which in any way changes section 669 and its application to cities under the commission form.

Chapter 102, acts of the thirty-fifth general assembly, amends and fixes the compensation of commissioners, the wording being:

"And their total compensation shall be as follows", etc.

The compensation is here paid from the city treasury and it seems a fair interpretation to say that the words "total compensation" mean total compensation from the city. Taken together it seems that section 669, above referred to, is applicable to cities under the commission form and that the commissioners are entitled to the extra compensation as provided by section 669. Hence, the question should be answered in the affirmative.

Yours truly,

WILEY S. RANKIN,
Special Counsel.

HOG CHOLERA SERUM—COST OF PRODUCTION—ITEMS TO BE ADDED
TO ORIGINAL COST IN DETERMINING SELLING PRICE.

May 13, 1914.

C. H. STANGE,
Ames, Iowa.

DEAR SIR: Replying to yours of the 11th instant will say that in my judgment it would be permissible to charge against the cost of the production of serum, in order to arrive at the price at which it is to be sold,

First, a reasonable proportion of the director's salary;

Second, an amount which might be designated as a sinking fund to cover possible losses on account of poor serum;

Third, an amount to cover other accidents or contingencies which might result in loss;

Fourth, interest on the amount invested in the plant or a reasonable rental of such plant, including a reasonable amount for depreciation.

However, I am of the opinion that it would not be proper to charge interest on the amount of serum in storage for the reason that those funds are furnished by the state.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

PRIMARY ELECTIONS—CHANGE OF AFFILIATION—HOW AND WHEN
ACCOMPLISHED.

May 21, 1914.

E. T. MEREDITH,
Des Moines, Iowa.

DEAR SIR: In yours of the 21st instant, addressed to the attorney general, you call attention to the fact that confusion exists among voters as to their right to change party affiliation on primary election day, and ask to be advised as to the matter.

This department has heretofore held that under code supplement section 1087-a8 one whose party affiliation has already been declared and registered might change his party affiliation without challenge and without filing any affidavit or taking any oath at any time not less than ten days prior to the date of any primary election by filing a written declaration with the county auditor stating his change of party affiliation.

In the latter part of the same section it is further provided:

"Any elector whose party affiliation has for any reason not been registered or any elector who has changed his residence to another precinct, or a first voter or citizen of this state casting his first vote in this state shall be entitled to vote at any subsequent primary election in the same manner and upon the same terms as provided in section seven of this act, and the clerks of the primary election shall record his party affiliation and the county auditor shall add his name to the alphabetical lists for use in subsequent primary elections as provided for in section seven of this act."

It will be observed, however, that this provision simply has reference to the registering on election day of party affiliation not previously declared or registered in that voting precinct.

In code supplement section 1087-a9 it is further provided:

"Any elector whose party affiliation has been recorded as provided by this act and who desires to change his party affiliation on the primary election day, shall be subject to challenge. If the person challenged insists that he is entitled to vote the ticket of the political party to which he has transferred his political affiliation and the challenge is not withdrawn, one of the judges shall tender to him the following oath: 'You do solemnly swear (or affirm) that you have in good faith changed your party affiliation to and desire to be a member of theparty.' And if he takes such oath he shall thereupon be given a ticket of such political party and the clerks of the primary election shall change his enrollment of party affiliation accordingly."

In my judgment one whose party affiliation has already been recorded may, by taking the prescribed oath set forth above, change his party affiliation on primary election day. See, *Jones vs. Fisher*, 137 N. W., at 941.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

ELECTIONS—SPECIAL HELD IN CONNECTION WITH PRIMARY—HOURS FOR VOTING.—Where special election is held in connection with primary the fact that the hours for voting are not the same as provided for under general election laws does not invalidate election.

June 12, 1914.

FRED JENSEN, County Attorney,
Spencer, Iowa.

DEAR SIR: In yours of the 12th instant, addressed to the attorney general, your first question is whether or not when a special election matter is submitted at the primary election and the polls are kept open only during the hours required by the primary election law and not as required by the general election law such elec-

tion would be valid in so far as the special election feature is concerned.

In my judgment this question should be answered in the affirmative. The general election law requires the polls to be open between the hours of eight o'clock in the forenoon and seven o'clock in the evening, whereas the primary election law requires the polls to be open from nine o'clock a. m. to eight o'clock p. m., except in cases where registration is required, and in each instance the polls are to open earlier.

"The provision of a statute as to the time of opening and closing the polls is so far directory that an irregularity in this respect which does not deprive a legal voter of his vote or admit a disqualified person to vote will not vitiate the election."

15 Cyc, p. 364, and cases cited.

In an Ohio case cited on this page it will be observed that the polls were closed one hour at noon and it was held not to invalidate the election; and in the Florida case cited on the same page there was a delay of less than one hour in opening the polls and only one person was prevented from voting by reason of such delay and it is not shown that such vote would have changed the result, and it was held that the election was valid.

In your case the length of time the polls were open was the same, the opening time being one hour later, and the closing time one hour later. Hence I am of the opinion that this was a sufficient compliance with the law even though the general election hours govern rather than those of the primary election.

With reference to your second question will say that in my judgment there should have been an order of the board of supervisors appointing primary election judges, judges of the special election. However, if they performed the duties, they were *de facto* officers and their action would be legal.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

CAPITOL EXTENSION—SALE OF HOUSES REMOVED FROM THE EXTENSION PLAT.—State may sell houses removed to other locations together with the lots they occupy.

July 14, 1914.

EXECUTIVE COUNCIL,
Statehouse.

GENTLEMEN: Replying to yours of the 14th instant concerning the authority of the executive council to remove houses belonging to the state and situated in the so-called Capitol Extension ground to other lands owned by the state and directed to be sold by the same act will say that this department concurs with the view expressed in your letter to the effect that section 6 of the act confers upon the executive council the power to so remove said buildings and to sell the same together with the lots to which they are removed that being a disposition of the same within the meaning of said section 6.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

SCHOOLS—TREASURER—DEPOSIT OF FUNDS IN BANK.—Treasurer selects bank; board passes only on sufficiency of bond.

July 18, 1914.

C. SULLIVAN, *Cashier*,
Cherokee, Iowa.

DEAR SIR: Replying to yours of the 16th instant, addressed to the attorney general, will say that by chapter 247, acts of the thirty-fifth general assembly it is made the duty of the treasurer of each school district 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 2% per annum on 90% 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; "but before such deposit is made such bank shall file a bond with sureties to be *approved by the treasurer and the board of directors* of such corporation in double the amount deposited."

In my judgment the treasurer has the right to select the bank in which the deposit is to be made, and the board of directors primar-

ily have nothing to do with the question of where the funds should be deposited. However, the bond must be approved by the board as well as by the treasurer. Until a bond has been filed and approved by both treasurer and the board the treasurer is accountable for the funds and may keep or deposit the same wherever he sees fit.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

DRAINAGE—ASSESSMENT OF COST—AMOUNT THAT MAY BE ASSESSED AGAINST LAND—LAND OWNED BY STATE—RULE IN SUCH CASES.

July 23, 1914.

EXECUTIVE COUNCIL,
Statehouse.

GENTLEMEN: In yours of the 23d ultimo you call attention to the fact that an assessment of \$70 per acre has been levied against the land in Eagle Lake, Kossuth county, presumably to cover the cost of some drainage system, and that the amount of the assessment equals the value of the land, and your question, briefly stated, is whether or not an assessment which amounts to a confiscation of the entire value of the property is lawful.

There seems to be no question about the power to create a liability against the property. In some states it is held that this is the extent of the power and that even where the land is held by an individual he cannot be rendered liable personally for the assessment, but that the extent of liability would be to exhaust the property. See, *Ivanhoe vs. Enterprise*, 29 Oreg. 245; 35 L. R. A. 58, Notes III and IV. However, there are some authorities that go further and hold that the owner of the land may also be held personally liable and that he is liable for any deficiency remaining unsatisfied after exhausting the property. See Note V, same case. Of course where the property is held by the state in its sovereign capacity it is exempt from such assessment. For instance, where it was sought to assess the cost of sewer against the capitol square and this right was denied. See *Polk County vs. State*, 69 Iowa, 24. However, I assume that the lands in controversy are held by the state with a view to investment or profit and that the rule adopted

in the case of *Sioux City vs. Independent School Dist.*, 55 Iowa, 150, where the taxes were sustained would apply. See also *Madison County vs. Winterset*, 145 N. W., 492, wherein it was held that a part of the cost of paving the public square abutting upon the courthouse grounds was properly chargeable to the county.

Occasionally it is provided by statute that the cost of public improvement shall not exceed a certain percentage of the entire value of the property benefited, but in the absence of such a statute I am of the opinion that where the property is liable to assessment at all an assessment may be levied equaling the entire value of the property.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

RAILROAD COMMISSION—EXPENSE OF PRINTING BRIEFS IN INTER-
STATE AND INTRASTATE CASES—FROM WHAT FUNDS PAID.

July 23, 1914.

EXECUTIVE COUNCIL,
Statehouse.

GENTLEMEN: Replying to yours of the 14th instant will say that the fund created by chapter 334, acts of the thirty-fifth general assembly is the primary fund from which to pay the expenses of the railroad commission in preparing and submitting cases to the Interstate Commerce Commission when involving interstate rates and services affecting Iowa, and to investigate and prepare cases affecting Iowa intrastate rates and services.

As to whether or not the briefs referred to in your letter would properly fall within the term "preparing and submitting cases" or "investigating and preparing cases" as stated in the section is the real question. In my judgment they might properly be paid for from this fund, and in cases where the state or any of its departments was a party, either as plaintiff or defendant, then the briefs in such cases might be paid by the council under chapter 2 of the acts of the thirty-fourth general assembly as amended by chapter 11 of the acts of the thirty-fifth general assembly. However, it will be observed that under this provision "the executive council of the state of Iowa is hereby authorized to pay any costs taxed," etc. This would indicate that the council should exercise

a discretion in the matter and that it might not be required to pay from this fund all such costs that might be taxed in any given matter. Hence, I am of the opinion that the council might pay for the briefs in question from either of these funds in its discretion and might also pay the same from the general revenues of the state.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

CITIES AND TOWNS—EMPLOYMENT OF AGENTS—COMPENSATION.—

Cities and towns have the right to employ persons to perform certain enumerated duties for them and the mayor has no right to refuse to sign a warrant for the compensation of such agent.

August 22, 1914.

J. W. KRIDELBAUGH, *City Solicitor*,
Chariton, Iowa.

DEAR SIR: In yours of the 12th instant, after reciting the facts showing the employment of one Frank C. Larimer as manager, and after setting out a portion of the resolution by virtue of which he was employed, and after detailing some of his duties under said employment, you propound the following question, "Is the employment of Larimer legal?"

In my judgment the question should be answered in the affirmative. A city has the power to employ agents and servants to assist in the transaction of its business. See, 28 Cyc, 588; *Stewart vs. City of Council Bluffs*, 58 Iowa, 642; also *Hathaway vs. City of Des Moines*, 97 Iowa, 333.

In my judgment, however, such an agent or employe would only have authority over such matters as are especially enumerated or delegated to him either at the time or after the time of his employment. In other words, the city is without authority to delegate to him any general powers.

Your second question is, "Does the mayor have the right to refuse to sign a warrant for payment of his wage, the bill having been allowed by the council?"

On the assumption that the bill covers only services rendered by the claimant under the direction of the council and does not include matters which the claimant assumed to do without the direc-

tion of the council this question should be answered in the negative.

For your information I may say that on July 22, J. C. Seward, your mayor, propounded the following question:

"Our city council *elected* a man as city manager to take over the general affairs of our city and same was done by resolution and not by ordinance, and under said resolution fixed his salary at \$100.00 per month and did not state out of what fund it was to be paid. I want to know if the council have to make said salary by ordinance in order to be legal and if I as mayor should sign order for payment of money out of general fund would I not be liable for so doing."

To which on the 23d of July I replied as follows:

"Replying to yours of the 22d instant will say that if your city has adopted the commission plan of government then it may employ the services of a general agent, otherwise not."

From his statement of the matter I was led to believe that the council had assumed to appoint a general manager within the meaning of the law conferring this power upon commission plan cities and hence the answer given. While it would clearly be within the power of the city to employ one man to do several items of work yet I am at a loss to know where a man might be found who would be an expert in all lines and hence qualified to oversee all branches of the city's business.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

ELECTRIC CURRENT—TRANSMISSION LINES—ERECTION OF ALONG HIGHWAYS AND ACROSS PUBLIC LANDS AND STREAMS.—Grant of authority by supervisors or railway commission distinguished.

August 25, 1914.

H. W. WAGNER,
Care Engineering Experiment Station,
Ames, Iowa.

DEAR SIR: Replying to yours of the 24th instant will say that chapter 94, acts of the thirty-third general assembly, gives the

county supervisors the right to grant the use of public highways for transmission of electric current but you will observe that it does not confer upon them any power over other lands.

Chapter 174 of the acts of the thirty-fourth general assembly confers upon the railroad commission power to grant the right to construct such lines over, along and across public lands and streams, and the lands of any person or persons and to acquire the necessary interest in real estate therefor in addition to the erecting of the same upon the highway.

Your first question is:

"Would it be violating the law to erect and operate an electric transmission line along the public highway without a grant from either the supervisors or railroad commission, provided the construction and maintenance complies with chapter 94 of the laws of the 33d assembly?"

This question should be answered in the affirmative.

Your second question is:

"Is a grant from both the county supervisors and the state railroad commission necessary for the construction and operation of such a transmission line on the public highways? If not, who has the primary power in this matter, the supervisors or the commission? Or is a grant from either body sufficient?"

If it is only desired to construct the line on a public highway the grant from the board of supervisors is all that is required. If, however, the line must cross public lands or streams as well as public highways then the grant from the railroad commissioners would be sufficient.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

BLACKLISTING.—Association of business men for purpose of "black-listing" persons who do not pay bills—Such association held to be unlawful.

August 28, 1914.

MR. J. A. HARRELL,
Webster City, Iowa.

DEAR SIR: Yours of the 24th instant addressed to the attorney general has been referred to me for reply. You call attention to

the fact that it is proposed by your merchants to organize a rating agency and you state the scope of its proposed operations as follows:

"To open an office and employ a manager and such assistance as he may need, to use a card system of information kept in cipher, for the manager to secure all information possible through his personal work and also secure from all merchants of the association their experience with the parties, and arrange all such information on the card, the same to be furnished any member of the association upon application by phone or written report by cipher. It is then left to the individual merchant himself whether or not he shall extend credit to the party."

As herein stated, I see no legal objection to the plan. However, you add the following proposition:

"Another thing we would like to use is that in case a party opens an account with a member of the association and refuses or neglects to pay, or cannot pay, to refuse him further credit with all the members until he first pays the original obligation."

In my judgment this method of handling the matter would be clearly illegal. I call your attention to the case of *Weston v. Barnicoat*, 175 Mass., 454; 49 L. R. A., 612, and especially the authorities collected in the note. You will doubtless find this volume in the office of some attorney in your city, and I would suggest a careful examination of the same.

Yours truly,

C. A. ROBBINS,

Assistant Attorney General.

GIFT ENTERPRISE LAW—INTERPRETATION OF—WHAT CONSTITUTES
A VIOLATION.

August 28, 1914.

MR. D. A. MAGEE, *Secretary,*
Retail Merchants Association,
Sioux City, Iowa.

DEAR SIR: I am in receipt of your communication of the 27th instant enclosing rules governing the Golden Gate contest, to-

gether with a copy of paper showing the method of such contest, with an additional explanation on your part.

From your letter, from the rules and from the facts set forth in the paper it appears that two or more merchants and business men have associated themselves together for the purpose of giving prizes to persons purchasing merchandise of one or more of the business concerns engaged in such association; that on account of such purchase tickets, stamps or certificates are given to each person according to the amount of money invested and that each stamp or ticket contains a certain number of votes, and that the person receiving the highest number of votes secures the prize.

Chapter 226, acts of the thirty-third general assembly, provides in part:

"Whenever two or more persons enter into any contract, arrangement or scheme, whereby for the purpose of inducing the public to purchase merchandise or other property of one of the parties to said scheme, any other party thereto, for a valuable consideration and as a part of such scheme, advertises and induces or attempts to induce the public to believe that he will give gifts, premiums or prizes to persons purchasing such merchandise or other property of such party to said scheme, and that stamps or tickets will be given by the seller in connection with such sales entitling the purchaser of such property to receive such prizes or gifts from any other party to such scheme, the parties so undertaking and carrying out such scheme shall be deemed to be engaged in a 'gift enterprise', unless the articles or things so promised to be given as gifts or premiums with or on account of such purchases, shall be definitely described on such stamp or ticket and the character and value of such promised prize or gift fully made known to the purchaser of such merchandise or other property at the time of the sale thereof, and unless the right of the holder of such stamp or ticket to the gift or premium so promised becomes absolute upon the completion upon the delivery thereof without the holder being required to collect any specified number of other similar stamps or tickets and to present them for redemption together, and the right of the holder of such stamp or ticket to the prize or gift so offered is absolute, and does not depend on any chance uncertainty or contingency whatever."

It is evident then that two or more persons have associated themselves together; that this is done for the purpose of inducing or attempting to induce the public to believe that they will give gifts; that this is done in order to promote the sale of merchandise.

The mere fact that it is called a certificate instead of a ticket could not possibly alter the situation, as the certificate may be the same as a ticket—an article of value in the event the person secures the largest number of certificates or votes. As before stated, the matter then becomes a gift enterprise unless the stamp, ticket or certificate becomes absolute upon the completion of its delivery without the necessity of the holder being required to collect any specified number of other certificates, and without its redemption depending upon any “chance, uncertainty or contingency whatever.”

It is common knowledge that at various times newspapers have given automobiles and pianos as prizes to the person securing the largest number of subscribers. This however does not offend against the gift enterprise act because it is only one person or concern operating individually. Each of the merchants engaged in the Golden Gate contest could individually carry on the identical contest save and except only that it was carried on individually and not in co-operation with other merchants. It is the fact that two or more join together for the purpose of giving prizes which makes it offend against chapter 226, acts of the thirty-third general assembly.

In my opinion the scheme is not a gambling or lottery scheme as to a large extent the reward depends entirely upon the energy or the amount of purchases rather than upon a game of chance such as the securing of a lucky number; but as before stated, its vice consists in the fact that it is operated by a combination of merchants and the further fact that each certificate containing a certain number of votes does not carry with it a definite value by itself and is not redeemable by itself.

If these merchants desire to combine together and desire to give a prize by making each certificate worth a definite amount, even though it was valued at only a fraction of a cent, and provided further that they arranged for the redemption of each certificate without in the language of section 2 of the act in question, “the holder being required to collect any specified number of other sim-

ilar (certificates) stamps or tickets”, it would not be in violation of the gift enterprise act.

Yours very truly,

GEORGE COSSON,
Attorney General of Iowa.

TAXES—DELINQUENT—COLLECTION OF—COMPENSATION TO BE PAID
COLLECTOR.

August 31, 1914.

I. E. DOUGHERTY, *Attorney,*
Rockwell City, Iowa.

DEAR SIR: Yours of the 29th inst. addressed to the attorney general has been referred to me for reply.

This department has heretofore held that chapter 89 of the thirty-third general assembly, to which you refer, does not apply to all delinquent taxes collected by the collector, as did section 1407 of the code supplement, but only to “such *delinquent personal property tax* as the board may *designate*.” On items thus designated the compensation of the collector is fixed by this section as follows:

“And may pay such collector *as full compensation* for all services rendered *and expenses* incurred a sum *not to exceed 10 per cent* of the amount collected.”

Hence, I am of the opinion that while the 5% may, and should still, be collected from the delinquent that this 5% would, in such cases, go to the county and not to the collector.

Yours sincerely,

C. A. ROBBINS,
Assistant Attorney General.

ELECTIONS—REGISTRATION OF VOTERS.—Registration law does not apply to unincorporated villages even though the estimated population exceeds that specified in the code.

September 8, 1914.

W. E. GILTNER, *Attorney,*
Albia, Iowa.

DEAR SIR: Replying to yours of the 5th inst., concerning request of your county auditor, W. M. Peterson, for an opinion re-

specting the provisions of chapter 108 of the acts of the thirty-fifth general assembly as applied to the unincorporated village of Buxton, which is situated partly in Mahaska and partly in Monroe counties, will say that by chapter 3 of the acts of the thirty-fourth general assembly it was provided:

"Wherever in the code or in the supplement to the code or any copy of the session laws prior to this date, the population of any county seat 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."

Inasmuch as the village of Buxton has neither been platted nor incorporated, there would be no way known to the law whereby its limits might be determined. Hence, no method whereby the population of such village as distinguished from the township in which it may be situated could be ascertained by either state or national census. Hence, there would be no way of knowing that the village of Buxton contained the 3,500 population required in order to necessitate the registration of voters for the general election.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

TOWNSHIPS—LIABILITY FOR INJURIES.—Townships are not liable for injuries received by a person engaged in working his poll tax.

September 14, 1914.

E. B. STILES, *County Attorney*,
Manchester, Iowa.

DEAR SIR: 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 one who has been warned out by the road supervisors to work out his poll tax, as required by code supplement sections 1550 and 1551, and who is injured by the caving in of a gravel bank while thus engaged may recover his damages from the township or township trustees.

Our supreme court has held that a township is not a corporation and cannot be sued. (*Theulen vs. Viola Twp.*, 139 Iowa, 61.) It was also held in the same case that the duties of the township trus-

tees in connection with the repair of the roads were quasi judicial and that they were not personally liable for errors or mistakes or even negligence. And it has been further held that there is no liability to a private individual unless the injury be the result of malice or corruption. (See *Nolan vs. Reed*, 139 Iowa, 68, and cases cited on page 72.) Hence it would seem to be clear that unless the liability is imposed by the workmen's compensation law that none exists.

Code supplement section 1550 imposes on the road supervisors the duty of requiring all able bodied male residents of his district between the ages of 21 and 45 to perform two days' labor on the roads between the first days of April and October of each year, and the following section requires the one liable to perform the labor upon receipt of proper notice to meet the supervisor at such time and place and with such tools, implements and teams as he may direct and labor diligently under his direction for eight hours each day.

It will be observed that the person performing this labor is in no sense an employe of either the township or of the road supervisors or of the trustees of the township. He is merely engaged in the performance of a duty imposed upon him by the statute. Hence the workmen's compensation law would not apply, and in my judgment your inquiry must be answered in the negative.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

CITIES AND TOWNS—BUILDING TRANSMISSION LINES—COST—HOW PAID—QUESTION SUBMITTED TO PEOPLE.—Where current is sold by one municipality to another, people of each should vote on proposition.

September 22, 1914.

GEO. J. SCHOLZ,
Alta Vista, Iowa.

DEAR SIR: Yours of the 16th instant, addressed to the attorney general, has been referred to me for reply.

You call attention to the fact that the town of Alta Vista is contemplating the building of an electric transmission line from the neighboring town of Elma and the buying of electric current from that town for municipal purposes, and that by October 1st you will

have enough cash on hand in the general fund to pay for the construction of said transmission line, and that the outstanding indebtedness of the town, not yet due for several years, amounts to \$2,000, and your question as stated by you is:

"Could the town council have this line built and paid for out of the general fund without first submitting the proposition to a vote?"

This matter is covered by section 720 supplement to the code, 1913, the material portion of which reads as follows:

"And they shall have power to enter into contracts with persons, corporations or municipalities for the purchase of heat, gas, water, and electric current for either light or power purposes, and shall have power to sell the same either to residents of such municipality, or to others, including corporations, and to erect and maintain the necessary transmission lines therefor either within or without the corporate limits, to the same extent, in the same manner, and under the same regulations, with the same power to establish rates and collect rents as is or hereafter may be provided by law for cities having municipally owned plants. No such works or plants shall be authorized, established, erected, purchased, leased or sold, or franchise extended or renewed or amended, *or contract of purchase entered into*, unless a majority of the legal electors voting thereon vote in favor of the same at a general, city or special election."

I am therefore of the opinion that your question should be answered in the negative for the question would have to be submitted to a vote even though you had money in the electric light fund with which to pay for the transmission line.

I would also suggest the further difficulty which may possibly have to be encountered and that is whether or not this section above quoted would not require the town of Elma to submit to its inhabitants the question of whether it should enter into the contract to sell to your town the electricity. There would seem to be as much necessity for the selling corporation to submit to its inhabitants the question of whether or not it would engage in the business of furnishing electric current to persons outside its corporate limits as for the buying corporation to submit to its inhabitants

the question as to whether or not it would buy the finished product rather than erect its own plant.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

ELECTIONS—GOVERNOR'S PROCLAMATION—PUBLICATION IN COUNTIES.—Only necessary to publish in each county portions of the proclamation which refer to offices which people in county may vote to fill.

September 30, 1914.

J. J. McMAHON, *Sheriff*,
Harlan, Iowa.

DEAR SIR: Replying to yours of the 28th instant, addressed to the attorney general, relative to the publication of the governor's election proclamation will say that I have conferred with the attorney general concerning the matter and both he and I are of the opinion that it would be a substantial compliance with the law requiring such publication to publish in each county only such portions thereof as designate the offices candidates for which the voters in your county would have the right to vote. That is to say, there should be published in each county the portion referring to the state ticket, also the portion having reference to the United States senators and congressmen in the congressional district, and the judicial ticket including justices of the supreme court and judges of the district court of the judicial district, senators and representatives of the general assembly for the senatorial and representative districts in which your county is represented.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

ELECTIONS—NON-PARTISAN JUDICIARY BALLOT—ALPHABETICAL ROTATION OF NAMES.—Names of candidates for districts and superior court should be rotated.

October 9, 1914.

J. D. HANNAN, *County Auditor*,
Council Bluffs, Iowa.

DEAR SIR: Your letter of the 8th inst., addressed to the attorney general, has been referred to me for reply. Your question is whether

or not the names of the candidates on the non-partisan judiciary ticket for judges of the district and superior courts should be rotated on the general election ballot.

There is no provision in the general election law for the rotation of names upon the ballot. However, by code supplement, section 1087-a12, it is provided that the names of candidates for senator in the congress of the United States and for offices to be filled by the voters of the entire state shall be arranged and printed upon the primary election ballot according to the manner stated, which only provides for rotation by counties.

By section 1087-a13, it is provided:

“The names of candidates for the office of senator in the congress of the United States and for offices to be filled by the voters of the entire state shall be arranged and printed on the primary election ballots in the order in which they are certified by the secretary of state. The names of candidates for offices to be filled by the voters of a county, and by the voters of any district of the state composed of more than one county, shall be arranged and printed upon the primary election ballots in the following manner, to-wit: The county auditor shall prepare a list of the election precincts of his county, by arranging the various townships, towns and cities in the county in alphabetical order and the wards or precincts of each city, town or township in numerical order under the names of such city, town or township. He shall then arrange the surnames of all candidates for such offices alphabetically for the respective offices for the first precinct in the list, thereafter, for each succeeding precinct, the names appearing first for the respective offices in the last preceding precinct shall be placed last, so that the names that were second before the change shall be first after the change. The names of candidates for all offices to be filled by the voters of a territory smaller than a county shall be arranged and printed alphabetically according to the surnames for the respective offices.”

By section 1087-b2, supplement to the code 1913, it is provided,

“At all primary elections at which candidates for judges are to be nominated, there shall be provided on each ballot for each political party, a ticket entitled ‘nonpartisan judiciary ticket,’ and the names of such candidates as shall have com-

plied with the requirements of this act shall be placed thereon in the same order as the names of the party candidates, but without any party designation; and the ticket shall be the same on all ballots, *except as varied to change the alphabetical rotation.*”

Hence, it is evident that the same method of rotation as applied to other candidates was intended to apply at the primary election to candidates on the non-partisan judiciary ticket.

By section 1087-b3, it is provided:

“At the general election in November there shall be placed on the ballots a separate ticket entitled ‘nonpartisan judicial ticket’, upon which shall be placed the names of the candidates nominated for judges of the supreme court, district, or superior courts in the state and in the several districts and cities, who have been nominated as herein provided. The names of all candidates shall be placed on said ticket and in the same order, as far as possible, as other candidates, and *with the same provisions with reference to alphabetical rotation* and the number of candidates for each office to which the elector is entitled to vote.”

As we have seen, there is no provision for alphabetical rotation in the general election law; hence, the words “same provisions with reference to alphabetical rotation” must refer to the provision for rotation found in the primary law which is quoted above.

Hence, it follows that your question should be answered in the affirmative.

However, you will notice that by the last sentence of section 1087-a13 the names of candidates for offices to be filled by the voters of a territory smaller than a county shall be arranged and printed alphabetically according to the surnames for the respective offices, and inasmuch as the judge of the superior court is elected by the voters of his cities and not of the entire county, the provisions for rotation would not apply to such offices.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

CITIES AND TOWNS—PAVING—ASSESSING COST OF.—Abutting property owners should pay proportionate cost of paving entire width of street exclusive of car tracks without regard to location of such tracks.

October 10, 1914.

MR. FRANK G. PIERCE,
Marshalltown, Iowa.

DEAR SIR: Replying to yours of the 5th inst. will say that in my judgment the cost of paving should be assessed against the various properties benefited thereby without reference to the exact location on the street of that portion of the pavement put in by the street railway company. That is to say the amount of taxes to be paid by the properties abutting upon the street on either side should not vary by reason of the fact that at some particular place in the street that portion of the street paved by the street car company may be nearer one side of the street than the other, and where there is a switch track in addition to the main track on one side of the center of the street, it is my judgment that the properties on either side of the street should each pay the one-half of the cost of paving that portion of the street not covered by the two tracks.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

ELECTIONS—VOTING MACHINES—USE OF PARTY LEVER.—To permit the use of a party lever is a violation of the spirit of the law.

October 19, 1914.

WIRT P. HOXIE, *County Attorney,*
Waterloo, Iowa.

DEAR SIR: I have a letter from your office asking whether the voting machines to be used in your city in the coming election should be so arranged as to permit the use of the "party lever" or to require the voter to use the individual levers and vote separately for each person for whom he desires to vote.

Chapter 3-A of Title VI of the supplement to the code, 1907, permitting the use of voting machines in elections and primaries did not in any manner change the system of voting then in force

but simply changed the method by which the voter records his choice. In other words, the Australian ballot system of voting is still in force and the voting machine law above referred to in no manner changed that system except in so far as to permit the arranging of the various party tickets either in vertical columns or horizontal rows upon the machine (section 1137-a15, supplement to code, 1907), and the further change with reference to the provisions for voting for presidential electors (section 1137-a11).

The legislature by the enactment of chapter 44, acts of the thirty-first general assembly, amended section 1119 of the code, and removed the circle from the ballot so as to preclude an elector from voting for all candidates upon one ticket by making a single cross opposite the name of the party by which such ticket was known and required him to express his choice by making a cross in the square opposite the name of each person for whom he desired to vote. To permit the use of the party lever and thus allow the voter to vote for all the candidates of one party by simply using the one lever would be in effect restoring the circle upon the ballot, the very thing which the legislature by their enactment declared should be removed.

It is my opinion, therefore, that the use of the party lever should not be permitted but that the machine should be so arranged as to require the voter to use the individual lever.

Yours truly,

JOHN FLETCHER,
Assistant Attorney General.

DRAINAGE—ASSESSMENTS—PAYMENT BY INSTALLMENTS—AGREEMENT ENTITLING PARTY TO PAY ON INSTALLMENT PLAN.—May be made any time before litigation.

October 27, 1914.

A. H. DAVISON, *Secy.,*
Executive Council,
Statehouse.

DEAR SIR: Replying to your oral inquiry with reference to the construction of section 1989-a26, supplement to the code, 1913, with reference to drainage assessments will say that the provision involved reads as follows:

"If the owner of any parcel of land, lot or premises against which any such levy shall have been made and certified, which is embraced in any certificate provided for in this section, shall within *thirty days from the date of such assessment promise and agree in writing endorsed upon such certificate, or in a separate agreement*, that in consideration of having the right to pay his assessment in installments, he will not make any objection of illegality or irregularity as to the assessment of benefits, or levy of such tax upon and against his property, but will pay said assessment with interest thereon at such rate not exceeding six per centum per annum as shall be prescribed by resolution of the board, such tax so levied against the land, lot or premises of such owner shall be payable in ten equal installments, the first of which with interest on the whole assessment shall mature and be payable on the date of such assessment, and the others with interest on the whole amount unpaid annually thereafter at the same time and in the same manner as the March semi-annual payment of ordinary taxes; but where no such terms and agreement in writing shall be made by the owner of any land, lot or premises then the whole of said special assessment, so levied upon and against the property of such owner, shall mature at one time and be due and payable with interest from the date of such assessment, and shall be collected at the next succeeding March semi-annual payment of ordinary taxes."

In my judgment it is not the intention of the legislature to limit the making of the separate agreement to thirty days from the date of the assessment but that the thirty days' limitation might be deemed to apply only where the agreement is endorsed on the certificate and that the "separate agreement" referred to might be made at any time before litigation has been instituted. To say that parties interested in the controversy may not settle the same by agreement would seem to be unreasonable, and if they may settle the same by agreement after controversy reaches the stage of litigation, they certainly may do so before.

Mr. Whitney suggests that the state might issue warrants in payment of the whole assessment and let the warrants draw interest the same as the certificates might have drawn.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

CITIES AND TOWNS—WATERWORKS—USE OF FUNDS DERIVED FROM.
—Either taxes levied or rents collected may be used to extend or renew mains.

October 28, 1914.

H. F. HARMON, *Town Clerk*,
Hubbard, Iowa.

DEAR SIR: I have your letter of October 24th in which you request the opinion of the attorney general with reference to the use of a part of the surplus of the water fund of the town of Hubbard for the extension of mains. I also have your later letter in which you state that if Mr. Cosson cannot give the matter personal attention you will accept the opinion of an assistant. Mr. Cosson's work is such that he cannot give your matter personal attention and has asked that I make reply to your letters.

There may have been some doubt as to whether cities and towns had the power under section 724 of the code of 1897 to do what you now propose to do, but since that section was amended by the twenty-ninth general assembly there is not any doubt in my mind but that you have the authority to make the expenditure which you propose to make. Section 724, above referred to, as it has been amended by subsequent legislation, reads as follows:

"They shall have power, when operating such works or plants, and shall have the power to sell the products of such municipal heating plants, waterworks, gasworks or electric light or electric power plants, to any municipality, individual or private corporations outside of the city, or town limits as well as to individuals or corporations within its limits, and to erect in the public highway the necessary poles upon which to construct transmission lines, and to assess from time to time, in such manner as they shall deem equitable, upon each tenement or other place equipped with water, gas, heat, light or power, reasonable rents or rates fixed by ordinance, and to levy a tax, as hereafter provided, to pay or aid in paying the expenses of running, operating, renewing, extending and repairing such works or plants owned and operated by such city or town, and the interest on any bonds issued to pay all or any part of the cost of their construction."

You will note that the revenue derived from rents and taxes that may be levied may be used to "pay or aid in paying the expenses of running, operating, renewing, extending, and repairing such

works or plants". Under the old section of the code they could only use such revenue for the purpose of running, operating and repairing the plants. It is therefore my opinion that the law as amended expressly gives the council the authority to expend any of the water fund, whether derived from rents or taxes, for the purpose of extending the mains.

Yours truly,

JOHN FLETCHER,
Assistant Attorney General.

ELECTIONS—MARKING BALLOT—MISCONDUCT OF JUDGES OF ELECTION AS GROUND FOR CONTEST—FACTS STATED SUFFICIENT TO VITIATE ELECTION.

November 7, 1914.

ED. T. ALDERMAN,
Nevada, Iowa.

DEAR SIR: In your first question you submit a sample ballot showing a cross in the square opposite the name of B. M. Soper who was a candidate for clerk of the district court, also a line is drawn through the name of L. S. Kloster who was a candidate for the same office on the progressive ticket with the name of B. M. Soper written in pencil over the name of Kloster thus crossed out but with no cross in the square opposite the name thus written in, and your question is whether or not a ballot so marked should count for B. M. Soper for clerk.

In my judgment this question should be answered in the affirmative. It was the evident intention of the person thus marking his ballot to vote for Soper, and in my judgment there is nothing on the face of the ballot that would indicate that the mark crossing out the name of Kloster or in writing in the name of B. M. Soper was intended as an identification mark. See, *Vorhees vs. Arnold*, 108 Iowa 77; *Kelso vs. Wright*, 110 Iowa 560.

Your second question is whether or not where a candidate for a county office acts as judge of the election and while so acting solicits votes within the polling place is sufficient to warrant the rejection of the vote of that precinct if a contest is made.

Code section 1124 provides:

"No person shall during the receiving and counting of the ballots at any polling place * * * do any electioneering or soliciting of votes within 100 feet of any outside door of any building affording access to any room where the polls are held."

Section 1198 provides the grounds upon which an election may be contested and the first ground enumerated therein is as follows:

"Misconduct, fraud or corruption on the part of judges of election in any precinct or of any board of canvassers or of any member of either board sufficient to change the result."

Section 1200 of the code provides:

"When the misconduct, fraud or corruption complained of is on the part of a judge of the election of any precinct it shall not be held sufficient to set aside the election unless the rejection of the vote of that precinct would change the result as to that office."

It would seem that the soliciting of votes being directly prohibited by the first section referred to would amount to misconduct on the part of a judge of election within the meaning of the second section cited, and the third section cited seems to contemplate the rejection of the vote of that precinct when such misconduct is shown probably for the reason that there is no way by which the effect of such misconduct may be measured in order to determine whether or not it would be sufficient to change the result. Hence your second question should be answered in the affirmative.

I am returning your sample ballot as requested.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

NEWSPAPERS—PUBLICATION OF NOTICES OF INCORPORATION.—

Where such notice is published in a daily paper it is not necessary to publish in each issue for four weeks but only in one issue each week for that time.

November 11, 1914.

J. E. JORDAN, *Attorney*,
405 Marsh-Place Bldg.,
Waterloo, Iowa.

DEAR SIR: Your letter of the 28th ultimo, addressed to the attorney general, has been referred to me for reply.

You call attention to sections 1613 and 1613-a of the supplement to the code relative to the publication of notice of an incorporation and ask for a citation of authorities interpreting these sections.

I do not have any authorities bearing on the question presented by you but do not believe that because of the passage of section 1613-a it is necessary, where notice is published in a daily, tri-weekly or bi-weekly newspaper, to publish the same in each issue of such paper. If you will read section 1613 as it appears in the code of 1897 you will observe the necessity for the passage of section 1613-a which was a legalizing act, because that section reads as follows: "A notice must be published for four weeks in succession," and it would be possible to construe the section as requiring publication of the notice in each issue of a paper if it was published more frequently than once each week. This section, however, was amended by the twenty-ninth general assembly so as to require the publication *once* each week for four weeks in succession, and by that amendment the legislature left no doubt as to the construction that should be placed upon the statute, and at the same time they passed section 1613-a for the purpose of legalizing the publication of notices which might have been questionable under the original code section.

Yours truly,

JOHN FLETCHER,
Assistant Attorney General.

TAXATION—ASSESSMENT OF BUILDING AND LOAN ASSOCIATIONS—
METHOD OF ACQUIRING INFORMATION BY ASSESSORS.

November 11, 1914.

J. M. DINWIDDIE, *Cashier*,
Cedar Rapids Savings Bank,
Cedar Rapids, Iowa.

DEAR SIR: Replying to yours of the 28th ult., addressed to the attorney general, will say that shares of stock in building and loan associations are now to be assessed in accordance with the provisions of chapter 119, acts of the thirty-fifth general assembly, to the individual owners of such stock at their places of residence.

The information necessary to enable the assessor to make the assessment is obtained by the state auditor furnishing the county auditor with the statement of the names and postoffice addresses of each stockholder of a foreign building and loan association, which information is in turn by the county auditor furnished to the assessors in his county. Domestic concerns are required on or before January 31st of each year to furnish the assessor of the assessment district in which its principal place of business is located a verified statement showing the condition of the concern.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

CORPORATION—TIME FOR FILING ARTICLES.—Provision that articles shall be filed within a certain time held to be directory only.

November 17, 1914.

HON. J. L. BLEAKLY, *Auditor*,
Statehouse.

DEAR SIR: Replying to the oral request of your Mr. Pennell for the opinion of this department as to whether or not the failure to file with the county recorder renewal articles of incorporation within five days after the action of the stockholders authorizing such renewal, or the failure to file the same with the secretary of state within ten days after the filing with the recorder would operate to render such renewal articles void provided such delayed filing is all done within the three months following the expiration of the original articles, I have to advise.

There is no provision in the statute that the failure to file within the time shall have the effect of rendering the renewal articles void and in my judgment each of these provisions should be held to be directory and not mandatory, and that while the practice of filing such renewal articles after the time has expired should not be encouraged yet in my judgment such delayed filing would not render the articles void.

In the case of *Perrin vs. Benson*, 49 Iowa, 325, under a statute which provided that the board of supervisors should levy a school house tax in the year 1875 and through oversight and neglect such tax was not levied, it was held that the provision as to time was directory and that the tax might be levied a year later.

The amended articles of the Badger Savings Bank submitted in connection with said oral request are herewith returned.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

ELECTIONS—PUBLICATION OF NOTICE.—Section 2820 code, construed—"Four weeks' notice" means four successive weekly publications although only three weeks elapse between first and last publication.

November 19, 1914.

A. L. NELSON, *Secy.*,
Board of Education,
Hazelton, Iowa.

DEAR SIR: Replying to yours of the 12th inst., addressed to the attorney general, will say that any ruling this department might make on the question would not be binding on the bond company and probably have little influence in the settlement of the controversy.

Section 2820 to which you refer provides "Four weeks' notice of such election shall be given by publication once each week in some newspaper published in the said town or city" etc., and as stated by you the publications were, in fact, made May 22nd, 29th, June 5th and 12th, so that while there were four weekly publications yet these publications only covered a space of three weeks' time and the first publication was only twenty-four days prior to the election and the question is whether or not this would be four weeks' publication within the meaning of this law.

I find that almost the exact question was passed upon by the supreme court of Missouri in the case of *Russell vs. Croy*, 164 Mo. 69; 63 S.W. 849, where the requirement was that proposed amendments to the constitution should be published weekly in some newspaper within each county of the state for four consecutive weeks next preceding the general election and it was held that publication once in each of the four consecutive weeks next preceding the week in which the election occurred complied with the statute although the first publication was less than twenty-eight days before the day of election. (See also to the same effect *In re City of New Orleans*, 52 La. Ann., 1073, 27 So., 592.)

So in this case, as the election was held on Monday and the last publication was on Friday of the previous week, there would be one publication in each of the four weeks immediately preceding the week in which the election was held, and in my judgment the election was legal.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

PURE FOOD—LOAVES OF BREAD—WRAPPING AND MARKING.—Bread not such a food as requires statement as to weight, count, etc.

November 20, 1914.

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

DEAR SIR: Yours of the 11th inst., addressed to the attorney general, has been referred to me for reply. You call attention to chapter 307 of the acts of the thirty-fifth general assembly, section 2 of which provides as follows:

"If any person shall sell, offer or expose for sale any food in package form, if the quantity of the contents be not plainly and conspicuously marked on the outside of the package in the terms of weight, measure or numerical count," etc.

Your question is:

"Would chapter 307, laws of the thirty-fifth general assembly require a statement of the net weight on single or twin loaves of bread wrapped with paper and tied with a string?"

This question is not entirely free from doubt. Some cases hold that a package is a number of things done up for handling and con-

venience while other cases hold that it is a package even though consisting of a single article where it is prepared into a bundle, bale, box or other receptacle suitable for commercial handling or transportation. (See under the word "package" No. 6 Words and Phrases, page 5154.)

There are many cases defining an original package within the meaning of the interstate commerce law but these cases are of little assistance in determining the question here presented, as the question in those cases was not what constitutes a package but rather what constitutes the original package.

Our own supreme court in the case of *State vs. Neslund*, 141 Iowa, 461 at 465 defines a package as follows: "A package usually means a bundle put up for commercial handling and as used in the action under consideration it means the package put up by the manufacturer or packer or dealer for ordinary commercial use."

In the case of *Armour & Co. vs. Bird*, 123 N. W., 580; 25 L. R. A. (N. S.), 616, under the law requiring food sold in package form to have shown upon the package the constituent elements, it was held by the supreme court of Michigan that where packages of sausage composed of meat and cereals were sold to the consumer from a larger package, properly labeled, the small package must be labeled so as to show the constituent elements contained in the mixture.

In view of these authorities, I am of the opinion that single or twin loaves of bread wrapped with paper and tied with a string would be a package within the meaning of the definitions above referred to. However, I am of the opinion that such bread would not be sold in package form within the meaning of the chapter in question for it will be observed all that is required is that the weight, measure or numerical count be shown and it would be absurd to require a statement on a package of bread to the effect that it contained one loaf when such fact is not only self-evident from the package itself but is a fact which could scarcely be concealed, and with the usual transparent wrapping is as apparent as though the loaf were unwrapped.

Therefore, I am of the opinion that the words "package form" as used in this section have reference to packages put up in such form as that the weight, measure or numerical count may not be observed or ascertained without breaking the package.

Your second question is:

"Would a loaf of bread come within the meaning of the word 'package' if sold from the case without wrapping or carton?"

From what has already been said it is apparent that this question should be answered in the negative.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

TAXATION—SPECIAL TAX FOR AID OF ELECTRIC RAILWAY.—Assessment of real estate of other railway lines within district. How valuation may be arrived at.

November 25, 1914.

H. B. ROSENKRANS, *County Auditor*,
Charles City, Iowa.

DEAR SIR: Replying to yours of the 19th instant will say that while the law does not specifically require the executive council to fix the valuation of the real estate of railway companies separate and distinct from the other property of such corporations, such as rolling stock, yet there would be no way in which chapter 169, acts of the thirty-fifth general assembly could be complied with without such separate valuation being first made, and in my judgment said council would have the right and it would be its duty to make such separate valuation where the same is required to enable the new law to be complied with. While this may entail upon the council some extra work yet doubtless those interested in the tax would be in position to assist the council by furnishing evidence of the values of adjacent land so as to enable the council to make the separate valuation with a minimum of labor.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

MOTOR VEHICLES.—Should pass to left of another vehicle proceeding in same direction. If other vehicle is on left side of street it may be passed on right side.

December 5, 1914.

M. C. REAM,
Chariton, Iowa.

DEAR SIR: Replying to yours of the 2d inst., will say that in my judgment the law inquired about should receive a reasonable construction; that it does not require one to pass upon the left side of a vehicle that is traveling on the wrong side of the street, namely the left side, and that both parts of the law should be construed together and contemplates that all parties are traveling according to law, and that hence the vehicle about to be passed would be on the right hand side and as near the curb as the condition of the street would permit and in such cases it would be clearly the duty of the driver of the passing vehicle to pass upon the left side. However, if the vehicle is on the left of the center of the highway, even though going in the same direction, in my judgment the passing vehicle might lawfully pass upon the right side and the same rule would apply even in the country highways.

I am enclosing you a copy of the automobile law in order that you may verify the provisions thereof.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

INTERNAL REVENUE ACT OF OCTOBER 22, 1914.—Effect upon state business—certain instruments and documents issued by state departments not affected—federal government cannot interfere with or burden state business—certain certificates held to be exempt from the tax by implication of law.

December 9, 1914.

EXECUTIVE COUNCIL,
Statehouse.

GENTLEMEN: On the 3d instant you orally requested an opinion concerning the manner in which the various departments of the state may be affected by the internal revenue act enacted by Congress on the 22d day of October, 1914.

You inquire whether revenue stamps must be attached to the following documents issued by the various departments of the state government:

1. Certificates issued by the secretary of state authorizing corporations to transact business within the state;
2. Certificates of authority issued to agents by the commissioner of insurance;
3. Teachers' certificates issued by the board of examiners;
4. Certificates of assessment issued by the executive council;
5. Abstract of election issued by the executive council;
6. Certificates of registration of automobiles issued by the secretary of state;
7. Certificates of registration of stallions issued by the board of agriculture;
8. Certificates of inspection issued by the dairy and food department;
9. Certificates of appointment of notaries public, and to this list might be added certificates to practice medicine, certificates of admission to the bar, and certificates to pharmacists and other certificates of like character.

The new revenue law enacted by the Federal Congress provides that on (1) certificates of profits of corporations etc., and transfers thereof, there shall be paid two cents on each \$100.00 of the face value; and on (2) "certificates required by law, not otherwise specified" there shall be paid a tax of ten cents.

If the instruments enumerated by you are subject to the tax above referred to it is because they come within the classification last named. No exception is made in the law itself of any certificate which falls within what I have, for convenience sake, designated as division "2" of the law levying a tax upon certificates, and if the instruments named in your request are not liable to the tax it is because they are exempt by implication.

It is well settled by many decisions of the United States supreme court that the federal government cannot tax the powers, properties, operations or instrumentalities of the states nor the means by which they carry their powers into execution any more than a state can tax the operations, instrumentalities or the property of the federal government, and no rule is better settled than that the federal government cannot by taxation or otherwise retard, impede, burden, impair or in any manner control the operation of the valid laws that have been enacted by state legislation for the

purpose of carrying into execution the powers vested in the state government.

It being conceded by the uniform decisions of the highest court in the land that the states have a right to administer their governmental affairs and to employ their own means and agencies to carry out their valid legislative enactments without interference by the federal government, the only question left to be determined is whether the state is engaged in performing governmental functions in issuing the various documents referred to by you.

A discussion here of what might be considered governmental business of a state as separate and distinct from ordinary corporate or private business of a state could serve no purpose at this time except to lengthen this opinion, but it is sufficient to say that in carrying out the provisions and mandates of its laws for the prevention of crime, fraud or imposition, and to protect the safety, comfort, convenience, health and general welfare of its people, or, in other words, when it is engaged in the enforcement of its police regulations it is certainly engaged in a purely governmental function. With these general observations we pass to the question.

It must at this day be conceded by all as the settled law that a state has authority under its police power to determine under what circumstances and conditions a corporation may engage in business in the state; to determine under what circumstances and conditions persons may practice the various professions within the state, etc. In other words, its power under valid enactments to license, regulate and control certain lines of business for the promotion of the welfare of its people is practically without limit so long as it leaves the field open to all alike and upon the same basis provided it does not burden interstate commerce.

Under the police powers of the state the legislature has enacted a law requiring that before any corporation can transact business within the state it must file its articles of incorporation in the office of the secretary of state and pay a filing fee, the amount of which is based upon the capitalization of the corporation. If the articles are approved by the secretary of state the enactment makes it his duty as one of the executive officers of the state to issue a certificate or license authorizing it to transact business within the state. Under the same power the legislature has enacted a law which provides that before any one can engage in the business of soliciting insurance for an insurance company a certificate must

be obtained from the commissioner of insurance authorizing him to engage in such business. The legislature of the state has also enacted a law which requires that every person before engaging in the business of teaching in the schools of the state shall submit to an examination as to qualification and if successful the state through its proper officers shall issue a certificate authorizing the applicant to engage in the business of teaching. A similar enactment has been made with reference to persons who would practice law, medicine, dentistry and the other professions; and by enactments of the same general character the legislature has enjoined upon the various departments of the state government the performance of the various functions enumerated by you. The certificates issued by the secretary of state authorizing a corporation to transact business is a license for which the state has exacted a fee before its issuance. The certificate of the board of educational examiners is a license, and so with the certificates issued by the board of medical examiners, certificates of admission to the bar and the various other certificates referred to by you. As a pre-requisite to the issuance of the various certificates the person applying must qualify in some manner particularly specified and these qualifications are exacted to protect the people of the state with whom he may deal.

All the legislation requiring the performance of these various duties by the different state departments was enacted in the exercise of the police power of the state for the safety, comfort, convenience, health and general welfare of the people of the state, and the authorities are unanimous that that power is one reserved by the states and free from any federal restriction. These certificates, or licenses, as they may be called, are issued by the state in its governmental capacity for the protection, not of some particular individual, but for the protection of all the people of the state. The action taken in each instance is governmental in character and in my opinion it must be kept free from embarrassment, restriction or control by any other governmental authority. The proposition that the state is exercising a governmental function in the issuance of the various certificates enumerated is supported by the authorities.

The War Revenue Act of 1898 provided that stamps equaling a certain amount should be affixed to all bonds, debentures, certificates of stock, etc. It also contained the provision:

"That all bonds, debentures, or certificates of indebtedness issued by the officers of the United States Government, or by the officers of any state, county, town, municipal corporation, or other corporation exercising the taxing power, shall be, and hereby are, exempt from the stamp taxes required by this act: *Provided*, That it is the intent hereby to exempt from the stamp taxes imposed by this act such state, county, town, or other municipal corporations in the exercise only of functions strictly belonging to them in their ordinary governmental, taxing, or municipal capacity."

This exemption clause was simply an attempt on the part of Congress to comply with what the courts had then determined to be the law, namely, that such matters were exempt by implication from any federal tax, so that had the exemption clause not been placed in the measure the interpretation of the court would necessarily have been the same.

Under a legislative enactment of the state of Illinois no person could engage in the sale of liquor without first obtaining a license from the state, and before the license could issue the applicant was required to give a bond payable to the people of the state, conditioned "that he will pay to all persons all damages that they may sustain, either in person or property, or means of support, by reason of the person so obtaining a license selling or giving away intoxicating liquor." A licensee failed to attach the required revenue stamp to his bond and he was arrested and prosecuted. The lower court imposed a fine, the case was reversed in the supreme court of the United States, Chief Justice Fuller writing the opinion of the court. Among other things the court said:

"The act and the ordinance (City of Chicago) required these bonds to be given as pre-requisites to the issue of licenses permitting the sale. The licenses could not be issued without compliance with this condition precedent. The statute expressly provided that no license should be granted unless the applicant 'shall first give bond in the penal sum of \$3,000,' and the ordinance, that 'no application for a license shall be considered until such bond shall have been filed.'

"The bonds were obviously intended to secure the proper enforcement of the laws in respect to the sale of intoxicating liquors; the prompt payment of fines and penalties; a remedy

for injuries to person, property or means of support; and the protection of the public in divers other enumerated particulars. The granting of the licenses was the exercise of a strictly governmental function, and the giving of the bonds was part of the same transaction. To tax the license would be to impair the efficiency of the state and municipal action on the subject and assume the power to suppress such action. And considering license and bond together taxation of the bond involves the same consequences. In themselves the bonds were not mere incidents of the regulation of the traffic, but essential safeguards against its evils, and governmental instrumentalities of state and of city, as authorized by the state, to insure the public welfare in the conduct of the business, although the business itself was not governmental. They were not mere individual undertakings to secure a personal privilege as suggested by the court below, but means for the preservation of the peace, the health and the safety of the community in compelling strict observance of the law, and remedying injurious results.

"The general principle is that as the means and instrumentalities employed by the General Government to carry into operation the powers granted to it are exempt from taxation by the states, so are those of the states exempt from taxation by the General Government. It rests on the law of self-preservation, for any government, whose means employed in conducting its strictly governmental operations are subject to the control of another and distinct government, exists only at the mercy of the latter. *Nelson, J., Collector vs. Day*, 11 Wall. 113."

Ambrosini vs. U. S., 187 U. S., 1.

Another case that seems analogous to the one under consideration is the case of *Warwick vs. Collector*, 102 Federal Rep., 127, where the plaintiff who was appointed a notary public in the state of Ohio failed to affix the required amount of revenue on his official bond, the circuit court in its opinion held that the bond was not liable to the tax upon the theory that the levying of a tax of this character was placing a restraint upon the state in exercising its functions in the appointment and qualification of its officers and agents. This case is absolutely determinative of the question as to whether certificates of appointment of notaries public shall bear a revenue stamp.

The state of South Carolina enacted a law which provided that no liquor should be brought into the state for sale unless brought in by a board of officers appointed by state authority and that no liquor could be sold except by agents appointed by the state for that purpose under the regulations prescribed by statute. The federal officers acting upon the theory that the liquor was subject to the internal revenue laws of the United States proceeded to assess the tax and the case was appealed to the supreme court of the United States. The majority of the court in a laborious opinion held that when the state engaged in the handling and sale of intoxicating liquors for profit it was engaged in a private business and not in the performance of one of its governmental functions and therefore its agents were subject to the federal tax. This conclusion, however, on the part of the majority of the court was only reached with considerable difficulty and a dissenting opinion was written by Justice White with whom concurred Justices Peckham and McKenna advancing the theory that the state of South Carolina had complete and absolute control over the liquor traffic and could exert in dealing with the liquor traffic such methods and instrumentalities as were deemed best, and that the United States was without authority to tax the agencies which the state had called into being for the purpose of dealing with the liquor traffic. I cite this instance to show how far some of our leading jurists would go in holding matters to be governmental in character rather than of a private nature.

If dealing in liquor by the state can by any clear process of reasoning be said to be performing a governmental function it is clear that with much greater force can it be said that the issuance of certificates of the character referred to by you is a governmental function since by the legislative enactments requiring the issuance of certificates of the character referred to and obedience to those enactments on the part of the executive state officers, the state is doing what it is clearly authorized to do under its police powers. These certificates are public documents and when issued are the evidence of official acts performed by state officers under mandate of law. They convey the will of the state and are complete without further action on the part of any one. They are a part of the plans adopted by the state for the purpose of exercising state control over certain lines of business which unrestricted might lead to injury to the people of the state. It may be said that the instruments give to the person receiving

them personal rights and privileges and therefore they cannot come within the implied exemption. Ambrosini, in the case above referred to, received a personal right under the license issued by the state of Illinois to sell liquor with financial profit to himself, but the court said the prime object of the license and the bond was to protect the people of the state who might be affected by Ambrosini being in business. So the fact that some one receives a personal benefit by reason of the action of the state is not controlling but rather the inquiry is as to whether the act is performed primarily for the benefit of the people of the state as a whole or for the personal benefit of an individual. The provisions of our laws requiring the issuance of the instruments enumerated were not made to aid some person to individual gain but for public gain in the way of regulation and control beneficial to the people of the state, and the officers who carry out those provisions by executive action are performing a purely governmental function. I conclude, therefore, that no stamp is required on any of the instruments referred to by you.

This opinion has been submitted to the Attorney General and he concurs in the opinion herein expressed.

Respectfully,

JOHN FLETCHER,
Assistant Attorney General.

COUNTY SUPERINTENDENT—ELECTION OF BY MEMBERS OF SCHOOL
BOARDS.—Representation in convention—who can be delegate.

December 9, 1914.

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

DEAR SIR: Replying to yours of the 7th inst., will say that as this department has heretofore construed section 1 of chapter 107 of the acts of the thirty-fifth general assembly, it authorizes each city or town independent school district to have one vote in the convention, either by its president, or in his absence or inability to act by some member of the school board to be selected by the board. Sub-district townships are entitled to one vote, the entire township being a school corporation. Where there is one or more rural independent districts situated in a congressional township such rural independent districts are together entitled to one

vote—the person to represent such rural independent district or districts to be selected by the presidents of all of the rural independent districts in such township at a meeting to be held at such time and place as the county auditor shall fix and written notice provided therefor.

In the case you mention, German township would be entitled to one vote in convention. If Steady Run township is a sub-district township and has included therein the town of Martinsburg, which is an independent district, then the independent district of Martinsburg would be entitled to one vote and the sub-district township to one vote. However, if there are located in Steady Run township one or more *rural* independent districts, then the rural independent districts together would be entitled to one vote, the sub-districts together entitled to one and the independent district of Martinsburg entitled to one.

I am unable to answer your question definitely as it is propounded for the reason that you fail to state whether or not Steady Run township is a sub-district township or the nine districts therein are rural independent districts.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

STATE TEACHER'S CERTIFICATE AND DIPLOMA—REVOCATION BY SUPERINTENDENT—AFFIRMATION OF SUPERINTENDENT'S ACT BY BOARD OF EXAMINERS.—Board not to re-hear the case but to review record for errors only.

December 14, 1914.

A. M. DEYOE, *Supt. of Public Instruction,*
Des Moines, Iowa.

DEAR SIR: Replying to your question of the 14th inst., which reads as follows:

“The educational board of examiners respectfully asks your opinion concerning the jurisdiction of the board in the matter of the revocation of life diplomas and state certificates, as provided in section 2734-u,”

will say that in my judgment the last sentence of the section which reads as follows:

“Provided further, that in the case of life diplomas or state certificates of whatever class, the revocation shall not be effective until affirmed by the educational board of examiners *after full review* by said board,”

requires the revocation of life diplomas or state certificates to be affirmed by the educational board of examiners before such revocation becomes effective and that the duty of said board when a revocation has been made by the county superintendent is to make a full review of the record of the proceedings before the county superintendent and also before the superintendent of public instruction, in the event an appeal is taken to him from the county superintendent, and to affirm said revocation if it finds no substantial error in the proceedings as shown by the record thereof, and, if error is found, to remand the same to the county superintendent for correction.

“Full review” to be made by said board does not contemplate the calling of witnesses nor re-examination into the facts but only requires said board to determine from a review of the record whether or not the revocation is regular, and, if so, should be affirmed. If the aggrieved party desires re-examination into the facts by the tribunal higher than the county superintendent his remedy is to appeal to the superintendent of public instruction.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

PUBLIC OFFICER—RESIGNATION OF—TO TAKE EFFECT IN THE FUTURE—MAY BE WITHDRAWN.

December 23, 1914.

FRANK WISDOM, *Attorney,*
Bedford, Iowa.

DEAR SIR: Replying to yours of the 22d inst., will say that my holding to the effect that a resignation of a public officer to take effect in the future might be withdrawn before the date fixed for its taking effect, was based upon the holding of our own supreme court in the saloon consent petition cases in which they held that withdrawals may be filed at any time before the petitioner's name is reached for canvass by the board. You are doubtless familiar with these cases.

The only authority upon which I relied is that found in 29 Cyc., 1404, where the following language is found: "An unconditional resignation which has been transmitted to the authority entitled to receive it and a resignation implied from the acceptance of an incompatible office may not be withdrawn but a resignation conditional in character or *to take effect in the future* may be withdrawn."

People vs. Porter, 6 Cal., 26;

Biddle vs. Willard, 10 Ind., 62;

State vs. McGrath, 64 Mo., 139;

State vs. Beck, 24 Nev., 92;

49 Pac., 1035.

Yours truly,

C. A. ROBBINS,
Assistant Attorney General.

CITY AND TOWN AUTHORITIES ARE REQUIRED TO CAUSE THE ROADS
WITHIN THEIR RESPECTIVE JURISDICTIONS TO BE PROPERLY
DRAGGED.

June 16, 1913.

MR. JONES,
Lamoni, Iowa.

DEAR MR. JONES: In your letter addressed to the state highway commission you ask to be informed upon the following matters:

"How does the law now stand as to dragging in towns? Will they continue to follow the provisions of the old law or is it entirely repealed? Does the new law apply to them so as to make it necessary to bond the officer in charge of this work, and the clerk also? Would the street commissioner be the proper one to superintend the work or could the street committee of the council act?"

In answer to your inquiry will say that the road dragging law as found in chapter 70, acts of the thirty-fourth general assembly, remains unchanged in so far as it applies to the dragging of streets and highways within the limits of incorporated cities and towns. The new road law, which went into effect on the 9th day of April, 1913, materially changed this law in so far as it affected the

dragging of roads outside the limits of such incorporated cities and towns. The city authorities must, therefore, comply with the provisions of chapter 70, acts of the thirty-fourth general assembly, in so far as applicable.

The provisions of section 14 of the new road law do not apply to the authorities within incorporated cities and towns. By the provisions of section 4, chapter 70, acts of the thirty-fourth general assembly, the city council is required to cause the dragging to be done, and they may assign this work to such city official as they see fit and make him responsible therefor. Whether or not this duty would fall upon the street commissioner or the street committee would depend upon the provisions of the ordinances and resolutions of your city council.

Yours very truly,

HENRY E. SAMPSON,
Assistant Attorney General.

PROPERTY OWNERS ARE REQUIRED TO DESTROY BEFORE THEY MA-
TURE ALL NOXIOUS WEEDS UPON THEIR LAND AND UPON THE
STREETS AND HIGHWAYS TOUCHING SAME.

July 24, 1913.

ROSS McLAUGHLIN, *County Attorney*,
Missouri Valley, Iowa.

DEAR SIR: In your letter of July 15th addressed to the attorney general, you ask for an interpretation of section 1, chapter 128, acts of the thirty-fifth general assembly, and particularly as to the duty of the property owners regarding the destruction of noxious weeds.

In answer to your inquiry will say that in my judgment the property owner is required, under this section, to do the following:

First. To cut, burn or otherwise entirely destroy all noxious weeds at such time in each year as shall prevent them from coming to maturity;

Second, to keep said lands free from such other weeds as shall render the highways unsafe for public travel; and,

Third, to cut near the surface all weeds on the highways between the 15th day of July and the 15th day of August of each year.

The first of these requirements applies only to such weeds as are named in section 2 of said chapter. It would seem that sweet

clover would be a "weed" within the meaning of this section and that under the second and third requirements, the property owner should include sweet clover.

Under the second requirement the property owner should cut such growths of other weeds back far enough so as to make the highway safe for public travel. Under the third requirement he should cut all weeds upon the highways.

Yours very truly,

HENRY E. SAMPSON,

Assistant Attorney General.

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